

The Object of Interpretation

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This Article provides an account of the object of legal interpretation. It examines various potential objects: text, lawmaking choice, practice, and order. The Article argues for a pluralist conception of the object of interpretation, according to which all of these alternatives are possible objects. In making this argument, the Article puts forth an account of the nature of the object of interpretation. The object of legal interpretation is, in essence, what is treated as a source of law—a fact that is recognized as generating law. As such, which alternative is exactly the object of interpretation in a given context depends partly on descriptive considerations regarding what the law treats as a legal source and how it does so, and partly on normative ones regarding which object of interpretation officials should choose.

This account has several consequences. No object of interpretation is self-evident, not even the text. Further, there is no single “correct” object of interpretation. Pluralism is inevitable, as it is always possible for legal practice and practitioners to treat different things as the object of interpretation. Legal systems and individual interpreters need, in a very real sense, to choose an object of interpretation. Since all interpretation depends on its object, any proposal for a method of interpretation must first define what is being interpreted.

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INTRODUCTION

Legal practitioners often need to determine the legal content of a legal material, such as a statute or a constitution.¹ They need to determine what legal norms—rules, principles, and other such prescriptions—follow from those legal materials.² This activity is often referred to as “legal interpretation”—though this is a broad notion

1. This Article focuses on constitutional and statutory interpretation, as these are the subject matters of most academic discussions on theories of legal interpretation in the United States. This Article cannot address the interpretation of other sources. See Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMANS, 62, 65–66 (2018) (noting that “no comprehensive scheme for classifying . . . models [of precedential interpretation] has been developed” and offering such a model); KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 217–328 (2010) (discussing the interpretation of private instruments). See generally Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379 (2015) (explaining different methods of interpreting precedents). At a broad level of generality, what is said here on the possible plurality of objects of interpretation and on how to determine what is the object applies to these materials too. But the objects could be different—not necessarily the ones mentioned. See *infra* Section I.B. Custom, in particular, is a legal source that raises specific difficulties. I leave that largely aside here. See *infra* Section I.B.3.

2. See *infra* Section II.A.

and one could refer to this activity with other terms.³ One can interpret a constitution or a statute in a variety of ways.⁴ Different theories of interpretation—such as different versions of originalism and living constitutionalism for constitutional interpretation,⁵ and textualism or purposivism for statutory interpretation⁶—

3. I explain this definition in more detail *infra* Section II.A.3. In any case, this terminology is standard. See Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545, 567 (2013) (observing that “many or most constitutional lawyers and theorists, originalists included, conceive of constitutional interpretation as the process or activity of trying to determine the Constitution’s legal meaning or effect”). Some writings use a similarly broad definition. See Nina Varsava, *Derivative Recognition and Intersystemic Interpretation*, 30 *LEGAL THEORY* 170, 172 (2024) (“[L]egal interpretation is the process of ascertaining the content of the law—the legally valid norms—provided by some legal source, such as a statute or judicial decision.”); GREENAWALT, *supra* note 1, at 13 (“I employ a broad sense of interpretation that includes all efforts to discern meaning and to determine particular applications that depend on that meaning.”); Fábio Perin Shecaira, *Sources of Law Are Not Legal Norms*, 28 *RATIO JURIS* 15, 17 n.5 (2015) (employing “a broad notion of interpretation—namely, the act of deriving norms from sources of law”); Francisco J. Urbina, *Reasons for Interpretation*, 124 *COLUM. L. REV.* 1661, 1669 (2024) (“‘Interpretation’ here means the activity of determining the legal content of legal materials . . .”). Some authors use a narrower understanding, particularly authors who distinguish between interpretation and construction. See *infra* notes 61–62 and accompanying text. Here I do not adopt this terminology, as my concern is ultimately with the determination of legal content, which typically entails the determination of both linguistic meaning and legal content—the latter is perhaps part of “construction.” See *infra* note 61 and Sections I.A, II.A. However, the interpretation-construction distinction is illuminating, and I refer to it later. See *infra* Section I.A.

4. See, e.g., CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* 8 (2023) (positing the question of how to choose a theory of constitutional interpretation among many alternatives); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *CALIF. L. REV.* 535, 538 (1999) (referring to a choice of “constitutional theory”). But see Stephen E. Sachs, *Is and Ought in Constitutional Law: A Response to Joel Alicea*, 48 *HARV. J.L. & PUB. POL’Y* 345, 358 (2025) (criticizing the idea of interpretive choice). Even critics of interpretive choice could accept the weak claim made above, since, even if they were right and, say, originalism were the law, it would still be *possible* for judges and other actors to adopt a non-originalist approach to interpretation, specified by a theory different from originalism—just that such approach would be categorized as entailing a mistake about the law, unlawful, etc. The same applies if one believes that there is no interpretive choice because the concept of interpretation or some other non-normative consideration determines interpretive choice. See Urbina, *supra* note 3, at 1707–12.

5. See, e.g., Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *NW. U. L. REV.* 1243, 1244 (2019) (discussing the difference between originalism and living constitutionalism); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 613 (1999) (arguing that “[o]riginalism is now the prevailing approach to constitutional interpretation”); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *NW. U. L. REV.* 549, 549, 551–52 (2009) (arguing that original meaning originalism is compatible with living constitutionalism). Recall that our definition of interpretation is a broad one, concerned with the determination of legal meaning or content. If one adopts the interpretation-construction distinction, as some originalists do, then the debate is about both “interpretation” and “construction.” See *supra* note 3 and accompanying text.

6. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 *COLUM. L. REV.* 70, 91–109 (2006) (analyzing the differences between textualism and purposivism); John F. Manning, *Textualism and the Equity of the Statute*, 101 *COLUM. L. REV.* 1, 10–15 (2001) (describing strong purposivism and the faithful agent theory); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 *DUKE L. J.* 1275, 1275 (2020) (arguing that “purposivism is alive and well”); Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 *VT. L. REV.* 611, 611 (2005) (“Once Congress has delegated a problem to the courts, it follows that purposivism should assume a prominent role in the interpretation of the statute . . .”).

specify different ways of interpreting statutes, the Constitution, and other legal materials.⁷

But what is it exactly that one interprets when one interprets, say, a statute or a constitution? There is no obvious answer to this question because many aspects of the same legal material are plausible candidates. And indeed, authors and judges disagree on what they treat as the “object” of statutory or constitutional interpretation—that is, as the thing that they are ultimately interpreting. For example, Justice Scalia treated the *text* of the statute or the Constitution as the object of interpretation.⁸ Justice Gorsuch adopts a similar view,⁹ and so do recent Supreme Court decisions.¹⁰ Others emphasize that statutes and constitutions are intentional lawmaking acts: The object of interpretation, then, should be a lawmaking *choice or decision*.¹¹ And yet others treat as the object of interpretation a *practice* of engaging with, say, the Constitution.¹² The rising traditionalism in the Supreme Court seems to be an example of this.¹³ And there are other alternatives.¹⁴ Which one is the “correct” one?¹⁵ Is there a “correct” alternative at all?

Authors and judges tend to think so. They often commit to a view of the object of interpretation, even if they do not necessarily theorize it or address it explicitly.¹⁶ Theorists and practitioners, to the extent that they address the object of interpretation explicitly, typically assume or argue that it must be a single thing.¹⁷ For example, Professor Richard Ekins’s important Article, *Objects of Interpretation*, grounds a critique of Professor Cass Sunstein’s theory of interpretive choice in the view that

The previously mentioned do not exhaust the usually debated theories of statutory or constitutional interpretation. *See generally, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (defending dynamic statutory interpretation); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022) (arguing for common good constitutionalism).

7. *See* Francisco J. Urbina, *Response: Meta-Interpretive Questions and the Aims of Theories of Interpretation: Beyond The Remedial Answer*, 105 B.U. L. REV. 1457, 1467–69 (2025) (explaining how theories of interpretation can specify ways of interpreting and their normative justification); Bill Watson, *What Are We Debating when We Debate Legal Interpretation?*, 105 B.U. L. REV. 1407, 1411 (2025) (suggesting such role but confined to “remedial interpretation”).

8. *See infra* Section I.B.1.

9. *See* NEIL M. GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 144 (Jane Nitze & David Feder eds., 2019) (“In the end, textualism is about ensuring that our written law is our actual law.” (emphasis omitted)).

10. *See, e.g.*, *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020) (“Only the written word is the law”); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (“As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text.”).

11. *See infra* Section I.B.2.

12. As is the case of judicial or legislative practice of engaging with the Constitution. *See infra* Section I.B.3.

13. *See generally* Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9 (2024) (offering an account of this trend).

14. For example, order. *See infra* Section I.B.4.

15. *See infra* Section III.C.

16. *See, e.g., infra* Section I.B.1.

17. Authors such as Justice Scalia and Richard Ekins, for example, have this in common. *See infra* Section I.B.1; Section I.B.2. For a critique of this approach, stating that “when a judge rejects intended meaning . . . it is unhelpful—a kind of stipulation . . . to say that they are no longer engaged in the enterprise of interpretation,” *see* Cass R. Sunstein, *Formalism in Constitutional Theory*, 32 CONST. COMMENT. 27, 29 (2017).

“the central object of constitutional interpretation is the Constitution, which is an intentional lawmaking act rather than a text floating free in the world.”¹⁸ Its focus is on that debate in constitutional theory; it does not purport to offer a systematic review of alternatives or elucidate the nature of the object of interpretation as such.¹⁹ Leading legal philosopher Joseph Raz, in answering the question of “Why interpret?,” affirms in passing that “the basic object of legal interpretation” is the “decisions of authority,”²⁰ noting also that the object of interpretation is a neglected topic in the literature.²¹ But this is not the primary topic of his essay.²² Eminent Italian scholar Riccardo Guastini addresses the object of interpretation generally, offering an insightful analysis of how interpretation in different contexts—such as that of a musical piece or a historical event—has different objects, postulating, ultimately, that in law the object is a text.²³ Other works, while not committing explicitly to a view of the object of interpretation, focus on one of the possible objects, typically the text. For example, in a landmark contribution, Professor Anya Bernstein explores “how judicial opinions select text to interpret and how they situate that text within contexts they create.”²⁴ Similarly, Professors Eskridge, Slocum, and Tobia, in a recent work offering a comprehensive account of issues that arise from the use of textualism in the current Supreme Court, address the choice of text.²⁵ The question is crucial, yet there is a previous question that also needs to be addressed: which

18. Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 1 (2017) (“I take as my foil Cass Sunstein’s recent argument, in these pages, that there is nothing that interpretation just is.”); see also Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015) (“[I]n the legal context, there is nothing that interpretation ‘just is.’”); Sunstein, *supra* note 17, at 27–28 (“Ekins is making a simple error, which is to try to resolve difficult questions in legal theory with a language lesson.”). A paper of a similar name is not on the object of interpretation, but on constitutional structure. See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1008 (2011) (“[I]t is [constitutional] structure, above all, that is the object of the Constitution.”).

19. Ekins addresses the object of interpretation elsewhere, similarly focusing on the implications of his groundbreaking theory of legislation without purporting to offer an account of the nature of the object of interpretation or a systematic review of alternatives. See RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 244–49 (2012) (discussing the object of interpretation from the point of view of his theory of legislation); *infra* Section I.B.2 (discussing Ekins’s theory).

20. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 238 (2009).

21. See *id.* at 239 (“One often neglected question is what is legal interpretation an interpretation of?”); see also Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 568 (2017) (“An interpreter must pick out that object. How is that picking out accomplished? Studies of legal interpretation rarely ask.”).

22. The object of the essay is to answer the question, “Why is interpretation central to legal practices?” RAZ, *supra* note 20, at 223.

23. See RICCARDO GUASTINI, *INTERPRETAR Y ARGUMENTAR [INTERPRET AND ARGUE]* 21–27 (Silvina Álvarez Medina trans., 2d ed. 2021) (affirming that legal interpretation “obviously belongs in the genre of textual interpretation” (translated by author)). I am grateful to Paolo Sandro for calling my attention to this and other European works.

24. See Bernstein, *supra* note 21, at 569.

25. See William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1627–30, 1663–67 (2023) (pressing the question of which text should be the focus of textualist interpretation and discussing the choice of the language at issue in textualist interpretation).

one of the possible candidates—the text being only one of many—is the actual object of interpretation in law?²⁶

All these are important contributions on which this Article builds in offering a general and systematic account of the object of interpretation. This Article explains the nature of the object of legal interpretation, systematically surveys the main candidates for that role, and specifies how legal practice settles on an object of interpretation. At the core of this Article’s account is a pluralistic view of the object of legal interpretation. The view that the object of interpretation is always the same thing is intuitive and echoed in several writings.²⁷ But it is unsound. The complexity of legal practice leads to different possible objects of interpretation.²⁸ There is no conceptually necessary object of interpretation—no specific object of interpretation that follows from the very nature of law.²⁹ This pluralism follows from the kind of thing that the object of interpretation is. Here, it is argued that the object of interpretation is best understood as a source of law.³⁰ Legal systems can recognize a variety of facts as sources, and they can do so in a way that underdetermines the object of interpretation.³¹

26. Note that the question of the choice of text raised by Bernstein and others is relevant even when the text is not the object of interpretation. This is because the text can matter in the way these authors assume, even when it is not ultimately the object of interpretation in the sense used here. This can happen, for example, when the text is evidence of the relevant meaning in the relevant object, or the object in the third sense described below. *See infra* Section I.A.

27. *See, e.g., supra* notes 17–23 and accompanying text; *see also* Joaquín Rodríguez-Toubes Muñiz, *Aspectos de la Interpretación Jurídica (Un Mapa Conceptual)* [*Aspects of Legal Interpretation (A Conceptual Map)*], 30 ANUARIO DE FILOSOFÍA DEL DERECHO [ANN. PHIL. L.] 309, 317–18 (2014) (holding—with a focus on continental scholarship—that authors adopt different “conceptions regarding which is the object of interpretation,” distinguishing three variations of the dichotomy of whether the object of interpretation is either “norms,” meanings or ideas; or facts, including texts (translated by author)). *See infra* Section I.A (explaining the sense of the term “object of interpretation” used here); *infra* Section I.B (explaining different possible objects of interpretation in the sense relevant here). Not all authors defend or presuppose a single object of interpretation. *See* Michel Troper, *Une Théorie Réaliste de L’Interprétation [A Realistic Theory of Interpretation]*, 8 REVISTA OPINIÃO JURÍDICA [LEGAL OP. MAG.] 301, 306–10 (2006) (arguing that the object of interpretation can be a text or a fact). By “interpretation of facts,” Troper seems to mean something like the subsumption of a fact in a legal category—this relies on a different sense of interpretation than the one used here. *See id.* at 309–10; *infra* Section II.A.1 (distinguishing legal norms from legal sources, and conceptualizing interpretation as the bridge between the two).

28. *See infra* Section II.B.

29. *See infra* Section II.A; Section III.B.

30. I am not the first to hold this view. *See, e.g.,* Duncan B. Hollis, *Sources in Interpretation Theories: An Interdependent Relationship*, in *THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW* 422, 426 (Samantha Besson & Jean d’Aspremont eds., 2017) (“Whatever constitutes a source of international law constitutes an appropriate object of interpretation.”). There are alternatives. An alternative would be to see the object of interpretation in the guise not of sources of law, but of authority. *See, e.g.,* RAZ, *supra* note 20 and accompanying text. On such a view, authority would account for the nature of the object of legal interpretation, which is different from an authoritative choice being an alternative for the object of interpretation. I am grateful to Raphaël Grenier-Benoit for pointing this out. For an insightful explanation of how sources of law differ from sources of authority, see Mathieu Carpentier, *Sources and Validity*, in *LEGAL VALIDITY AND SOFT LAW* 75, 83–84 (Pauline Westerman et al. eds., 2018). In Part II, I make a case for the sources view of the object of interpretation and explain its implications for the diversity of possible objects.

31. *See infra* Section II.A.

How do legal interpreters determine the object of interpretation, then? The object of interpretation is always contingent. It depends on empirical features of a given legal system—what is recognized as a source of law and how—and on moral considerations bearing on interpreters.³² It is possible, and in many contexts desirable, that the object of interpretation be legally unsettled: that no single alternative be adopted by law.³³ When this is the case, legal interpreters must exercise discretion in choosing an object of interpretation.³⁴ But they must also deliberate morally about whether to follow a legal settlement when there is one and about which settlement they will help bring about when one is needed.³⁵ The “correct” object of interpretation is, then, a function of positive law and moral judgment.³⁶

A number of consequences follow from this account of the object of interpretation. First, there is no obvious object of interpretation. Any view on the object of interpretation needs to be defended on empirical and normative grounds.

Second, paying close attention to the object of interpretation allows us to isolate it and distinguish it from other aspects of interpretation, such as the relevant meaning—for example, original meaning, most morally appealing meaning, intended meaning, etc. Some theories of interpretation are primarily about meaning—for example, originalism³⁷ and moral readings³⁸—and some about the object of interpretation—common law constitutionalism,³⁹ for example—and some can be about both—for example, intentionalism.⁴⁰ It also allows us to distinguish between the parts of theories that are about object and the parts that are about something else, such as meaning. “Textualism” is a theory about the object and about meaning,⁴¹ but meaning and object do not logically follow from each other, and each needs to be argued for independently.⁴²

Third, the argument illustrates the relevance of normative justification to a law of interpretation. Professors Stephen Sachs and William Baude greatly illuminate

32. See *infra* Part III.

33. See *infra* Section III.B.

34. See *infra* Section III.C.

35. See *id.*

36. See *infra* Part III.

37. To the extent that the main concern of originalism is with original meaning, it does not need to commit to the view that the object of interpretation is a text. See, e.g., Stephen E. Sachs, *Originalism Without Text*, 127 *YALE L.J.* 156, 157 (2017) (“[O]riginalism doesn’t need to be about the meaning of any text.”).

38. Dworkin’s “moral reading” could be applied to many other objects, not necessarily a text. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996) [hereinafter DWORKIN, *FREEDOM’S LAW*] (arguing for a “moral reading” of the Constitution); see *infra* Section I.B. More generally, Dworkin’s constructive interpretation can be applied to things that are not texts or even part of the law. See RONALD DWORKIN, *LAW’S EMPIRE* 62 (1986) (“I claim that artistic interpretation in our culture is constructive interpretation.”).

39. See *infra* Section I.B.3.

40. See *infra* Section I.B.2.

41. See *infra* Section I.B.1.

42. See *infra* Section I.B; Section II.B. I further develop this claim in Francisco J. Urbina, *Choices in Interpretation*, 106 *B.U. L. Rev.*, https://papers.ssm.com/sol3/papers.cfm?abstract_id=6169766 (forthcoming 2026).

how law can settle aspects of legal interpretation, but they downplay the need for moral justification of interpretive approaches.⁴³ Legal settlement and moral justification are intrinsically related.

Fourth, and more obviously, in practice the outcome of some cases may change if the interpreter adopts one view or another on the object of interpretation. The case of *King v. Burwell*,⁴⁴ discussed below, offers an illustration of this.⁴⁵

This Article proceeds as follows. Part I sets up the argument by mapping different senses of the term “object of interpretation” in Section I.A. Here, the object of interpretation is the thing whose significance, import, or content interpreters ultimately seek to determine. Crucially, there are different possible objects of interpretation available in legal practice. Section I.B explains four such alternatives: text, lawmaking choice, practice, and order. Section I.C illustrates these alternatives and their impact on a legal decision by contrasting the majority and minority opinions in the Supreme Court case, *King v. Burwell*.⁴⁶

To both understand how such diversity of objects of interpretation is possible, and how it can be settled, it is necessary to address the fundamental question of the nature of the object of interpretation. This is the topic of Part II, which explains that the object of interpretation is what is treated as a legal source—more specifically, a “precise” legal source. Section II.A explains legal sources and their relationship to legal norms, as well as the distinction between “rough” and “precise” sources. It is the latter that is properly the object of interpretation. Section II.B explains the plurality of possible precise legal sources and, thus, of possible objects of interpretation. And yet, interpreters and legal systems may need to settle on an object of interpretation. How is this done?

Part III addresses the question of how to determine the object of interpretation. It explores the different ways in which the object of interpretation can be settled in Section III.A, offering a framework based on considerations of two types. First, Section III.B’s discussion of legal settlement of the object of interpretation addresses what the law is. Second, Section III.C addresses what interpreters should do on the practical settlement of the object of interpretation. What this amounts to is that the object of interpretation is contingent and a matter of normative justification. The object of interpretation matters tremendously, but it is not set in stone. A community has agency over it—it should use it well.

I. POSSIBLE OBJECTS

Before exploring the different possible objects of interpretation available in practice, it is important to clarify what is meant here by the object of interpretation, and thus to delimit the topic of our study. The term “object of interpretation” can be used in different legitimate ways. Section I.A clarifies three possible senses of the term “object of interpretation.” Here, in this Article, our concern is

43. See *infra* notes 217, 254–55 and accompanying text.

44. 576 U.S. 473 (2015).

45. See *infra* Section I.C.

46. *King*, 576 U.S. 473.

with the object of interpretation in the second sense explained below, namely, with that whose significance, import, or content interpretation ultimately seeks to determine. As will be explained in Part II, in law, this is a source of law.

Having established what is meant here by the “object of interpretation,” this Part sets up the argument of the Article by mapping the different possible objects of interpretation in Section I.B and offering an illustration of these differences in Section I.C. The argument suggests that there are different possible objects of interpretation available in the practice of a developed legal system—including text, lawmaking choice, practice, and order.

A. SENSES OF THE TERM “OBJECT OF INTERPRETATION”

There are different senses of the term “the object of interpretation.” A first sense is the goals or aims achieved by the activity of interpretation,⁴⁷ such as the kind of understanding that interpretation produces or the values it serves. “Object,” in this sense, could refer to two things. It could refer to some intrinsic aim of interpretation, such as determining the meaning of law,⁴⁸ or a specific meaning, such as intended meaning or original public meaning.⁴⁹ It could also refer to an extrinsic aim of interpretation, such as some value promoted by some form of interpretation.⁵⁰ This first sense of the object of interpretation is not our concern here.

Another way to understand the term “object of interpretation” is to take it to refer to the thing that one interprets—to “that which falls to be interpreted.”⁵¹ In law, it refers to the thing interpreted in legal interpretation.⁵² Yet this formulation

47. See Ekins, *supra* note 18, at 1 (noting that the term “object of interpretation” sometimes refers to the “point” of interpretation).

48. Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 106 (2017) (affirming that “legal interpretation seeks the content of the law”); Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1237 (2015) (“[M]eaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover.”).

49. See, e.g., Conor Casey, *Continuity and Evolution in Vermeule on Legal Interpretation*, 69 AM. J. JURIS. 29, 37 (2024) (“I take Vermeule to accept that the core object of legal interpretation is ascertaining the reasoned intention of the legitimate authority in positing what they decide to posit.”); Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 S.D. L. REV. 651, 653 (2005) (characterizing as debates on the object of interpretation those on whether to focus on “the objective indication of words” or the intention of the legislature (citation omitted)).

50. See, e.g., Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 351 (2005) (referring to “goals external to the communication between speaker and reader”).

51. Ekins, *supra* note 18, at 1.

52. It is useful to mention this explicitly because the object of interpretation is different in different practices and disciplines, even when interpreting the same material. For example, both biblical interpretation and historical interpretation can take the Bible as a material to be interpreted. But they do not interpret it under the same description: The first interprets it as revelation and the second as, say, evidence of what people believed. The same thing, then, can constitute the object of different forms of interpretation. See Peter Lamarque, *Objects of Interpretation*, 31 METAPHILOSOPHY 96, 101 (2000) (“Interpretation gets under way, indeed, is made possible, in the light of prior knowledge about what kind of thing, broadly conceived, the object of interpretation is.”). In legal interpretation, the interpreted materials are understood under the description of “sources of law.” See *infra* Part II.

is still ambiguous. It can refer to the thing that interpretation ultimately seeks to understand or to the materials that are immediately assessed. The latter is evidence of the former.⁵³ These are two additional senses of the term “object of interpretation”—our second and third senses.

Thus, in a second sense, the object of interpretation is the thing whose significance, import, or content interpretation ultimately seeks to determine in the relevant domain. For example, in art this could be the work of art, rather than the paint on the canvas, and in history it could be a historical event, rather than the communicative content of this letter or that historical document, and in biblical interpretation it could be revelation, rather than the communicative content of a verse.⁵⁴ This is the sense of object of interpretation that is of interest to us here. Below, in Part II, I will argue that, in law, the object of interpretation in this sense is what is treated as a legal source. Legal interpreters want to determine what the applicable legal norms are, and to do this they need to assess the things that contain or generate legal norms: legal sources. More precisely, they need to determine what legal norms follow from a legal source. As mentioned above, this intellectual activity is called “legal interpretation” here.⁵⁵ The thing that interpretation interprets is, in this sense, a legal source. The object of interpretation, then, is what is treated as a legal source.⁵⁶ We will return to this in Part II.

One should distinguish this second sense from a third: the object of interpretation as the “evidence” one immediately assesses to interpret the object in the second sense.⁵⁷ For example, assume that the lawmaking choice is that which generates the legal norms of a statute, the legal source,⁵⁸ and thus this is what

53. The distinction does not seem peculiar to law. So, if historical interpretation is about interpreting legal events, then there is a distinction between the event one ultimately wants to understand and the materials—letters, newspaper of the time, material objects of the time such as weapons and clothing, etc.—one uses as evidence for this interpretation. In biblical interpretation, one seeks to understand God’s revelation, the evidence for which is, e.g., a letter of an apostle. Even in art, if the object is “the work of art,” different things may serve as evidence of it, such as the context in which it is placed, the material thing of which it is made, etc. See Lamarque, *supra* note 52, at 100–01 (claiming that the work of art is the object of artistic interpretation).

54. See *supra* note 53 and accompanying text.

55. See *supra* note 3 and accompanying text.

56. Why say that the object of interpretation is what “is treated” as a source and not simply a source? After all, what one treats as a source should be, well, a source. There is nothing wrong in saying that the object of legal interpretation is a legal source, and, for ease of exposition, I sometimes do so here. But the more precise formulation refers to what is treated as a source because of the possibility of a mismatch between what is treated as a source in a specific instance of interpretation and what is a legal source in a legal system. This mismatch is relevant not only because of the possibility of error—something is treated as a source, but it is not really one—but also because of human agency over legal sources. One way of bringing about a source is through a practice of recognition, and one way to bring about a practice of recognition of a source—or bring about change in what is conceived to be the actual source in a legal material—is by making it consistently, concordantly, the object of interpretation. See Hollis, *supra* note 30, at 423 (recognizing this two-way relation between sources and interpretation); *infra* Section II.A.2; Section III.C (explaining the idea of “precise” recognition and agency over what is recognized as a source).

57. See Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL’Y 2, 21–24 (2025) (distinguishing between an “evidentiary conception” and a “content conception” of textualism).

58. See *infra* Section II.A.

interpretation tries to get at. It may still be the case that evidence of the relevant intentions can be gathered from, say, the statute's text and legislative history. Here, while the intentional act, and not the text, is the object of interpretation in the second, more fundamental sense, interpreters will also look to texts as evidence for such intention—for example, the text of the statute and that of the legislative record. These texts can be said to be the “object” of the interpreters' inquiry in a different, third, sense: not the thing whose significance, import, or content they are trying ultimately to determine, but the thing they are more immediately looking at to determine the significance, import or content of something else—the object in the second sense. The same could be said about any alternative for the object of interpretation in the second sense: the evidence for it may always lead to the assessment of something else, including materials that are not plausible objects of interpretation in the second sense.

It is worth noting that the distinction between these last two senses of objects of interpretation corresponds, at least in law, to a distinction in the activities of discerning or determining each of the objects.⁵⁹ Here it is useful to bear in mind a distinction between two activities: first, the activity of determining communicative content and second, the activity of determining legal content.⁶⁰ Authors who call attention to this distinction often use the term “interpretation” for the first activity and “construction” for the second.⁶¹ (The term “construction” is sometimes also taken to include other activities, such as the creative elaboration of doctrine or decision rules to supplement legal content and the application of the relevant norms.).⁶² Here the labels are not important. Below, I will say more about the

59. I am grateful to Larry Solum for suggestions leading to this distinction.

60. See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 479–80 (2013) (distinguishing between “linguistic meaning of legal texts” and “the legal content that the texts create”).

61. Lawrence Solum defines “interpretation” as “the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text” and “construction” as “the process that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text).” Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010); see also Randy E. Barnett, *Interpretation and Construction*, 34 HARV J.L. & PUB. POL'Y 65, 66 (2011) (“*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances.”). Not all originalists agree on the distinction. See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (“We find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing.”).

62. See, e.g., JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 98 (2024) (“Constitutional construction fleshes out and implements vague and abstract language through creating and applying doctrines, conventions, practices, laws, and institutions to implement the Constitution's provisions and further constitutional values.”); Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. 1, 2 (2017) (“In the second stage, construction, the decision-maker . . . determines if the rule so interpreted applies to a particular concrete situation and, if so, what actions must be taken to effect the appropriate consequences.”). These activities are distinct from the activity of determining legal content. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (distinguishing between an activity of “identifying constitutional norms and specifying their meaning and another of crafting doctrine or developing standards of review”); see also Stephanie Hall Barclay, *Constructing*

determination of legal content.⁶³ For now, I only want to suggest this distinction to make a point about the different senses of the object of interpretation: the distinction between the two activities further reinforces and clarifies the distinction between the second and third senses of “object of interpretation” in law. The two activities—determining communicative content and determining the legal norms, or legal content, of something—have different “objects.”

The object of the activity of determining communicative content—“interpretation,” in the narrow sense of the distinction—is a form of communication, often, but not necessarily, some kind of text—including the text of a statute or constitution and that of other materials, if relevant, such as congressional records. So, the object of “interpretation,” in the sense of the interpretation-construction distinction, is always the object *in the third sense*. This contrasts with the object of the activity of determining legal content—the activity which includes at least part of “construction” in some influential renderings of the interpretation-construction distinction. The object of that activity is necessarily something that contains or produces legal content, namely, a source of law, and thus the object of interpretation *in the second sense*.⁶⁴ Naturally, determining legal content, in many contexts, requires, among other activities,⁶⁵ determining communicative content of some materials and thus “interpretation”—in the sense of the distinction—of an object in the third sense.

To recapitulate, we have three senses of the term “object of interpretation”: first, the “goal” of interpretation; second, the thing whose significance, import, or content interpretation ultimately seeks to determine; and third, the materials that interpretation immediately assesses. It is particularly important to distinguish the

Constitutional Rights, 138 HARV. L. REV. F. 140, 145 (2025) (drawing this distinction); Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 40 (2010) (discussing different theories and terms for the activities of elaborating doctrine or decisions rules). The terminology is tricky here because the term “construction” could be used for any of the activities mentioned above or for all of them. *See id.* at 50–53 (surveying different alternatives on how to place systemically the determination of legal content in the interpretation-construction distinction); Barclay, *supra*, at 145 (explaining different types of “construction”); Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J.L. & PUB. POL’Y 13, 19–22 (2020) (distinguishing between accounts of the distinction in which “construction” supplements the deficiencies or limitations of “interpretation” and accounts in which “construction” necessarily complements “interpretation”).

63. *See infra* Part II.

64. An early formulation of the interpretation-construction distinction in contract law seems to track the distinction between senses of objects suggested above: “By ‘interpretation of language’ we determine what ideas that language induces in other persons. By ‘construction of the contract,’ . . . we determine its legal operation—its effect upon the action of courts and administrative officials.” Klass, *supra* note 62, at 21 (emphasis added) (quoting 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW §534, at 7 (1951)).

65. Authors differ on whether they emphasize more or less the role of “interpretation” in “construction.” *See* Berman, *supra* note 62, at 59–60 (holding that judges “should inquire into many things en route to a determination of what is the Constitution’s legal effect, content, or significance,” one of them being “determining the Constitution’s (fixed) linguistic meaning”); Urbina, *supra* note 3, at 1719 (arguing that even when “construction” transcends “interpretation,” “the point of reference (whose legal meaning is determined, and which may be transcended, complemented, overridden, etc.) is the legal material as ‘interpreted’”).

last two senses of object, as they can be easily conflated. After all, at a certain level of generality, both the second and third senses of the object can be described in the same way: the thing one interprets. But, as explained, they refer to different things and are the objects of two different activities. It is important to clarify these different senses so that the subject of our discussion is clear.

This Article is concerned with elucidating the object in the second sense—the thing interpreted in the more fundamental sense—rather than the evidence for it or the goals or aims of interpretation. In what follows, the term “object of interpretation” is used, again, in the second sense.

B. ALTERNATIVE OBJECTS OF INTERPRETATION: TEXT, WILL, PRACTICE, AND ORDER

If the object of interpretation is the thing whose significance, import, or content legal interpreters ultimately seek to determine, then what is it, concretely? Is it a text? Or something else? There is no obvious answer to this question. Just as there are different possible meanings of a text,⁶⁶ there are different possible objects of interpretation. And just as those diverse meanings could all be meanings of the same legal material—for example, the Constitution of the United States⁶⁷—there can be several possible objects of interpretation in the same legal material. Legal practice is sometimes about one object and sometimes about another.⁶⁸ When it comes to the object of interpretation, there are alternatives.

This Section outlines alternative possible objects of interpretation. It surveys four important ones: text, lawmaking choice, practice, and order. These are not the only possible objects of interpretation,⁶⁹ and I claim no originality in discovering them. Here it suffices to list some prominent alternatives implicit in debates on interpretation and to give a brief description of each. The aim is not to offer a full account of any of them but rather to set the stage for an account of the object of interpretation by showing how legal practice and theory offer more than one plausible alternative for the object of interpretation. A subsidiary aim of the discussion is to illustrate how these objects are independent of the different meanings that can be ascribed to them. All this vindicates the legitimacy of the question: What exactly is the object of interpretation? If different approaches to interpretation presuppose different objects of interpretation, then this question is unavoidable and important.

66. See Fallon, *supra* note 48, at 1239 (listing different potential “‘referents’ for claims of meaning” of a text); see also William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1089–90 (2017) (“As decades of interpretive debates have established, there’s more than one plausible way to read a text.”).

67. For example, there are originalist readings and moral readings to the same Constitution. See, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1953 (2021); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453 (2013); DWORKIN, FREEDOM’S LAW, *supra* note 38, at 3.

68. See *infra* Section I.C for an example.

69. Thus, I do not claim that there is a closed list of possible objects derived from the nature of interpretation or some other such consideration. See *infra* Part III on what determines the object of interpretation. I am grateful to Charlie Capps for raising this point. Similarly, I do not aim to explore all conceivable alternatives for the object of interpretation.

1. Text

Perhaps the most natural and intuitive alternative for the object of statutory or constitutional interpretation is the text. Textualists and originalists often presuppose such a view.⁷⁰ Take, for example, Justice Scalia's writings on interpretation. For Scalia, "[t]he text is the law, and it is the text that must be observed."⁷¹ More precisely, "the objective indication of the words, rather than the intent of the legislature, is what constitutes the law."⁷² It follows from this view that "[e]very issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."⁷³ The object of interpretation is the text, nothing else. Thus, Scalia rejects the possibility that "the object of judicial interpretation is to determine the intent of the legislature."⁷⁴ The decision in *Holy Trinity Church v. United States*⁷⁵ was wrong "because it failed to follow the text," regardless of whether the result was just or what the legislature intended.⁷⁶

Here, it is useful to distinguish between different claims that, in underscoring the role of text in interpretation, may all rightly deserve the name "textualism"—but that, falling under a common label, may be easily confused. One claim is that the text is the object of interpretation—the claim this Subsection is about. Other claims made by textualists concern the relevant meaning of the text: that the relevant meaning of a text is, for example, its original public meaning.⁷⁷ As mentioned above, a reason for distinguishing object and meaning is that claims about

70. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551 (1994) (arguing for the "[p]rimacy of the [c]onstitutional [t]ext" and presenting as "[t]he central premise of originalism . . . that the text of the Constitution is law that binds each and every one of us until and unless it is changed through the procedures set out in Article V").

71. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutmann ed., 1997); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 397 (2012) ("The traditional view is that an enacted text is itself the law.") For an illuminating discussion criticizing the idea that text is law as a "category mistake," see Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2036–41 (2022). I take Scalia's position to be not that text is a legal norm—which, as Encarnacion rightly notes, would be a mistake—but that the text is a source of law. See *infra* Section II.A.1 (distinguishing sources from norms); see also Encarnacion, *supra*, at 2041–46 (suggesting other ways of stating textualism's core claims).

72. SCALIA, *supra* note 71, at 29; see also *id.* at 17 ("It is the law that governs, not the intent of the lawgiver.").

73. *Id.* at 13.

74. *Id.* at 17.

75. 143 U.S. 457 (1892).

76. SCALIA, *supra* note 71, at 22 ("It may well be that the statutory interpretation adopted by the Court in *Church of the Holy Trinity* produced a desirable result; and it may even be . . . that it produced the unexpressed result actually intended by Congress, rather than merely the one desired by the Court. Regardless, the decision was wrong because it failed to follow the text.").

77. See, e.g., *id.* at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law . . ."); see also SCALIA & GARNER, *supra* note 71, at 33 (characterizing "[t]he interpretive approach we endorse" as one focused on "determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued"). For a thorough survey of the different nuances of textualism and the different views that textualism entails, including as a theory of adjudication, see generally Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

the object of interpretation are conceptually separable from claims about its meaning: A text can be read in light of its original public meaning, its intended meaning, its current meaning, or some other meaning. Settling on the text as the object of interpretation does not necessarily entail a specific meaning.⁷⁸ The same applies to other possible objects of interpretation, as the next Subsections illustrate.⁷⁹

The text is such a salient object of interpretation that it may seem to be the only possible one. But there is nothing self-evident in the text being the object of interpretation. There are other alternatives.

2. The Lawmaker's Choice

Much law is the product of a will to introduce new law or suppress or change extant law.⁸⁰ As leading theorist of legislation, Professor Richard Ekings, explains, “[t]he exercise of legislative authority is the making and promulgation of a choice.”⁸¹ It is a choice “to change the law in specific ways.”⁸²

78. Though there may be other relations. For example, that the object is X could be a reason for its relevant meaning to be Y and not Z. Or the same reasons that justify X could justify Y.

79. See *infra* Section I.B.2; Section I.B.3; Section I.B.4. That object and meaning are distinct is reinforced by the fact that, from the point of view of interpretive choice, the choice of the object of interpretation and the choice of the relevant meaning are different interpretive choices. See Urbina, *supra* note 42, at section III.C (arguing for this distinction and explaining the different interpretive choices and their relations).

80. Different intellectual traditions emphasize the role of will in law. See, e.g., JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 67 (Victor Gourevitch ed. & trans., 1997) (“[L]aws . . . are acts of the general will.”); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832), reprinted in *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* xxiii 350 (Hackett Publ’g Co., Inc. 1998) (1954) (referring to law as the product of a sovereign); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 *NOTRE DAME L. REV.* 1, 16–43 (2022) (explaining a natural law conception of popular sovereignty.).

Note that the legislative choice to *not* make law—legislative inaction—can also be the object of interpretation. See generally William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 *MICH. L. REV.* 67 (1988) (surveying decisions interpreting legislative inaction and offering an account of such interpretation). Here, it is evident that the object of interpretation cannot be a text, since legislative inaction produces no text.

81. EKINGS, *supra* note 19, at 247.

82. *Id.* at 246. Professor Victoria Nourse also emphasizes legislative decision in her influential theory of statutory interpretation. See Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 *B.C. L. REV.* 1613, 1620 (2014) (“The question the interpreter must ask is: what did Congress decide?”). See generally Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70 (2012) (explaining her “decision theory”). Nourse’s theory seems to me to treat the text as the object of interpretation, focusing on the legislative choice of text—and thus, on textual meaning. See, e.g., *id.* at 90 (asserting that decision theory “looks for Congress’s textual decisions”). This would be closest to what I call below “intentionalism of meaning,” focused on the meaning of a *text*, with the following caveat: Nourse’s work does not rely on the notion of “intention,” focusing solely on decisions. See *id.* at 83 (holding that “the concept of ‘intention’ has distorted the legal debate” and that “one need not describe the decision as a matter of intent to understand that a choice has been made”). It seems to me that much of Nourse’s sophisticated and workable framework for deciphering legislative choices and profiting from legislative history could also apply to a theory focused on the legislative choice of legal norms—rather than on the text—as the object of interpretation, but I cannot address that here.

If the law is the product of an intentional lawmaking choice or decision, couldn't this very act be the object of interpretation rather than the text that manifests it?⁸³ Couldn't, then, the *choice* or *will* of the legislature to introduce a set of legal norms in the legal system, and not others, be the object of interpretation?⁸⁴

This sounds like intentionalism—the view that interpretation is focused on authorial intention.⁸⁵ But, as with theories underscoring the role of text in interpretation, we must distinguish between claims about the object of interpretation and about the relevant meaning of that object. Indeed, the idea that legislative choice is the “object” of interpretation is ambiguous between the claim that the legislature’s intended choice is the object properly speaking, in the sense used here, and the different claim that the relevant meaning of an object—say, a text—is the intended meaning.⁸⁶

83. This view applies to constitutional interpretation as much as to statutory interpretation when the Constitution is the product of an intentional lawmaking act. *See* Ekins, *supra* note 18, at 1 (“[T]he central object of constitutional interpretation is the Constitution, which is an intentional lawmaking act rather than a text floating free in the world.”).

84. Actually, there are two legislative choices at stake in Ekins’s theory. In my terminology, one is the choice of legal norms and the other is the choice of a formulation, in a text, of those legal norms. I take Ekins’s terms “reasoned choice” or “lawmaking intention” to capture the first and “intended meaning” to capture the second. *See* EKINS, *supra* note 19, at 246 (“The legislature promulgates its lawmaking intention—its choice that this set of propositions is to form part of the law The legislature’s intended meaning expresses the propositions it has chosen, which is of central importance precisely because it articulates the object of the legislature’s choice.”). I take it to follow from Ekins’s theory that the former is the object of interpretation. But it is unclear that this is the view uniformly expressed in his writings. For example, sometimes he suggests that the object of interpretation is the “intended meaning.” *See id.* at 246 (“[I]nterpreters should aim to infer the legislature’s intended meaning, which is how it formulates the set of propositions it intends to introduce into the law. This intended meaning is the central object of statutory interpretation.”). On other occasions, it would seem that the object of interpretation is both choices. *See id.* at 247 (“Interpreters should aim to understand the legislature’s intended meaning. They should also aim to understand the reasoned choice that finds expression in this intended meaning.”). Ultimately, though, it seems to me that on Ekins’s theory, what is actually taken to be generative and thus controlling of legal content, is the choice of legal norms (Ekins’ “reasoned choice” of the legislature); the choice or intent regarding the meaning of the text is subordinate, in that it is taken to give evidence or expression to the former, which is the most fundamental. This is clear when the two collide—when the authorially intended meaning of the text does not coincide with the choice of legal norms of the legislature. Ekins addresses this in his discussion of equity, where invariably, on his account, it is the legislature’s reasoned choices that are controlling. *See id.* at 276 (arguing that “when intended meaning comes apart from reasoned choice the latter should take priority, for the point of the intended meaning is to articulate this reasoned choice”). There are several other instances in which Ekins treats as the object of interpretation not the intended meaning of words of the text but the actual lawmaking choices. *See, e.g., id.* at 258 (“The interpreters infer what the legislature was likely to have meant by reference to what it would have been rational for it to decide, especially given the general scheme that its other choices disclose.”); *id.* at 255 (“The interpreter’s duty is to find and give effect to the chosen plan of action”); *id.* at 251 (“[T]he legislature chooses a complex plan and while reflection on the end or ends may be highly relevant to determining the legislative choice and working out its consequences, it is the chosen plan that is authoritative.”).

85. *See, e.g., id.* at 1 (“[L]egislative intent has traditionally been thought to be the central object of statutory interpretation.” (emphasis omitted)).

86. *See supra* note 84.

Call the first “intentionalism of object” and the second “intentionalism of meaning.” While the two could go together, they could also come apart. A version of intentionalism of meaning is a form of textualism, as a theory of the object of interpretation: that the words and sentences *in a text* should be read in light of what its authors intended them to communicate. Call this “textualist intentionalism.” While all these intentionalisms are easily conflated, the idea that the object of interpretation is the legislative *choice* is different from the idea that the meaning of a *text* is what its authors intended. The latter presupposes that the object of interpretation is a text, not a lawmaking choice.

The difference may be subtle, but it is real, and it may lead to different results. For example, a textualist intentionalist view will focus on the intended meaning the legislature gave to this or that word or sentence in the text; in contrast, an approach focusing on the intentional meaning of the legislative choice itself will focus not on the meaning of a text but on the legal norms that the legislature intended to change or introduce in the law. Thus, both approaches focus on different intentions, each with a content different than the other. These differences may have practical consequences. Take the well-known *Smith v. United States* case.⁸⁷ The case concerned the question of “whether the exchange of a gun for narcotics constitutes ‘use’ of a firearm ‘during and in relation to . . . [a] drug trafficking crime’ within the meaning of 18 U.S.C. § 924(c)(1).”⁸⁸ Here, it is possible that the legislature did intend to use the word “use” in its ordinary and broad sense⁸⁹ but did not intend to introduce a norm that increases the punishment for a drug offense for a person who trades a gun for drugs.⁹⁰ If so, then on one approach, the statute applies to the facts in *Smith*—and thus the case was correctly decided—and on another one, it does not—and thus the case was incorrectly decided.⁹¹

In any case, object and meaning come closest when comparing an intentionalist assessment of the lawmaking act with an intentionalist assessment of the meaning of a text. But intentional meaning is not the only meaning one could discern in a lawmaking choice. Other meanings, such as public or moral meanings, are available, as the example of *King* below illustrates.⁹² Similarly, one could look for the intentional meaning of a text, an object, a practice, and any other

87. 508 U.S. 223 (1993) (concerning the question whether trading a gun for drugs constitutes “using” it in relation to drug trafficking).

88. *Id.* at 225, 226–27 (“Under 18 U.S.C. § 924(c)(1), a defendant who so uses a firearm must be sentenced to five years’ incarceration. And where, as here, the firearm is a ‘machinegun’ or is fitted with a silencer, the sentence is 30 years.”).

89. *See id.* at 228 (“Surely petitioner’s treatment of his MAC–10 can be described as ‘use’ within the everyday meaning of that term.”).

90. For discussion of *Smith* in the context of debates on interpretation, see Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 237–39 (2011) (discussing the majority opinion and Justice Scalia’s dissent, arguing that “[w]hat textualists should be seeking is fidelity to what the legislature asserts or stipulates, not what the sentences used to do so mean”).

91. Of course, it could be challenged that, as a matter of fact, the legislature intended any of those things.

92. *See infra* Section I.C. The same could be said for legislative inaction. *See* Eskridge, Jr., *supra* note 80, at 108 (“[T]here is no inherent reason why the legal significance of legislative inaction must be tied to actual intent.”).

possible object of interpretation that is the product of an intentional act.⁹³ Indeed, one advantage of distinguishing meaning from object is precisely that it sheds light on different possible combinations.

3. Practice

Sometimes, a statute or a constitution is interpreted not primarily in light of its text or anything its authors chose or did, but in light of a practice of engaging with those legal materials.⁹⁴ This practice often is—but does not need to be—a judicial practice. When this happens, what is really interpreted in interpreting, for example, a constitution or a statute, is a set of judicial decisions nominally applying those materials. I say “nominally” because the text of those materials recedes into the background, and what matters in interpreting them is not whether previous decisions are consistent with their text, but what those previous decisions entail as to the legal content of those materials.

Professor David Strauss offers a vivid illustration of this phenomenon:

Pick up a Supreme Court opinion in a constitutional case, at random. Look at how the justices justify the result they reach. Here is a prediction: the text of the Constitution will play, at most, a ceremonial role. Most of the real work will be done by the Court’s analysis of its previous decisions. The opinion may begin with a quotation from the text. “The Fourth Amendment provides . . .,” the opinion might say. Then, having been dutifully acknowledged, the text bows out. The next line will begin with “We”—meaning the Supreme Court—“have interpreted the Amendment to require . . .” And there will follow a detailed, careful account of the Court’s precedents.⁹⁵

On this description, what the Court treats, in fact, as the object of the interpretation of the Constitution is a *practice*.⁹⁶ The thing to interpret in determining the

93. This is not necessarily the case for all possible objects. For example, order, another possible object of interpretation, is not necessarily intended—though it could be. See *infra* Section I.B.4.

94. Not all law is formally communicated, and thus the object of interpretation sometimes cannot even be a text. Custom is an example. See JOHN GARDNER, *Some Types of Law*, in *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 54, 67 (2012) (“[C]ustomary law, unlike legislated law, is not made by any acts of communicating it. It is made by acts of conforming to it.”).

95. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33 (2010). I do not claim that Strauss himself adopts the view of the object of interpretation described in this section. My interest is in his description of a legal phenomenon in the paragraph quoted. For a similar observation, see GARDNER, *supra* note 94, at 58 (“[L]egislative text is not the *only* possible object of legislative interpretation. The law created by the statute—the statute’s legal effect—is itself a second possible object of interpretation. The two come apart most obviously when intervening interpreters ([e.g.,] judges in the highest court) use their legal power to interpret the legislative text in a way that binds successor interpreters.”).

96. Originalists seem keenly aware of this possibility—which they evaluate negatively. For example, wouldn’t a rapprochement be possible between originalists and common law constitutionalists whereby precedent is interpreted in light of its original meaning, and thus originalism is extended to case law? This would be incompatible with originalism. The reason is that many originalists are also textualists—or, in any case, take the object of interpretation to be something else than the specific practice that is expressed through judicial precedent. Thus, they see a tension between original meaning (of a text) and precedent. See, e.g., Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 *CONST. COMMENT.* 289, 289 (2005) (“*Stare decisis* contradicts the premise of originalism—that it is the

legal content of the Constitution is neither its text nor a choice of a lawmaker, but a practice of engaging with it.⁹⁷

Two clarifications are in order. First, judicial practice is not the only possible practice that could become an object of interpretation. The practices of other actors engaging and applying, for example, the Constitution, could also become the object of interpretation. An example of this is the Supreme Court's use of what Professor Sherif Girgis calls "living traditionalism."⁹⁸ In this approach, "the Court reads a constitutional text in light of the longstanding or widespread practices of other actors. The actors may be Presidents or Congresses, state lawmakers or state courts, or even ordinary citizens."⁹⁹ These practices "don't shed special light on original meaning"¹⁰⁰ and also do not "seem to reflect what the Founders called 'liquidation.'"¹⁰¹ Professor DeGirolami's "traditionalist" theory is an articulate conception and defense of such an approach.¹⁰²

Second, that judicial practice can be the object of interpretation of, say, a statute or the Constitution, should not be confused with case law being a source of law by itself.¹⁰³ In many places, the common law stands as a source of law by

original meaning of the words of the text, and not anything else, that controls constitutional interpretation."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 861 (1989) ("[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis*."). For the claim that originalism does not require attention to text, see *supra* note 37.

97. Ekins notes this critically in discussing theories of interpretation:

Recognizing, with Dworkin, that much constitutional law is found in the mass of judicial decisions, Sunstein asserts, first that 'judges who interpret the Constitution owe a duty of fidelity to what has come before' (so not just to the text) and that one 'recurring question is the relationship among the case law, social practices and the original understanding of the text. . . . On this view, the object of constitutional interpretation would seem to be the judicial practice of working with the canonical text. Hence, one interprets not the text itself, such that its original meaning is not controlling, but the history of adjudication by reference to that text, which may take us increasingly far from that original meaning without abandoning it altogether.

Ekins, *supra* note 18, at 23 (citations omitted).

98. See generally Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023) (describing living traditionalism).

99. *Id.* at 1482.

100. *Id.* at 1483. See also Sherif Girgis, *Originalism's Age of Ironies*, 3 HARV. L. REV. F. 1, 3 (2024) ("The originalist-identifying Court relies not only on text and meaning but also on 'history and tradition,' especially political practices. And not just 'original'-era practices but ones coming long after ratification, too." (citations omitted)).

101. Girgis, *supra* note 98, at 1483; see also DeGirolami, *supra* note 13, at 25–34 (distinguishing traditionalism from "liquidated originalism").

102. See generally DeGirolami, *supra* note 13.

103. See GARDNER, *supra* note 94, at 59 ("If the text drops out, so that the cases start to be treated as independent authorities for the legal norms they left behind, then those legal norms are no longer legislated legal norms. Then we are dealing with pure case law."). This observation could lead one to think that there are only two alternatives: either the text (say, of a statute) is the object of interpretation (and the source of law), with judicial decisions about the text being mere guides as to the text's content, or legal decisions have become a legal source on their own, parallel to the legal source that is the statute. Certainly, both things could happen in law. The point is that there is a third possibility: that legal practice of engaging with the statute becomes the legal source that the statute is. Neither the first nor the second possibility but only the third, accounts for the kind of situation described by Strauss. See *supra*

itself, *alongside* statutes and constitutions.¹⁰⁴ But this is not the same as legal decisions—or some other practice—being the object of interpretation *of some other legal source*, such as statutes or constitutions. A practice is the object of interpretation of another source when it is “dependent” on that source.¹⁰⁵ It controls the law produced by some other source rather than generate law as a self-standing source of law.¹⁰⁶ In Strauss’s description, judicial reasoning is shown as treating Supreme Court decisions not as a fully independent source of law alongside the Constitution, but as that which determines the legal content of the Constitution.¹⁰⁷

As with other objects of interpretation, there can be different legal meanings of the same object of interpretation. In contemplating, for example, a judicial practice of determining the meaning of a constitutional provision through case law, it is possible to focus on what those judges intended to articulate as the meaning of those constitutional provisions, or on what was publicly understood that they articulated as the relevant meaning, or to search for the most morally appealing version of what they understood the content of the constitutional provision to be, etc.

4. Order

The last alternative for an object of interpretation is one that, for lack of a better name, I call “order.” For order to be the object of interpretation in a statute or a constitution, that statute or constitution must be taken to either reflect or bring about an actual arrangement of things—an intelligible and relatively coherent set of coordinated human behavior, values, or institutions. Law reflects or brings about a lived reality, an actually existing order. This order can be the thing interpreted as much as text, choice, or practice.

note 95 and accompanying text. If the object of interpretation is squarely the practice, what controls the meaning of the statute is the practice of its interpretation, not the actual text. The legal source in the “statute” is actually the judicial practice of engaging with that legal material. On legal sources, see *infra* Part II.

104. See, e.g., *infra* note 184 (listing legal sources in the U.S.).

105. This alludes to Professor Grant Lamond’s distinction between dependent and independent sources of law:

An “independent” source of law is one that is independent of other sources of law. As is well known, many major parts of the law in common law jurisdictions are based primarily on case law (e.g. contract, trusts, administrative law). By contrast, a “dependent” source of law is one which is dependent on another source of law. In the case of precedent, the most obvious example is statutory interpretation: those decisions of courts which provide an authoritative interpretation of a statute. A dependent source of law determines the legal effect of another source of law; and its legal effect depends upon the continued existence of the other source.

Grant Lamond, *The Doctrine of Precedent and the Rule of Recognition*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* 21, 22 (Timothy Endicott et al. eds., 2023). Note that the term “dependency” can be misleading. It can suggest both that one source’s validity (its status as a legal source) depends on another source and that its legal content is controlled by another source.

106. To my mind, this can happen in two ways. First, the dependent source can produce legal norms that control how to interpret the independent source. This is a “law of interpretation.” See *infra* Section III.B. Second, the dependent source can stand in place of the independent source, so to say, as the thing that interpreters assess when interpreting the independent source. Here it is the object of interpretation regarding the independent source. I am grateful to Alma Diamond for this point.

107. For Strauss’s description, see *supra* note 95 and accompanying text.

“Order” is not central to our current legal thinking, which is structured primarily around legal norms.¹⁰⁸ It is, therefore, no surprise that we find a vivid illustration of order as an object of interpretation in historical works.

Professor Jonathan Gienapp’s recent critique of originalism provides an example.¹⁰⁹ Gienapp reminds us that for the founding generation, legal interpretation was not exhausted by the text. He explains that, “[t]he [Constitution’s] meaning was shaped by the nature of the polity, and the nature of the polity could not be derived from the document—no matter how hard some today might be inclined to try.”¹¹⁰ Thus, “[w]hat the Constitution said, permitted, and required turned on the nature of the federal union, which itself was subject to sharply competing interpretations.”¹¹¹ For example, debates over the “limited and enumerated powers”¹¹² of the national government under the Constitution depended on what the United States actually was: a nation or a federation of states.¹¹³ Thus,

[t]he sum of delegated authority was limited to those powers enumerated if—and *only* if—the underlying polity was a collection of sovereign states rather than a national sovereign people. If it was the latter . . . the sum of delegated power was necessarily greater, extending to, as Jay put it, all national objects.¹¹⁴

There are other examples of order as the object of interpretation. Some Eleventh Amendment jurisprudence seems to rely on an actual arrangement of institutions, past or present, to assert the content of that amendment.¹¹⁵ Another

108. There are some exceptions. See ERIC VOEGELIN, *THE NATURE OF THE LAW AND RELATED LEGAL WRITINGS* 24 (Robert Anthony Pascal et al. eds., 1991) (articulating a theory of law as “the substance of order”); CHRISTOPH KLETZER, *THE IDEA OF A PURE THEORY OF LAW* 90 (2018) (explaining how law “imagines an order as already actual within the world.”); JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 282 (2d ed. 2011) (explaining the use of the indicative propositional form in legal drafting in terms of professional legal drafters having “in their mind’s eye the pattern of a future social order”).

109. See generally JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* (2024) (offering a historical critique of originalism).

110. *Id.* at 136.

111. *Id.* at 136; see also *id.* at 123 (holding that “understanding what the Constitution meant required understanding what sort of thing it was, which usually required understanding what kind of polity it represented”); *id.* at 133 (Similarly, Republicans and nationalists shared the premise that at least some interpretive debates could be “settled only by appealing to the true nature of the underlying compact.”).

112. *Id.* at 125 (citing David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 575–79, 581–84 (2017)).

113. *Id.* at 124–36 (describing the views of nationalists and Republicans).

114. *Id.* at 131–32.

115. See, e.g., *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (“Despite the narrowness of its terms . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . .”); *Allen v. Cooper*, 589 U.S. 248, 254 (2020) (“In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State. That bar is nowhere explicitly set out in the Constitution. The text of the Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State. But this Court has long understood that Amendment to ‘stand not so much for what it says’ as for the broader ‘presupposition of our constitutional structure which it confirms.’” (quoting *Blatchford*, 501 U.S. at 779)). I am grateful to Brian Bix for calling my attention to these examples.

example is taking the political regime—such as the republican form of government—as the object of constitutional interpretation, as opposed to the text of the Constitution.¹¹⁶ More generally, arguments from structure, as a constitutional modality, seem to be amenable to this kind of assessment that goes beyond the text and instead looks to the actual arrangement of institutions.¹¹⁷

As with the other objects of interpretation, one could seek different meanings in the same order. Are we searching for an actual existing order as those who live now understand it? Or as it was understood or brought about in the past? Do we care about the actual existing order or some moral reconstruction that displays it in its best light? And so on.

C. AN EXAMPLE: *KING V. BURWELL*

The Supreme Court's decision in *King v. Burwell*¹¹⁸ illustrates the contrast between different objects of interpretation and how these can affect the interpretation of a provision.

The case concerns the interpretation of Section 36B of the Affordable Care Act (ACA).¹¹⁹ As Chief Justice Roberts, writing for the majority, explained, after “a long history of failed health insurance reform”¹²⁰ the ACA adopted “a version of the three key reforms that made the Massachusetts system successful.”¹²¹ These three reforms are a restriction on insurers from denying coverage or charging higher premiums for health reasons,¹²² a requirement for individuals to “buy insurance or pay a penalty,”¹²³ and a tax credit “to certain individuals to ensure that they could afford the insurance.”¹²⁴ Experience has shown that adopting only the first of the reforms produces a “death spiral”: “As premiums rose higher and higher, . . . the number of people buying insurance sank lower and lower As a result, the number of people without insurance increased dramatically.”¹²⁵ The reforms thus are “closely

116. Professor Martin Loughlin believes this is the position of Professor Bruce Ackerman: “Ackerman argues for a reorientation that interprets the regime rather than the text.” MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* 147 (2022).

117. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1982) (“Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.”). Note, though, that Bobbitt says that structural arguments “depend on deceptively simple logical moves from the entire Constitutional text.” *Id.* The point here is that it is possible, and perhaps not too rare, that a structural argument depends not so much on norms derived from a text, but from norms derived from an order. I am grateful to Brian Bix for this suggestion.

118. 576 U.S. 473 (2015).

119. *Id.*; Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–18122 (2018).

120. *King*, 576 U.S. at 479.

121. *Id.* at 481.

122. See *id.* at 479–80 (referring to “guaranteed issue” and “community rating” requirements).

123. *Id.* at 481 (referring to the Massachusetts system); see *id.* (“[T]he Act generally requires individuals to maintain health insurance coverage or make a payment to the IRS.”).

124. *Id.* The ACA gives “refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line. Individuals who meet the Act’s requirements may purchase insurance with the tax credits, which are provided in advance directly to the individual’s insurer.” *Id.* at 482 (citations omitted).

125. *Id.* at 480.

intertwined.”¹²⁶ To these reforms, the ACA added a fourth element, requiring the creation of an “Exchange”—a marketplace for insurance. An Exchange can be created either by a state or, if a state does not establish an Exchange, “the Act provides that the Secretary of Health and Human Services ‘shall . . . establish and operate such Exchange within the State.’”¹²⁷

The case revolved around a provision in Section 36B of the ACA. The provision created and regulated a tax credit for individuals “in an insurance plan through ‘an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act.”¹²⁸ The question was whether an Exchange established by the Federal Government would fall under this rule.¹²⁹ For the Court, it did.¹³⁰

The ACA provides for two types of Exchanges. The provision at stake mentions only one. But the Court read it to include the two. As Justice Scalia wrote in dissent, the Court read “‘by the State’ to mean ‘by the State or not by the State.’”¹³¹ The Court acknowledges that this is not the “natural” reading of the provision.¹³² The majority also acknowledges that the ACA’s definition of “State” unsurprisingly “does not include the Federal Government.”¹³³

How does the Court end up reading that an Exchange “established by the State” refers also to Exchanges not established by the State but by the Federal Government?¹³⁴ The Court thought that context made Section 36B ambiguous

126. *Id.* at 482. The Court explains that:

Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. . . . And the coverage requirement would not work without the tax credits. The reason is that, without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement.

Id. (citation omitted).

127. *Id.* at 483 (quoting 42 U.S.C. § 18041(c)(1)).

128. *Id.* at 483 (quoting 26 U.S.C. §§ 36B(b)–(c) (emphasis added)).

129. *Id.* at 479 (“Specifically, the question presented is whether the Act’s tax credits are available in States that have a Federal Exchange.”); *see also id.* at 483 (“The issue in this case is whether the Act’s tax credits are available in States that have a Federal Exchange rather than a State Exchange.”). The Court deemed its “task [was] to determine the correct reading of Section 36B,” declining to grant *Chevron* deference to the IRS. *Id.* at 486.

130. *Id.* at 498 (affirming the judgment of the Court of Appeals for the Fourth Circuit).

131. *Id.* at 505 (Scalia, J., dissenting).

132. *See id.* at 488 (“If we give the phrase ‘the State that established the Exchange’ its most natural meaning, there would be no ‘qualified individuals’ on Federal Exchanges.” (emphasis omitted)); *id.* at 497 (“[T]he context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”).

133. *Id.* at 487 (“[T]he Act defines ‘State’ to mean ‘each of the 50 States and the District of Columbia . . .’”).

134. *Id.* This is not the only relevant issue in determining whether the provision is ambiguous. For the provision to apply to individuals enrolling through a Federal Government Exchange, it also had to be determined that Exchanges established by the Federal Government are “Exchanges” and that they were “established ‘under [42 U. S. C. § 18031].’” *See id.* at 486 (listing the three requirements for individuals to receive tax credits to frame the subsequent reasoning). The latter was also controversial. *See id.* at 489 (“Third, we must determine whether a Federal Exchange is established ‘under [42 U. S. C. § 18031].’ This too might seem a requirement that a Federal Exchange cannot fulfill . . .”).

and thus that it had to determine the meaning of the statute.¹³⁵

The key premise in the Court's reasoning for determining the meaning of the statute is that without tax credits for those enrolled through a Federal Government Exchange, the regime of the ACA would largely fail. The Court explained, "[h]ere, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."¹³⁶ More precisely, "[u]nder petitioners' reading . . . one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way."¹³⁷ The reading is incompatible with the three key reforms the ACA brought about.¹³⁸

But how can one say that these are "the Act's three major reforms"¹³⁹ if its text does not seem to support them? The contrast with the dissent is instructive. "Like it or not," argues the dissent, "the express terms of the Affordable Care Act make only two of the three reforms mentioned by the Court applicable in States that do not establish Exchanges. It is perfectly possible for them to operate independently of tax credits."¹⁴⁰ Of course, this may mean that the reform fails, as the Court thought. Yet the dissent counters, "[i]f true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says."¹⁴¹ Instead, the dissent insists, "[o]ur task is to apply the text, not to improve upon it,"¹⁴² accusing the majority of "rewriting the law under the pretense of interpreting it."¹⁴³ The basic premise of the dissent is

135. *Id.* at 492 ("After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase 'an Exchange established by the State under [Section 18031]' is unambiguous. . . . Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B."). What follows focuses on the Court's arguments for determining the meaning of Section 36B. For the reasoning for the ambiguity of Section 36B with regards to whether "established by the State" refers also to Exchanges established by the Federal Government, see *id.* at 488 & n.1. If the provision in Section 36B were given "its most natural meaning, there would be no 'qualified individuals' on Federal Exchanges. But the Act clearly contemplates that there will be qualified individuals on every Exchange" and that "the fact that the dissent's interpretation would make so many parts of the Act 'inapplicable' to Federal Exchanges is precisely what creates the problem." See *id.* (emphasis omitted).

136. *Id.* at 492.

137. *Id.* at 493.

138. See *id.* at 498 ("Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.").

139. *Id.* at 493.

140. *Id.* at 511 (Scalia, J., dissenting).

141. *Id.* (Scalia, J., dissenting).

142. *Id.* at 515 (Scalia, J., dissenting) (quoting *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989)).

143. *Id.* at 516 (Scalia, J., dissenting); see also *id.* at 515 (Scalia, J., dissenting) (accusing the majority of "the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery"); *id.* at 517 (Scalia, J., dissenting) (claiming the Court "rewrote the law").

that the regime of the ACA *is* what can be gathered from the text, nothing else. Hence the dissent's claim that "we are governed by the terms of our laws, not by the unenacted will of our lawmakers."¹⁴⁴

The reasoning of the majority and that of the dissent illustrate different views on the object of interpretation. The latter evidently presupposes that the object of interpretation is the text of the ACA. Seen from this vantage point, the reasoning of the majority seems contorted¹⁴⁵ to the point of rewriting the law. But the text is not the only possible object of interpretation.

The reasoning of the majority makes the most sense when seen as trying to capture not the meaning of the text, but of the choice of the legislator. What regime did the legislature envisage and actually choose? The text is an indispensable guide for this, but what the inquiry is ultimately about is not the text but a legislative choice. On this view, the point is not that, on the "natural" reading of Section 36B, the ACA "contains a flaw"¹⁴⁶ that must be fixed by the Court, as the dissent suggests. The issue is that this reading does not reflect the regime that Congress seems to have chosen.¹⁴⁷ Hence the importance, for the majority, of establishing, in the very first pages of the decision, the nature of the three reforms as gathered from the justification of the Act and the history of reform.¹⁴⁸ This, the Court believes, is the regime chosen by Congress.¹⁴⁹ If a reading of Section 36B would "undo" this regime, then that reading is wrong.¹⁵⁰ It is not that the Court must covertly legislate to improve Section 36B, but that Section 36B is an input, together with the rest of the statute and other sources of information, on the choice adopted by the legislature, which ultimately is what the Court is trying to interpret. An important premise in the Court's reasoning is that the choice reflected in Section 36B is part of a wider choice for the three basic reforms,¹⁵¹ and thus, it should be understood as being consistent with it. Hence the Court's insistence on not "undoing" the work of Congress.¹⁵²

144. *Id.* at 515 (Scalia, J., dissenting).

145. *See id.* at 518 (Scalia, J., dissenting) (referring to the Court's "somersaults of statutory interpretation").

146. *See id.* at 511 (Scalia, J., dissenting); *see also supra* note 141 and accompanying text.

147. Which sources are acceptable for ascertaining this? This is a question about implementing methods. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 82 (2000) (addressing the process by which interpreters resolve issues such as "[w]hat sources are admissible? Should those sources be arranged in some hierarchy and consulted sequentially (as in the 'plain meaning' rule, which instructs courts to consult legislative history if and only if the statutory text is ambiguous?)"). This Article is not about what evidence is acceptable but about what interpreters are ultimately interpreting. *See* Solum, *supra* note 57, at 21–24 (distinguishing between an "evidentiary conception" and a "content conception" of textualism).

148. *See supra* notes 120–27 and accompanying text.

149. Of course, the majority could be wrong. *See, e.g., King*, 576 U.S. at 512–13 (Scalia, J., dissenting) (suggesting an alternative Congressional "purpose").

150. *See id.* at 498 ("But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.").

151. *See supra* notes 119–27.

152. *See supra* note 150; *see also* Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 87–90

Thus, it is not that one reasoning is faithful to the law and the other is not. Both are faithful to different things. More technically, both take different things to be determinative of legal content because they have different views of the object of interpretation. One believes it is the text, the other a lawmaking choice.¹⁵³

The decision can also illustrate how meaning can be detached from object. Assume the object is the actual legislative choice. From this, it does not follow that the meaning ascribed to that object must be the one actually intended by Congress. Instead of focusing on intent, one could ascribe to that object—the legislative choice—something like an original public meaning. Here, what would matter is what the public took the legislature to be choosing in adopting the ACA. On such a view, the Court’s majority could have argued that the public largely understood Congress to be adopting the three reforms for all States, and thus a reading of Section 36B should reflect that. On this view, Justice Scalia’s rhetorical question “[w]ho would ever have dreamt that ‘Exchange established by the State’ means ‘Exchange established by the State or the Federal Government’?” misses its mark.¹⁵⁴ The question is not what the public understood some sentence to mean, but what changes in the law it perceived the legislature to have chosen.

The aim here is not to argue for any of these approaches to the object of interpretation or to the relevant meaning. The point is only to illustrate that there are different alternatives. The fundamental difference between the majority and the dissent is in what should be the object of interpretation in this case: the text of the ACA or Congress’s choice. If the latter, then there is nothing odd or even especially creative in the reasoning of the Court. Only if the text is seen as the uncontested object of interpretation do the accusations of the dissent make sense. But the text is not the only possible object of interpretation.

How can we know who is right here? We cannot know how to settle these kinds of disagreements without understanding what these disagreements are about. We must first understand what kind of thing the object of interpretation is. This is the subject of the next Part.

II. OBJECTS AND SOURCES

The previous Part showed that there are different possible objects of interpretation and that different theories sometimes presuppose different objects of interpretation. This may seem exasperating. It is not only that people overtly disagree

(2015) (reading *King* as focusing on Congress’ plan rather than the textual meaning of a specific provision).

153. Similar arguments could be made adopting other objects of interpretation. For example, practice could become the object of interpretation. A succession of decisions and administrative rules on the ACA would conform a body of law, a practice of engaging with the Act, that could become the object of interpretation in cases concerning the ACA. Order is another example. Once the ACA regime is established, it is possible to take the actual arrangement of things brought about by the ACA as the object of interpretation itself. Here, the Court’s reasoning could be about how Section 36B actually operates in practice and how it relates to existing features of the health insurance in practice: A reading that would upend the actual operation of the insurance system and lead to radical change would be ruled out as inconsistent with the ACA—taken as an order rather than as a text.

154. *King*, 576 U.S. at 501 (Scalia, J., dissenting) (emphasis omitted).

on how to interpret legal materials. They also disagree—sometimes inadvertently—on something more fundamental: on exactly what it is that legal interpreters are supposed to be interpreting. How can one resolve these disagreements?

To answer this question, we must first understand what kind of thing the object of legal interpretation is. Here, we will find the key to understanding both why there are different plausible candidates for the object of interpretation and how one should settle on an object of interpretation.

This Part, first, explains the object of interpretation in terms of *sources of law* in Section II.A. It explains what a legal source is in Section II.A.1 and the distinction between “rough” and “precise” sources in Section II.A.2, to introduce the idea that the object of interpretation is properly what is treated as a “precise” source of law in Section II.A.3. Second, Section II.B argues that legal practice produces several plausible “precise” sources of law with respect to the same legal material—for example, a statute—and, therefore, leads to the plurality of possible objects of interpretation. This plurality raises the question of which of the alternatives—text, choice, practice, or order—to treat as the object of interpretation in a concrete situation in practice—the question addressed in Part III.

A. OBJECTS OF INTERPRETATION AND “PRECISE” LEGAL SOURCES

1. Legal Norms and Sources of Law

Above, I said that the “object” of interpretation is a “source of law.” Here, I will explain this claim. To understand the object of interpretation, then, we need to better understand what a source of law is in the sense used here.¹⁵⁵

Practitioners and theorists use the term “sources of law,” or other similar ones, like “legal sources,” in many ways.¹⁵⁶ Here, “sources of law,” and “legal sources,” are facts that generate legal norms.¹⁵⁷ The legal norms created by a legal

155. The idea of a “source of law” is crucial for legal practice and theory, and yet it is a relatively neglected topic in academic literature in the English-speaking world. See Giorgio Pino, *Sources of Law*, in OXFORD STUDIES IN PHILOSOPHY OF LAW 58, 58 (John Gardner et al. eds., 2021) (“The sources of law are a neglected topic in contemporary jurisprudence.”); Shecaira, *supra* note 3, at 15 (observing that “the very notion of a source of law has received little attention” in the Anglo-American jurisprudential culture); Grant Lamond, *Sources of Law in the Common Law*, in JURISPRUDENCE IN THE MIRROR: THE COMMON LAW WORLD MEETS THE CIVIL LAW WORLD 271, 271 (Luka Burazin et al. eds. 2024). This cannot be remedied in a single section of this Article. What follows articulates a view of sources of law to the extent necessary to address the object of interpretation.

156. See Lamond, *supra* note 155, at 275 (listing different alternative usages of sources of law).

157. For a similar definition, see Alma Diamond, *Originalism’s Dilemma: Legal Formalism, or Judicial Neutrality*, 104 OR. L. REV. 117, 135 (2025) (“Legal sources are facts from which we derive legal norms, facts that contribute to the truth of statements of law.”); see also Lamond, *supra* note 105, at 22 (“Sources of law are those materials and practices from which legal considerations are derived.”); Lamond, *supra* note 155, at 274 (“A formal source, I take it, is something that creates legal considerations.”); Shecaira, *supra* note 3, at 17 (“[A] source of law is something, most commonly a piece of text approved by law-making officials, from which legal norms can be derived.”); Pino, *supra* note 155, at 61 (“The sources of law, it is often said, are acts or facts that create, modify, and annul legal standards (‘laws,’ ‘legal norms,’ and the like).”). Pino goes on to criticize this account as “precarious.” See *id.* His own view is that “a legal norm is not itself produced by a source, but rather by the

source are its “legal content.”¹⁵⁸

This definition presupposes a distinction between legal norms and legal sources. Legal sources are facts.¹⁵⁹ Legal norms are norms.¹⁶⁰ A county ordinance that says “No vehicles in the park” is a legal source.¹⁶¹ A prohibition of entering the park with a motor vehicle is a norm.¹⁶² That norm is a legal norm because it is generated by a legal source¹⁶³—the county ordinance. In the American legal

interpretation of a source.” *Id.* at 68 (emphasis omitted). I take this to be compatible with the account offered here. There are other possible concepts of source of law. *See infra* note 200.

One could say that legal sources generate, *change*, or *eliminate* legal norms. For ease of exposition, in what follows, I will just refer to them as “generating” legal norms, but this includes changing and eliminating norms.

Similarly, one could say that legal sources give rise to “legal considerations,” which include, but are not limited to, legal norms. *See* Lamond, *supra* note 155, at 274 (“A formal source, I take it, is something that creates legal considerations. . . . Statutes, precedents, customs, and other sources produce a wide range of legal considerations, not restricted to legal norms.”). Because it is not obvious what these other legal considerations are (and whether they are not, on closer inspection, also legal norms) and because focus on legal norms is common, here I refer to legal norms when talking about legal content, and this is meant to include legal norms and all other legal considerations (if any) arising from a source of law.

158. *See, e.g.*, Solum, *supra* note 60, at 480 (“‘Legal content’ is a precise way of labeling the content of the legal norms the text produces.”). One could say that it is possible to derive norms from legal sources that go beyond legal content. *See* Watson, *supra* note 7, at 1456 (holding that interpretive debates are primarily about “how legal actors should proceed when a legal text’s contribution to the law is underdetermined and no other legal norm fills the gap”); *see also* Urbina *supra* note 7, at 1463 (observing that in Watson’s remedial interpretation, “interpretation derives a norm from a source (the statute) that goes beyond the legal content produced by the statute”). Here I largely bracket this point, which I address elsewhere. *See generally* Urbina, *supra* note 7. If some of the norms that can be derived from a legal source through interpretation are not, on the best legal theory, exactly part of legal content, then we could refer to them as “purported legal norms,” and to all the norms thus derived from the object as “source-derived content,” or so. Be that as it may, these source-derived norms will be different from, say, doctrines created to fill in gaps left by the norms derived from sources running out. *See id.* at 1463 (drawing this distinction). I am grateful to Bill Watson and Andrew Jordan for discussions on this.

159. On sources as facts, *see* Pino, *supra* note 155, at 63 (“[A] source of law is a fact. In principle, any kind of fact—even natural, meteorological, or theological facts—could count as a source of law, provided that such a fact is recognized as a source of law by the relevant community.”).

160. *See id.* at 68 (noting the distinction between legal sources and legal norms and stating “the two concepts must not be confused nor conflated into one single entity”); Fernando Contreras, *Validity and Invalidation 104* (2024) (Ph.D. thesis, University of Oxford) (on file with author) (In the context of discussing intentionally made law, “[t]he analytic distinction between source and law tracks the distinction between the say-so, uttered by the power-holder, and its meaning. This distinction presupposes two different planes of reality. One is the plane of acts-in-the-law, of ‘sources’; the other is the plane of legal meaning, of the ‘law’ which springs from the source.”); Shecaira, *supra* note 3, at 17 (making a case for the significance of the distinction).

161. Or, one could say, an instance of a source, if one wishes to reserve the term source for types rather than tokens. The distinction is not relevant for our purposes.

162. More precisely, it is a mandatory norm. *See* JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 49–84 (2d ed. 1999) (offering an account of mandatory norms).

163. One could think of the relation between legal sources and legal norms in different ways: Sources could be taken to be the cause of legal norms (one generates the other) or to contain or express legal norms. In what follows, I use causal language (generate, creates, etc.), but here I do not address this point, as, to my mind, it makes no difference for the discussion below.

system, there is a legal norm that forbids knowingly releasing asbestos into the air,¹⁶⁴ and the legal source of that norm is the Clean Air Act.¹⁶⁵

Scholarship and practice often allude to “legal norms” in a loose sense, which includes both legal norms properly speaking and legal sources.¹⁶⁶ For many purposes, there is no harm in this. Often, context provides a clear indication of whether one is talking about a norm or a source, and sometimes the distinction does not matter. But there is a distinction. A legal norm can have more than one source, and a legal source may entail different legal norms.¹⁶⁷

More importantly for our purposes, it may be evident and uncontroverted that something is a legal source, but unclear which legal norms follow from it. Even if it is unclear what is the exact content of the ordinance “No vehicles in the park” —Can ambulances enter?¹⁶⁸—it may still be clear that the ordinance is a source of law.¹⁶⁹

I said that legal sources are facts. But they are facts that are given law-making significance: they are taken to generate legal norms. How do some facts get to have this significance? This is a large question in legal philosophy which cannot be exhausted here.¹⁷⁰ A relatively general and ecumenical answer would be the

164. See *United States v. W.R. Grace*, 504 F.3d 745, 749 (9th Cir. 2007) (discussing defendants’ indictment for “conspiring knowingly to release asbestos, a hazardous air pollutant, into the ambient air . . . in violation of 42 U.S.C. § 7413(c)(5)(A)”).

165. See 42 U.S.C. § 7413(c)(5)(A) (“Any person who knowingly releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18 or by imprisonment of not more than 15 years, or both.”). The fact that the norm is in the indicative—as it is often the case—does not change its prescriptive nature. See *supra* note 108.

166. See Pino, *supra* note 155, at 81 (affirming that “in juristic parlance, there is a frequent and pervasive confusion between ‘sources’ and ‘norms’”).

167. See *id.* at 69 (“[O]ne and the same source of law can be amenable to two rival interpretations, one yielding a valid norm and another yielding an invalid norm . . .”).

168. See H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958) (introducing this hypothetical); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958) (discussing the hypothetical and raising difficult cases); see also Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008) (“It is the most famous hypothetical in the common law world.”).

169. Relatedly, while sources may be a discrete and limited thing existing in a specific time and place, the legal norms that follow from it are not necessarily so. For example, one could think that the same contract or statute may give rise to different legal norms in different moments in time. See Contreras, *supra* note 160, at 95 (noting that “source” of law is a metaphor that “evokes the image of a fountain from which water continually flows”). This could be for at least two reasons. First, as Köpcke explains, law is systemic, and thus, the legal content of a contract or a statute could depend on other legal sources and norms in the legal system. See MARIS KÖPCKE, *LEGAL VALIDITY: THE FABRIC OF JUSTICE* 123–49 (2019) (explaining the systemic nature of legal meaning). Second, and more controversially (and this anticipates some of our future discussion), sources need to be interpreted to determine what legal norms follow from them, and different ways of interpreting may be pertinent at different times. See Urbina, *supra* note 3, at 1737–39 (explaining the instability of interpretation).

170. There are some canonical treatments. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 100–23 (Paul Craig ed., 3d ed. 2012) (explaining chains of legal validity and the rule of recognition); HANS KELSEN, *THE PURE THEORY OF LAW* 193–278 (Max Knight trans., Univ. of Cal. Press 2d ed. 1967) (explaining the dynamic production of the legal order and the basic norm).

following:¹⁷¹ Some empirical facts are taken to have legal significance, such that they are seen as having the potential to change the law. Call this granting of legal significance “recognition.”

Recognition comes in two forms: through some norm valid in that legal system, itself the product of a legal source, or directly through a recognitional practice. Sources that are recognized in the first way are called “codified sources” and sources recognized in the second way are called “practice-based sources.”¹⁷² An example of the former is a constitution that establishes the legal power of a congress to pass statutes. Statutes are sources of law because they are so recognized by a legal norm in that legal system, a legal constitutional norm, derived from a legal source, the Constitution. An example of practice-based sources is the situation in a system without a written constitution, when statutes are directly recognized as sources of law by practice—by, say, the legal practice of judges and other officials.¹⁷³

There is a limit to “codified sources.” The legal norm, “No vehicles in the park,” is the product of an ordinance, a legal source, issued by the County Council. The ordinance is a legal source because there is a legal norm that says so, and that legal norm finds its origin in, say, a statute—a legal source—passed by Congress. The statute, in turn, counts as a legal source because there is a legal norm arising from, say, a constitution—a legal source—that grants Congress law-making powers. The chain cannot be endless, though, and at least one legal source cannot be derived from law arising from other positive legal sources. Hart’s answer to this problem is that one or more legal sources generate law, not because some law says so, but rather because there is a social practice directly recognizing the facts that constitute such source as generating law.¹⁷⁴ Such recognition

171. Here I have benefited from the exposition in Diamond, *supra* note 157, at 138–40. Note that in what follows, I confine myself to positive law, as opposed to natural law. This is partly because, while it is intelligible to speak of “sources” of natural law, I doubt we access natural law norms *through interpretation*, but rather through “reason, observation of nature, and openness to transcendence.” Mary Ellen O’Connell & Caleb Day, *Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms*, in *THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW* 563, 563 (Samantha Besson & Jean d’Aspremont eds., 2017).

172. See Pino, *supra* note 155, at 70–71 (“While a codified source owes its status as a source of law, *prima facie*, to its being explicitly so qualified by another source of law, a practice-based source is grounded directly and exclusively on the recognitional practice of the law-applying officials.”); see also Diamond, *supra* note 157, at 150 (drawing “a distinction between sources of law that rest on legal norms and sources of law that rest on social norms” (emphasis omitted)).

173. See *infra* notes 174–78 and accompanying text.

174. See Leslie Green, *Introduction to HART*, *supra* note 170, at xxiii (“The rule of recognition is an obligation- or duty-imposing rule: it not only identifies the sources of law; it directs judges and others to apply the law so identified.”). Hart also refers to the rule of recognition as identifying sources. See, e.g., HART, *supra* note 170, at 214 (arguing that international law lacks “a unifying rule of recognition specifying ‘sources’ of law and providing general criteria for the identification of its rules”); *id.* at 266 (arguing that Dworkin’s idea of “fit” “presupposes the identification of the settled law, and for that to be possible a rule of recognition specifying the sources of law and the relationships of superiority and subordination holding between them is necessary”). None of this entails that the rule of recognition identifies only sources.

exists as a practice of officials,¹⁷⁵ who understand themselves to be identifying certain facts as sources of law by reference to a social rule—Hart’s rule of recognition.¹⁷⁶ For example, if officials in the United Kingdom recognize that “[w]hatsoever the Queen in Parliament enacts is law,”¹⁷⁷ then the fact of enactment by the Queen in Parliament is understood to count as generating legal norms—even in the absence of a written constitution or some other law granting lawmaking powers to Parliament.¹⁷⁸

2. “Rough” and “Precise” Sources of Law

There is an ambiguity in this understanding of a legal source. Let’s distinguish between a “rough” use of the expression “legal source” and a “precise” one.¹⁷⁹ On the “precise” use of a legal source, one refers to a specific and well-defined fact¹⁸⁰ that generates legal norms.¹⁸¹ On the “rough” use, one attaches the label of “a legal source” to a bundle of jointly related facts that are taken to generate legal norms, without critical discernment of which specific fact or facts within the bundle generate norms.¹⁸² On the “rough” use, “legal source” is the equivalent of “legal materials” or “legal instruments”: a statute, a contract, the Constitution, etc. On the “precise” use, the legal source is a specific thing in the legal material:

175. See Grant Lamond, *The Rule of Recognition and the Foundations of a Legal System*, in READING HLA HART’S THE CONCEPT OF LAW 97, 108–12 (Luís Duarte d’Almeida et al. eds., 2014) (discussing whose views count for the rule of recognition).

176. See HART, *supra* note 170, at 100–23 (explaining the rule of recognition).

177. *Id.* at 148.

178. Of course, what counts as Queen, Parliament, or enactment is informed by rules, as Hart explained. See *id.* at 51–61 (explaining the need for rules to account for offices).

179. Bill Watson articulates a crucial distinction between “coarse-grained” and “precise” agreement on grounds of law. See Bill Watson, *How to Answer Dworkin’s Argument from Theoretical Disagreement Without Attributing Confusion or Disingenuity to Legal Officials*, 36 CANADIAN J.L. & JURIS. 215, 233–36 (2023). I think the distinction I articulate in this Section follows Watson’s, just that I focus on legal sources (statutes, constitutions, etc.), whereas Watson focuses mostly on the conception of meaning of a legal text and of a holding of a precedent. See, e.g., *id.* at 233 (referring to judges who “agree that an enacted text’s meaning just is its contribution to legal content. At the same time, however, their agreement is coarse-grained, in the sense that they disagree over which facts ground meaning” (emphasis omitted)). Watson rightly observes that officials rarely disagree on what counts as a legal material (say, a statute) or, as Watson puts it, a “legal text.” See *id.* at 227 (noting that it is “extraordinarily rare . . . for legal officials to disagree over what counts as a legal text” in the U.S.). What I suggest here is that their agreement on those legal materials can be more or less precise, in that they can agree or not on what exactly in that legal material is ultimately the source of law.

180. Or set of facts, as long as all these facts and their relations (hierarchy, specific contribution, etc.) are well defined. For ease of exposition, what follows will refer to the “precise” sense, source, and recognition, as if concerning a single fact.

181. Both uses are ways of referring to a concrete legal source (a token) and to types of sources. For example, one could refer to “statutes,” roughly, as sources of law, and similarly roughly, to the Clean Air Act as a source of law. Or one could refer, precisely, to the text of statutes or to the text of the Clean Air Act as a source of law.

182. The distinction could be made in terms of a theoretical and a pretheoretical sense, but some theories do not need to use the precise sense, and thus can legitimately use the “rough” sense—which for that reason would be misleading to call “pretheoretical.” In some cases, there may be a need to clarify in practice what is the exact source of law, and thus to use the “precise” sense of the source.

If “the text [of a statute] is the law,”¹⁸³ then, on the precise use, the source of law is the *text* of the statute.

We can similarly speak of a “precise” source—to refer to the specific fact that generates legal norms—and of a “rough” source—to refer to a bundle of jointly related facts that are taken to generate legal norms, without critical discernment of which specific fact or facts within the bundle generate norms. In the example above, the statute is the rough source and the text of the statute the precise source.

Finally, and most importantly, a legal system’s recognition of something as a legal source can be “precise” or “rough,” depending on whether it recognizes a precise fact as generating legal norms or a bundle of facts without critical discernment as to which one generates legal norms.

The “rough” use of sources of law is very common. In legal practice, one often refers to legal sources in this sense, to describe materials that are taken to generate law in a given legal system. For example, it is often said that legal sources in the United States are the Constitution, statutes, court decisions, and administrative rules and regulations.¹⁸⁴ On this “rough” terminology, the Clean Air Act is a source of law, in the sense that it gives rise to valid legal norms. The norm that forbids knowingly releasing asbestos into the air is a legal norm because it has its source in the Clean Air Act, which is a legal source in the United States.¹⁸⁵

This is enough for the bulk of legal practice. In legal practice it is often enough to say that a “statute” is a source of law and thus generates this or that legal norm. But one could legitimately ask: What exactly is it that generates law in the Clean Air Act? Is it its text? Or the fact that Congress chose a certain regime—the text being evidence of that lawmaking fact? Or something else? The answer to these questions is the source of law in the “precise” sense.

3. Sources and the Object of Interpretation

Law orders human behavior through norms.¹⁸⁶ The point of legal sources is to change something at the level of legal norms. Legal sources have an indirect impact on human action: they affect the legal norms that bear on human deliberation, choice, and action. In legal practice, we are concerned with legal sources for the purposes of knowing how they bear on human action—what does the new tax legislation require of us, what does the new immigration legislation allow me to do, etc.¹⁸⁷ Our concern, then, is with the legal norms produced by these

183. See SCALIA, *supra* note 71, at 22.

184. See AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 2* (8th ed. 2021) (“Four main sources of law exist at both state and federal levels: constitutions; statutes; court opinions (also called cases); and administrative regulations.”).

185. See *supra* notes 164–65.

186. See LON L. FULLER, *THE MORALITY OF LAW* 74 (Yale Univ. 1964) (conceiving law as “the enterprise of subjecting human conduct to the governance of rules”).

187. This is the concern of legal practice. For other purposes our interests may be different. For example, in political analysis, we may be concerned with a statute for what it says about political trends in Congress.

sources.¹⁸⁸ We want to know what legal norms bear on our conduct and to know that we need to understand the legal sources that generate—and often express¹⁸⁹—those legal norms.

To understand which norms follow from legal sources, we must *interpret* them. What is meant by “interpretation” here is the activity of determining what legal norms follow from a legal source.¹⁹⁰ *Legal* interpreters¹⁹¹—be they judges, administrative officials, congresspersons, or citizens—are in the business of assessing legal sources to determine what legal norms they could entail.

In legal interpretation one goes from legal source to legal norms. The thing interpreted is the thing that is recognized as generating legal norms, and interpretation is the activity of determining what specific legal norms it produced. If what we refer to by “the object of interpretation” is the thing that is ultimately interpreted, then the object of legal interpretation is what is treated as a legal source.

An example may be helpful. Interpreters read the county ordinance that says “No vehicles in the park”¹⁹² to determine what legal norms follow from it. They often do so to answer a specific question about the applicable standards in a given case. Were ambulances allowed in the park when the defendant drove one through it to save an injured jogger? Let us see the relevant regulation: it says, “No vehicles in the park.” Does this ordinance give rise to an absolute prohibition of motor vehicles? Or does it entail a principle to be weighed against other considerations?¹⁹³ Or does it contain a rule and implied exceptions, such that the prohibition does not reach ambulances? In reading the ordinance—a source of law—we want to get to legal norms.¹⁹⁴

The object of interpretation is a legal source. Here, we must tread carefully. It is possible to talk about the object of interpretation as a legal source in the two ways anticipated earlier: roughly and precisely.¹⁹⁵

188. See Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 790 (2017) (“[W]hat we really care about is what the law is, and not what the text means . . .”).

189. Though not always. Not all legal sources operate by adopting a canonical formulation of the legal norms they intend to produce (think of custom).

190. This characterization of interpretation, focused on interpretation as a bridge between sources and norms, is not novel. See GARDNER, *supra* note 94, at 58 (“So (to simplify): what one is looking for in interpreting a legislative text are the legal norms that it creates.”); RAZ, *supra* note 20, at 223 (“Legal interpretation is primarily—I will suggest—the interpretation not of the law, but of its sources.”); Shecaira, *supra* note 3, at 17 n.5 (2015) (defining interpretation as “the act of deriving norms from sources of law”); Pino, *supra* note 155, at 68 (“Strictly speaking, then, a legal norm is not itself produced by a source, but rather by the interpretation of a source.” (emphasis omitted)); see also *supra* note 3.

191. Legal interpreters are unlike other interpreters, whose interests may be different. Some may be interested only in communicative content, others in historical significance (what was the significance of this for that period), etc.

192. See *supra* note 168.

193. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 38–45 (Bloomsbury Acad. 2013) (1977) (distinguishing between rules and principles).

194. This does not mean that we need to stop at legal norms. We may want to elaborate on doctrine to articulate the legal position in which legal norms leave us, determine the effect of the norms in a concrete case, and evaluate the moral implications of this, among other things. But all of this is distinguishable from the activity of determining the legal norms that flow from a legal source. See *supra* note 62 and accompanying text.

195. See *supra* Section II.A.2.

In a “rough” sense, the object of interpretation is the applicable legal material: a constitution, a statute, a contract, etc.¹⁹⁶ In our example, the object of interpretation can be said to be the county ordinance. We can talk of a “rough” object of interpretation when this is a “rough” source.

Sometimes we will need more precision. Determining the object of interpretation typically becomes relevant when the precise source makes a difference. We focus on the object of interpretation when, for example, there is a dispute as to whether it is a text, a legislative choice, a practice, or something else.¹⁹⁷ The object of interpretation, as a concept in legal thought, is of practical interest when there is a question as to what the “precise” source of law is. This is why, while there are many legitimate ways in which one can speak of the object of interpretation, here the object of interpretation is the “precise” source of law.

B. THE PLURALITY OF OBJECTS OF INTERPRETATION: ALTERNATIVE SOURCES OF LAW

The complexity of legal practice gives rise to different plausible candidates as to the precise source of law. This is why it is not obvious what the precise source of law is in a given legal material and why there is no obvious general answer to the question, “What is the object of interpretation?” At least in the legal materials often discussed in discussions on interpretation—constitutions, statutes, contracts, etc.—there are several facts involved that could be a precise source of law and thus the object of interpretation, properly speaking.

Imagine a simple legal system where all law derives from a text inscribed on a stone. The stone’s inscription has no known author; it is simply taken to be, by itself, the law. Here, the precise source of law and the object of interpretation seem clear: not just the stone, but the text on the stone.¹⁹⁸

The hypothetical illustrates by contrast the complexity of our legal world. Many legal sources, such as statutes, are the product of a lawmaking choice—an act of will of some complex institution. But they are also expressed in a canonical text, and the statute itself—and thus the legal relevance of the text—is thought of as separable from the act of will that originated it. The statute, for example, remains part of the law long after its authors are gone.¹⁹⁹ Furthermore, legal sources are meant to be applied. There will be a practice of applying the legal source and, in doing so, elaborating on its meaning. The statute itself may generate or give expression to an actual arrangement of things—an order. So, we have a series of different facts of legal significance. The lawmaking choice is a fact, the

196. See, e.g., *supra* note 184 and accompanying text.

197. The dispute does not need to take place only because it could make a difference in a case, as in *King*. See *supra* Section I.C. It could also be, for example, because the object of interpretation provides a reason for an approach to interpretation. See, e.g., *supra* note 18.

198. Though perhaps even in this simple example, there is more than one possible object of interpretation. There is nothing at stake in settling that for this hypothetical scenario.

199. See FINNIS, *supra* note 108, at 267 (“It is a working postulate of legal thought . . . that whatever legal rule or institution . . . has been once validly created remains valid, in force or in existence, in contemplation of law, until it determines according to its own terms or to some valid act or rule of repeal.”).

text is a different fact, and then there is the fact of how the statute has been understood and applied, and of the actual arrangement of things it expresses or brings about. Which one of these facts is the precise source of law?²⁰⁰

As seen above, a fact is a source of law when it is recognized as such. The point here is that, unlike in our hypothetical simple legal system, in a modern legal system, there are several facts involved in a statute that could be recognized as the precise source of law. And these are all candidates for precise recognition. They are all candidates because there is no single one of these that is the natural or only possible precise source of law. This is because their identification as a precise source of law depends on recognition,²⁰¹ and recognition is contingent. As explained below, it does not attach to any of these sources as a matter of deep conceptual necessity or the nature of things.²⁰² Recognition as the precise source of law of the statute could fall on any of these elements or any other.

In fact, one advantage of looking at sources of law with the question of the object of interpretation in mind is that it brings the diversity of candidates to the foreground. In trying to determine which legal norms flow from some legal material, legal practitioners and commentators sometimes focus on some fact—say, text—and sometimes on another—say, lawmaking choice.²⁰³ This suggests that there are different possible precise legal sources. The reason for this is the following: to focus on a specific fact in a legal material to determine the legal norms that follow from that material is to treat that specific fact as having lawmaking significance—that is, as a source of law in the precise sense. The fact that many different things are treated in practice as the object of interpretation suggests different possibilities arising from practice as to the precise source of law.

How, then, is legal practice to settle on an object of interpretation? The next Part addresses this question.

III. DETERMINING THE OBJECT OF INTERPRETATION

There are different possible objects of interpretation. As said above, in some contexts, the precise object of interpretation makes no difference. But in other contexts, the object of interpretation does make a difference. These contexts include cases where different objects lead to different interpretations and,

200. Note that there are narrower concepts of legal sources than the broad one used here. *See supra* note 157. On a different conceptualization of “sources of law,” the four alternative objects of interpretation discussed in Section I.B might not all count as sources *in the same sense*. This can be legitimate and useful for certain purposes. But it is also legitimate to adopt a broader concept of sources, one on which all the alternatives are sources in the same sense, so as to capture the fact that they can— from the standpoint of a study of the object of interpretation—perform functions that fall under the same description and be recognized on similar terms within a legal system. For a sophisticated discussion of the different senses and possible conceptualizations of “sources of law,” see generally Mathieu Carpentier & Torben Spaak, *Sources of Law*, in *JURISPRUDENCE IN THE MIRROR: THE COMMON LAW WORLD MEETS THE CIVIL LAW WORLD* 241 (Luka Burazin et al. eds., 2024).

201. *See supra* Section II.A.1.

202. *See infra* Section III.B.

203. *See supra* Section I.C (as illustrated in *King*).

ultimately, to different decisions;²⁰⁴ debates where a theory relies on an account of the object of interpretation for defending its approach to interpretation;²⁰⁵ academic and practical efforts at elucidating interpretive alternatives;²⁰⁶ and others. Here, interpreters need to settle on an object of interpretation. How can interpreters know which object of interpretation is the “correct” one? How should the object of interpretation be determined?²⁰⁷

This Part answers these questions. First, in Section III.A, it maps three possible ways of determining the object of interpretation: by attending to the nature of law, to the particulars of a legal system, or to normative considerations. Having ruled out the first possibility, Sections III.B and III.C offer a framework for determining the object of interpretation that articulates claims about the law and about what interpreters should do. It has, following a distinction by Professors Mitchell Berman and Kevin Toh, a “constitutive” and a “prescriptive” element.²⁰⁸ The two

204. See, e.g., *supra* Section I.C.

205. See, e.g., *supra* note 17.

206. See *infra* Conclusion.

207. Note that the question, thus posed, is ambiguous in two important ways. First, “determined” could be taken in an epistemic or in a constitutive sense: it could refer to the activity of “making” a certain fact a legal source, or it could refer to the activity of discerning or discovering whether a given fact has “been made” a legal source. See Mark Greenberg, *Legal Interpretation and Natural Law*, 89 *FORDHAM L. REV.* 109, 129 (2020) (“An important terminological point: the word ‘determine’ (‘determination,’ ‘determining,’ and so on) is ambiguous between a metaphysical sense—to determine the content of the law is to make the content of the law what it is—and an epistemic sense—to determine the content of the law is to ascertain or figure out what the content of the law is.” (emphasis omitted)). As seen below, both are at stake here.

Second, the question is ambiguous between the systemic and the individual perspective. It could refer to how a legal system settles on the object of interpretation or on what an individual interpreter should treat as the object of interpretation. As shown below, both perspectives are necessary. See *infra* Section III.B; Section III.C. A full answer as to what the interpreter should treat as an object of interpretation requires attending to the system-wide determination of legal sources and to the inescapable normative choices of individual interpreters.

A final clarification is in order. While an act of interpretation calls for determining the object of interpretation, in the same case there can be more than one object at stake. For example, a judge could interpret the text, and then, when the legal content of the text runs out, resort to interpretation of another object, such as practice. See Klass, *supra* note 62, at 33–34 (explaining that “when one type of interpretation runs out, another type might step in”). With regards to the object of interpretation, this will entail different acts of interpretation, each with its own object, and each adding additional legal content, further determining the solution of the case. This will also entail treating different matters as relevant sources of law in the same case, and because more than one precise source is at stake, there will be a question of hierarchy of sources, in case of contradiction. To my mind, something like this is what takes place in some instances of the text-and-tradition approach in recent Supreme Court decisions, but to establish this goes beyond the confines of this paper. I am grateful to Sam Bray for raising this point.

208. See Mitchell N. Berman, *Keeping our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 *HARV. L. REV. F.* 133, 138–39 (2022) [hereinafter Berman, *Keeping our Distinctions Straight*] (recounting the different iterations of the distinction); Berman & Toh, *supra* note 3, at 552 (distinguishing “theories of the ultimate criteria of legal validity, or of the ultimate determinants of legal content” from “theories of what judges should do in the course of resolving constitutional disputes”); Berman, *supra* note 188, at 790 (“The claim [Justice Scalia] presses there is a prescriptive claim about how judges ought to interpret texts. The claim we are now considering is a constitutive claim about the grounds of our constitutional law.” (emphasis omitted)); Mitchell N. Berman, *Our Principled Constitution*, 166 *U. PA. L. REV.* 1325, 1328–32 (2018) (introducing a

interact. In short, determining the object of interpretation requires attending to what is actually recognized as law in a legal system—to legal norms and recognitional practices—and to practical reasons bearing on an interpreter’s choice of an approach to interpretation.

It turns out, then, that if we want to know which alternative for the object of interpretation is the “correct” one, there will be three senses of “correctness” at stake. This will follow from the discussion in this Part, but it may be useful to outline them at the outset.

The first is legal correctness. A claim about the object of interpretation is correct in this sense if it corresponds to either what the legal system recognizes as a source of law in that legal system or is mandated by a legal rule. This is a function of “precise” recognition or of the existence of a legally valid norm mandating interpreters to adopt a specific object of interpretation. This pertains to legal settlement of the object of interpretation, the subject of Section III.B.

A second relevant sense of correctness is practical and individual. This is about what an interpreter should treat as the object of interpretation, and it depends on the moral and prudential reasons bearing on that choice. An object of interpretation is correct, in this sense, if it is the one an interpreter has most reason to adopt. The relevant reasons are “normative”: moral and prudential. Certainly, an important such reason is to conform to the law, to the extent that the law provides reasons for action.²⁰⁹ This is the individual practical settlement of the object of interpretation addressed in Section III.C.

A third sense in which an object of interpretation is the “correct” one is practical and systemic. Correct is what a legal system *should* recognize precisely as a source of law—if it should recognize a legal source precisely at all—or mandate as an object of interpretation—if it should mandate one at all. This practical and systemic settlement of the object of interpretation is addressed in Section III.C as well.

While the first is important, it is the last two that ultimately bear on agents seeking to determine the object of interpretation. And while the three senses in which an object is “correct” are distinct, they are interrelated. What follows explains these ideas.

A. ALTERNATIVE WAYS OF DETERMINING THE OBJECT OF INTERPRETATION

There are three possible alternatives for determining the object of interpretation.

The first is to treat this as a matter to be settled by reflecting on the nature of law. This view presupposes that law, in its essence, is such that legal content arises from, for example, the text. The question here is whether a specific object

constitutive theory of American constitutional law). The distinction does not entail that there is no relation between the elements. While Berman and Toh emphasize the priority of the constitutive, here the emphasis is on the normative. See Berman, *Keeping our Distinctions Straight*, *supra*, at 139 (“Because . . . there’s no sensible way to figure out how judges should reason without presupposing at least a rough account of what judges should be looking for, a constitutive theory of constitutional legal content has natural priority over a prescriptive theory of constitutional adjudication.”); *infra* Section III. C (claiming the normative is prior in the sense that normative choices feature in legal settlement and bear on judicial decisions even when there is a legal settlement).

209. See *infra* note 221.

of interpretation is necessary in law. In this view, determining the object of interpretation is a task for a general theory of law.

The second is to see this as a question answered by the particulars of each legal system.²¹⁰ Perhaps in our legal system, for example, the rule of recognition is such that it recognizes the law as arising from the text rather than from the law-maker's choice or from a practice. Naturally, such an approach presupposes something about the nature of law: that it does not determine the precise source of legal norms, but that law can—in some way, for example, in a rule of recognition—determine it in a given legal system.

The third possibility is to see this as a practical matter, a matter concerning the choice of an agent—the interpreter. For this view, the question, “What is the object of legal interpretation?” is best formulated as “What should an interpreter treat as the object of interpretation, the precise source of law, in these circumstances?” In this view, what determines the object of interpretation are the practical, normative reasons that an agent has for choosing one course of action rather than another.²¹¹

The first possibility is not promising. Legal systems vary in what they recognize as a source of law, even roughly:²¹² some legal systems recognize custom,²¹³ others do not.²¹⁴ Some recognize judicial decisions, and others do not.²¹⁵ This plurality cannot be squared with the idea that the nature of law determines what facts are legal sources—both “roughly” and “precisely.”²¹⁶ Legal theory, however, can

210. Berman offers a similar distinction between the first and second approach in the context of a different debate. See Berman, *supra* note 188, at 793 (advancing the idea that “the law is the [original public meaning] of the text” could be defended as a “universal thesis” or a “parochial one” (emphasis omitted)).

211. As with the choice of method of interpretation. See Urbina, *supra* note 3, at 1703–04 (arguing that only normative reasons bear on interpretive choice).

212. Or, more precisely, legal systems vary in what they consider a legal source and how—including whether they consider it a “permissive” or a “mandatory” source. See *infra* notes 213–15; HART, *supra* note 170, at 294 (drawing this distinction).

213. See, e.g., JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 21–28 (9th ed. 2019) (explaining custom as a source in international law).

214. See, e.g., Dale Beck Furnish, *Custom as a Source of Law*, 30 AM. J. COMPAR. L. 31, 31 (Supp. 1982) (“Custom as a direct source of law in the United States has been overtaken by our extensive system of reported case precedents and the unrelenting trend towards legislative norms as the pre-eminent source of rules in this country. The corpus of our law is found in written, official sources.”).

215. See Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 787 (2005) (contrasting common law jurisdictions with civil law jurisdictions, where “cases are not formally recognized as a source of law, and the doctrine of stare decisis is not recognized”).

216. This argument is analogous to a critique by Berman of the “universal thesis” that the law is original public meaning of the text:

Such a claim is hard to swallow. First, the apparent empirical counterexamples now explode in number. A defender of this thesis must explain away all putatively correct legal propositions from every legal system, from any place and any time, that depart from the [original public meaning] of an applicable authoritative legal text. Second, although the “standard picture” may be part of the *implicit* package of beliefs for most of us, including for many legal scholars and elites, it gains no support from any well-developed, general jurisprudential theory I know of.

Berman, *supra* note 188, at 793.

explain how legal sources are determined and, in so doing, make that act of determination more self-aware.

Having ruled out the first possibility, the rest of this Part focuses on the other two avenues. Determining the object of interpretation is a matter of law and practical reasoning.

B. LEGAL SETTLEMENT OF THE OBJECT OF INTERPRETATION

There is no reason against thinking that it is at least possible for a legal system to settle the question of the precise source of law and thus settle what, in contemplation of the law, is the object of interpretation. By the law “settling” the question of the object of interpretation, I mean that the law takes a position on the object of interpretation, sanctioning one of the alternatives as the legally correct object of interpretation. As Professors Baude and Sachs explain, law can govern legal interpretation generally.²¹⁷ In the same vein, the object of interpretation could be a matter regulated by law, just as are other aspects of interpretation. In other words, the object of interpretation could be legally settled.

How would a legal system settle on a view of the object of interpretation? There are two ways.²¹⁸ The first is simply through a rule mandating interpreters to treat one thing or another as an object of interpretation. An example would be the rule that “Interpreters should treat the text of legal materials as the object of interpretation.” Interpretive legal rules could also be “permissive,” in the sense explained by Professor Richard Re: they could allow for a range of interpretive approaches, including on the object of interpretation.²¹⁹ Insofar as there is no rule mandating a single object of legal interpretation, or the rules are permissive in the sense just mentioned, the law leaves the object of interpretation legally undetermined. In any case, such a “law of interpretation”—the legal rules mandating interpreters to focus on one object or another—would be part of the prescriptive element in the settlement of objects of interpretation, which is the topic of the next Section. It would directly guide agents to treat one thing as the object of interpretation and not another,²²⁰ thus providing a reason to do so.²²¹

217. See Baude & Sachs, *supra* note 66, at 1082 (“Interpretation isn’t just a matter of language; it’s also governed by law.”).

218. It seems to me that the literature on original law originalism entails claims of both types. Compare, e.g., Baude & Sachs, *supra* note 66, at 1084 (“This paper focuses attention on these preexisting rules—rules of law, and not of language—that determine the legal effect of written instruments.”) with Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 819 (2015) (“Our law happens to consist of *their* law, the Founders’ law, including lawful changes made along the way.”).

219. See Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1654 (2023) (“[B]oth formal law and actual practice allow jurists to choose among a wide range of interpretive theories. The result is a vast and unregulated set of de facto interpretive permissions.”). Re’s focus is on theories or methods of interpretation such as textualism, purposivism, pragmatism, and others. See *id.* at 1666 (referring to those three methods of interpretation). But Re’s insights apply to the legal settlement of any aspect of interpretation, including the object.

220. See Urbina, *supra* note 3, at 1701–03 (arguing that legal rules prescribing adopting an approach to interpretation are normative reasons, assuming the law provides reasons for action).

221. That is, assuming the law provides reasons for action. See Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 747 (1989) (“Philosophers of law have treated law as practical reason

The second way is properly constitutive. It is not about what the law *prescribes* but what the law *is*.²²² The law would settle the object of interpretation, not by prescribing interpreters to *treat* something as the object of interpretation, but by recognizing that thing—and no other—as a precise source of law.²²³ Recall that the object of interpretation is what is treated as a source of law and, specifically, a precise source of law. If, in a given legal system, for a statute or a constitution, the precise source of law is the text (rather than the legislative choice, or some other specific fact), then, in that sense, the law settles the object of interpretation for that statute or constitution.

How does the law determine that something is a precise source of law? This is a matter of recognition. As seen above, a legal system can recognize legal sources more or less precisely.²²⁴ Legal systems recognize sources in two ways: through a practice and through a valid legal norm. This leads to the distinction between “practice-based” sources and “codified” sources.²²⁵ In both cases, recognition can be more or less precise.

Think of the most fundamental recognition in a legal system, which is practice-based—the rule of recognition. According to Hartian positivism,²²⁶ the rule of recognition is a rule that exists as a practice of legal officials, providing criteria for the identification of other rules as rules of the legal system and thus providing criteria of legal validity.²²⁷ While it grants validity to other legal rules, it is not

in this sense intensively since H.L.A. Hart dramatized the importance of the law as a provider of reasons for action . . .”). For a survey of reasons for action provided by positive law, see John Finnis, *On Hart’s Ways: Law as Reason and as Fact*, 52 AM. J. JURIS. 25, 38–39 (2007). See generally Alma Diamond, *Shadows or Forgeries? Explaining Legal Normativity*, 37 CANADIAN J.L. & JURIS. 47 (2024) (distinguishing between different types of normativity of law).

222. See *supra* note 208 and accompanying text.

223. For a sophisticated discussion of different ways in which the law can sanction different aspects of interpretation, including as criteria of validity, see generally Varsava, *supra* note 3. Varsava distinguishes aspects of what are usually presented as parts of theories of interpretation, such as “ordinary meaning as the objective of statutory interpretation,” from interpretive methodology, by which she means “methods, techniques, or means that interpreters may use to identify the statutory or statute-based legal norms that apply to disputes.” *Id.* at 180, 184. The former can be thought of or be recognized as criteria of validity. See *id.* at 173 (“Originalism . . . is sometimes called an interpretive methodology even when used to refer to the view that a norm is ultimately valid if it reflects a legal provision’s original meaning . . .”); *id.* at 184 (“If federal judges are coming to embrace ordinary meaning as the objective of statutory interpretation . . . then the criteria of validity for statutory law may be changing.”).

224. See *supra* Section II.A.2.

225. See *supra* note 172 and accompanying text.

226. This seems to be the default theory in the English-speaking academy now. See Berman, *supra* note 188, at 794 (“Very probably, the dominant view in the American legal academy is broadly Hartian.”). In any case, the argument made here uses the rule of recognition as illustration but does not depend on the truth of the whole of Hart’s theory.

227. See HART, *supra* note 170, at 100 (“Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation.”); *id.* at 111 (referring to the rule of recognition as a “rule providing criteria for the identification of other rules of the system”); *id.* at 105 (“The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is . . . an *ultimate* rule . . .”). Note that Hart “is best understood as claiming that the rule of recognition identifies (or provides criteria for the identification of) all types of rules as rules . . . of the system, not just rules of obligation.” Lamond, *supra*

itself valid, in the sense that no other legal norm provides for its validity. It is, thus, the foundation of a legal system.²²⁸

Now, the rule of recognition is contingent. It depends on the practices in a society.²²⁹ Even if it was true that every legal system necessarily has a rule of recognition,²³⁰ the specific rule adopted in a legal system, including how precise it is in recognizing legal sources, is contingent on the practices in that system. Take Hart's example of a rule of recognition:

RR: "[W]hat the Queen in Parliament enacts is law."²³¹

It would be perfectly possible that a legal system had a more precise rule of recognition. Indeed, officials could converge around treating the following as a criterion of legal validity:

RR': The *text* that the Queen in Parliament enacts is law.

The same applies to codified sources—sources that are recognized as such through some valid legal norm. Assume that in a country a written constitution contains a legal norm granting lawmaking powers to Parliament. In this country, the degree of precision of the recognition of acts of Parliament as law depends on contingencies about the constitution. It depends, for example, on whether the constitution contains the norm that "what Parliament enacts is law" or, rather, the norm that "the text that Parliament enacts is law."

The point is that it does not follow from the mere identification of legal sources in a legal system—not even by the rule of recognition—that the object of interpretation is legally settled. It may be, or it may not.²³² And note that a legal system may recognize some sources roughly and others precisely.

In fact, attention to the issue of the object of interpretation illuminates the question of legal sources. We may know, for example, that in a given legal system, legal officials do not coincide in identifying the same object of interpretation with regard

note 175, at 99. Note, also, that while Hart sometimes says that the rule of recognition identifies "rules," some may say it most properly identifies "sources," or both. See Luka Burazin & Giovanni Battista Ratti, *Rule(s) of Recognition and Canons of Interpretation*, in *JUDGES AND ADJUDICATION IN CONSTITUTIONAL DEMOCRACIES: A VIEW FROM LEGAL REALISM* 123, 124 (Pierluigi Chiassoni & Bojan Spaić eds., 2021) (arguing that "the rule of recognition sets the criteria only for sources of law and not legal norms themselves"); *supra* note 174.

228. See HART, *supra* note 170, at 100–23 (offering an account of the rule of recognition).

229. Though, it is not clear exactly whose practice it is. It could be a practice of society in general, officials, or only judges. See Lamond, *supra* note 175, at 108–12.

230. Though, Hart conceives of legal systems without one—just that they would be deficient. See HART, *supra* note 170, at 91–92 (explaining that a "social structure . . . of primary rules of obligation" is affected by the defect of "uncertainty").

231. *Id.* at 107.

232. Note that in determining whether there is a legal settlement of the object of interpretation, and what it is, one will need to interpret either a valid legal source or a practice. This interpretation is prior and independent to the interpretation of the legal source for which one wants to determine the object of interpretation.

to a specific legal material, and the object of interpretation often varies in different cases. From this we can conclude, for example, that the rule of recognition does not settle the issue of the object of interpretation. This is because “the rule of recognition exists only as a complex, but normally concordant, practice.”²³³ It is a common or shared standard.²³⁴ If official practice is divergent in identifying something as law, then it is not part of the rule of recognition.²³⁵ So, if official practice is concordant in treating the Constitution as a source of law but discordant as to what exactly is the “precise” source and thus the object of constitutional interpretation—text, choice, order, practice, etc.—then recognition of the Constitution is “rough”: the rule of recognition identifies a bundle of facts (“the Constitution”) as generating law, but it does not identify a specific fact in that bundle as that which determines legal norms.

Where does this leave us? Law might settle the object of interpretation, but it might not. Where there are different official approaches to the object of interpretation, there are good reasons to think that the legal system has not settled on an object of interpretation. Explicit rules prescribing one object of interpretation are possible but not necessary.

From a normative point of view, it may even be advantageous for a legal system to leave the object of interpretation unsettled, at least for some sources.²³⁶ In many situations, “rough” sources may be enough. And leaving the object of interpretation legally unsettled may allow officials to adjust to different circumstances, which will matter if the underlying normative reasons for a choice of the object of interpretation shift with circumstances.²³⁷ For example, sometimes

233. HART, *supra* note 170, at 110.

234. *See id.* at 115 (“Here what is crucial is that there should be a unified or shared official acceptance of the rule of recognition”); *id.* at 116 (“[The rule of recognition], if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only.”).

235. *See* Berman, *supra* note 188, at 794 (“[T]he law is the OPM of the text is true of our constitutional system if and only if American judges converge on a practice of recognizing that as so.”); *see also* Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J.L. & HUMANS. 59, 83 (2022) (“If judges and lawyers disagree about the legal status of originalism, then . . . originalism, it seems, simply cannot be part of our law.”). For an extended discussion of the theoretical difficulties of a conception of the rule of recognition compatible with original law originalism, *see* Emad Atiq & Jud Mathews, *The Uncertain Foundations of Public Law Theory*, 31 CORN. J.L. PUB. POL’Y 389, 397–418 (2022). *But see generally* William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178 (2023) (offering an account of legal recognition centered on public justification rather than on the norms officials enforce in practice). Note that the claims made here about how the object of interpretation is legally settled apply equally to other aspects of interpretation—such as determining the relevant meaning (original public, intended, etc.)—as reflected in the debate among the works cited in this Article.

236. *See Re supra* note 219, at 1665 (“The choice to insist on a thoroughly mandatory approach to interpretation is just that—a choice.”).

237. *See* Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515, 1528, 1534–38 (2019) (explaining the plurality of values bearing on constitutional decisionmaking and the “context dependence [of] sound constitutional decisionmaking”); Urbina, *supra* note 3, 1727–37 (explaining that a consequence of “the normative choice thesis is the contingency of interpretative choice”). Here, I do not argue for this view, but only suggest that it is possible. It is also possible that there are strong systemic reasons for the object of interpretation to always—or almost always—be settled. Such an argument in favor of, for example, the text, could be built along the lines of Paolo Sandro’s sophisticated argument for semantic minimalism so that the law be able to subject human conduct to the guidance of

following the will of an authority is the most important consideration,²³⁸ but other times, having the canonical public standard provided by a text is more important.²³⁹ Or, sometimes the capacity to adapt provided by the slow evolution of a practice is the most important consideration,²⁴⁰ while at other times consistency with an existing order is paramount.²⁴¹

If this is so, then following the law will be more normatively appealing if the object of interpretation reflects these shifting normative considerations. This takes us to the next set of considerations: practical considerations on the choice of the object of interpretation.

C. PRACTICAL SETTLEMENT OF THE OBJECT OF INTERPRETATION

Interpreters face a genuine choice on the object of interpretation. Because there are different possible objects, it is inescapable that they need to choose to interpret one or the other.²⁴² The literature on interpretive choice articulates this insight with regard to the relevant meaning,²⁴³ but the same applies to the object of interpretation.²⁴⁴ Here, we adopt the point of view of the individual interpreter. Confronted with a plurality of possible ways to interpret something, interpreters must choose—there is no alternative.²⁴⁵ In law, such a choice is a choice about how to undertake some practical enterprise—adjudicating, legislating, enforcing the law, etc.²⁴⁶ It is a practical activity ruled by practical reasons—moral and

rules. See PAOLO SANDRO, *THE MAKING OF CONSTITUTIONAL DEMOCRACY: FROM CREATION TO APPLICATION OF LAW* 201 (2022).

238. This could happen if, for example, there is great value in a recently struck bargain in Congress, as was probably the case with the ACA. See *supra* Section I.C. Recency could be relevant. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 211 (2008) (“When new amendments are adopted, the democratic-process argument will justify attention to original meanings—for a while—in cases where those amendments are applied.”).

239. As could happen in a context where the text provides more certainty than the alternatives, and certainty is a more important value than those supporting alternatives.

240. See STRAUSS, *supra* note 95, at 2–3 (“So it seems we want to have a constitution that is both living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation.”).

241. See, e.g., *supra* notes 110–14 and accompanying text.

242. See Urbina, *supra* note 3, at 1707–12 (arguing that the plurality of alternative approaches to interpretation creates the need for choice based on moral and prudential reasons).

243. See *id.* at 1682–89 (surveying the literature making the case for interpretive choice). For a view similarly stressing the practical nature of interpretation, but without adopting an interpretive choice framework, see Isabel Lifante-Vidal, *In Defence of a Constructivist Conception of Legal Interpretation*, 40 J. CONST. THEORY & PHIL. L. 63, 70 (2020) (“‘It is better to understand P in the sense of N than in any other sense’, in which we necessarily find a claim to correctness” which “incorporates evaluative judgments.”).

244. On the distinction between object and meaning, see *supra* Section I.B.

245. See SUNSTEIN, *supra* note 4, at 61 (“I aim to show that all of the contested approaches are options for us, and that none of them is mandatory (with the possible exception of textualism). We need to justify our choice, and we must do so on grounds that are external to the Constitution itself.”); *id.* at 19 (“[T]here is nothing that interpretation just is . . . we have a variety of conceptions of interpretation, and it is up to us which one to choose.”).

246. See Lifante-Vidal, *supra* note 243, at 76 (observing that interpretive activities “only make sense (‘are fruitful’) if they are conceived as instrumentally useful for a later practical activity (proposing a legislative reform, defending certain solution to a legal problem, etc.)”); see also PIERLUIGI CHIASSONI,

prudential reasons for action.²⁴⁷ Examples of these reasons are that some method of interpretation would make the constitutional order better than the alternatives;²⁴⁸ promote values “such as democracy, fairness, and the rule of law;”²⁴⁹ etc.²⁵⁰ When one chooses a method of legal interpretation, one owes nothing to what interpretation really is, or to the nature of language, or to some theory of law.²⁵¹ None of that constrains interpretive choice.²⁵² One should simply act on the best moral and prudential reasons.²⁵³ The exact same point can be made about the object of interpretation. Confronted with several plausible objects of interpretation, interpreters have no alternative but to choose, and must do so based on the best moral and prudential reasons available to them.

This is the prescriptive element in the determination of the object of interpretation. How does this prescriptive element cohere with the constitutive element? How does this practical need of interpreters to choose a normatively appealing object of interpretation cohere with the fact of legal settlement of the object of interpretation?

For some the answer is: they do not. It is all about legal settlement. Leading originalists William Baude and Stephen Sachs seem to hold this view in the context of debates on methods of interpretation, “meaning,” more generally. They criticize the views of Richard Fallon and Cass Sunstein as “skeptical,”²⁵⁴ and Sachs recently challenged the view that methods of interpretation need to be justified normatively. He argues that what matters is the truth about law:

Asking “why be an originalist?” is like asking “why be a heliocentrist?” . . . In many cases our truth-telling reasons reduce complex practical questions, like whether we should publicly avow heliocentrism, to simpler theoretical questions, like whether the Earth really orbits the Sun. So, in slogan form, we might

INTERPRETATION WITHOUT TRUTH: A REALISTIC ENQUIRY 19 (2019) (underscoring the “practical purpose to which textual interpretation is being performed”).

247. The term “normative reasons” is sometimes used for this, though the term is ambiguous, as this is not the only possible normativity. See Urbina, *supra* note 3, 1676–77 (characterizing “normative reasons”); *id.* at 1701 n.189 (referring to different senses of “normative”).

248. See SUNSTEIN, *supra* note 4, at 8 (“Judges (and others) should choose the theory that would make the American constitutional order better rather than worse.”).

249. Mark Greenberg, *Legal Interpretation*, in STAN. ENCYC. PHIL. (July 7, 2021), [https://plato.stanford.edu/entries/legal-interpretation/\[https://perma.cc/2W2W-R9TV\]](https://plato.stanford.edu/entries/legal-interpretation/[https://perma.cc/2W2W-R9TV]); see also Fallon, Jr., *supra* note 48, at 1300 (referring to a similar set of normative considerations: “promoting rule of law values,” “facilitating political democracy,” and “defining a morally defensible set of individual rights”).

250. See Urbina, *supra* note 3, at 1676–77 (listing other examples).

251. See SUNSTEIN, *supra* note 4, at 8–9 (implying that no theory of interpretation is required by the “very idea of interpretation”); see also Urbina, *supra* note 3, at 1690–1706 (arguing that non-normative considerations do not bear on interpretive choice).

252. See Urbina, *supra* note 3, at 1665–66 (“[R]easons referring to, for example, what counts as interpretation, or to the nature of interpretation or of law, can neither constrain nor justify interpretive choice.”).

253. See *id.* at 1687–89 (arguing that “normative reasons matter for interpretive choice”). The relevant reasons typically include reasons related to role morality and other considerations relevant in an institutional setting. See *id.* at 1732–33. I am grateful to Alma Diamond for raising these points.

254. See Baude & Sachs, *supra* note 66, at 1092–93 (discussing Fallon and Sunstein).

say that the moral case for originalism rests on its being true: originalism really is the law around here, and judges and officials should say so.²⁵⁵

This claim could be easily extended to the legal settlement of the object of interpretation: what matters is what the law is around here. But this is only part of the story. Normative reasoning is unavoidable and intrinsically related to legal settlement.

The relation between the two elements is easiest to assert when the object of interpretation is not settled by law. Whenever there is no precise recognition or legal rules do not mandate a specific object, there will be no legal settlement on the object of interpretation. The law “runs out,”²⁵⁶ and interpreters have legal discretion to choose.²⁵⁷ When they have such legal discretion, then evidently, they should choose based on the best non-legal reasons for choosing and acting.

But we should tread carefully. We should not be misled into a “two-step” view of the relation between the constitutive and the prescriptive element. In this view, an interpreter should work in two steps. First, discern whether there is a legal settlement on the object of interpretation. If the object of interpretation is not legally settled, the interpreter has discretion and, as a second step, needs to make a normative judgment. This “two-step” view is wrong.²⁵⁸

The truth is, instead, that the constitutive and prescriptive elements are integrated. In fact, the practical, prescriptive element always plays an indispensable role, even when the object of interpretation is legally settled. This role has an individual and a systemic dimension.

The individual dimension is that of the individual interpreter. From the point of view of an interpreter—a lawyer, a judge, a citizen—the question “What is the object of interpretation?” always takes this form in practice: “Which one of these alternatives should I make the object of my interpretation of this particular material?” Take the position of the judge.²⁵⁹ A judge applying a statute must interpret

255. Sachs, *supra* note 4, at 348 (emphasis omitted).

256. See Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. 983, 983 (2025) (referring to “a broad consensus . . . among legal scholars that the law not infrequently ‘runs out’” and casting doubts on that idea). Even if Capps is right, it is enough for the view defended here that legal sources provide no guidance to judges on the object of interpretation, even if in some broad sense law determines it. See FRANCISCO J. URBINA, *A CRITIQUE OF PROPORTIONALITY AND BALANCING* 190–91 (2017) (referring to situations in which the law fails to guide even when there is no gap in the law).

257. See DWORKIN, *supra* note 193, at 48–50 (distinguishing different senses of discretion). The sense of discretion used here is Dworkin’s “stronger sense,” in other words, “not bound by standards set by the authority in question.” *Id.* at 49.

258. See Francisco J. Urbina, *It Doesn’t Matter What “Interpretation” Is*, 38 CONST. COMMENT. 291, 308–11 (2023) (book review) (discussing the deficiencies of an analogous “two-step view” of interpretive choice).

259. See Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 855 (2022) (“Overwhelmingly, the literature on constitutional interpretation takes as its paradigm interpreter a Supreme Court Justice . . .”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 888 (2003) (“Legal education, and the legal culture more generally, invite interpreters to ask the following role-assuming question: ‘If you were the judge, how would you interpret this text?’”). Reasons derived from legal settlement may bear differently on the interpretive

it. If there are several possible aspects of the statute that could be interpreted—different possible objects of interpretation—the judge needs to choose one. Without this choice, there is no interpretation. It is true that the judge has legal discretion when the object of interpretation is legally unsettled. But, from a moral point of view, the interpreter needs to make a moral judgment no matter what. Even if there is legal settlement,²⁶⁰ the interpreter needs to determine whether to follow that settlement or not. It is still the case that there are other things that this judge could interpret, even if this flouts the legal settlement on the object of interpretation. And if there are alternatives, there is a choice, and if there is a choice, there is a need for moral deliberation. The judge still has a range of alternatives; it is just that one is sanctioned by the law and others are not. Judges often have reasons to follow the law,²⁶¹ but they sometimes have reasons not to.²⁶² It could be, for example, that different objects of interpretation lead to different results, and the one that leads to the more just result is not the legally sanctioned one. From a practical point of view, legal settlement never eliminates the need for interpretive choice and moral deliberation.

This is particularly important when an official practice, such as that constituting the rule of recognition, brings about the legal settlement of the object of interpretation.²⁶³ If the rule of recognition exists in official practice, then it can be changed through official practice. Officials, then, have a responsibility to bring about and sustain a reasonable rule of recognition: either one that gives a morally justified settlement of the object of interpretation or one that does not settle the object of interpretation when leaving this matter open is the most practically reasonable option.²⁶⁴ Individual officials may take their chances at trying to change the rule of recognition when they think a more normatively appealing one should be adopted. They may do so by departing from legal settlement and choosing a different object of interpretation—recognizing a different “precise” source—with the aim that other officials follow suit so as to change the rule of recognition. Here, “all that

choices of other actors. See Urbina, *supra* note 3, at 1703 n.200 (“It may be that the law of interpretation doesn’t apply or applies less to some actors . . .”).

260. See *supra* Section III.B.

261. See generally 4 JOHN FINNIS, *Law’s Authority and Social Theory’s Predicament*, in PHILOSOPHY OF LAW: COLLECTED ESSAYS 46 (2011) (challenging the view that there are no prima facie reasons to obey the law).

262. See, e.g., JOHN RAWLS, *The Justification of Civil Disobedience*, in COLLECTED PAPERS 176, 176 (Samuel Freeman ed., 1999) (explaining conditions for civil disobedience).

263. See *supra* Section II.A; see also Lifante-Vidal, *supra* note 243, at 77 (observing that “[i]nterpretative activity is . . . an activity shaping legal practice”). For ease of exposition, I focus on official practice pertaining to the rule of recognition, though it may be argued that official practice could legally settle the object of interpretation in other ways. What I say above would apply to any form of legal settlement of the object of interpretation through official practice.

264. This draws from Professor Felipe Jiménez’s acute observation that:

[A]rguments about the refinement and determination of the exact contours of the criteria set out by the rule of recognition, as attempts to answer the question as to in which direction the law should develop.

Jiménez, *supra* note 235, at 83–84.

succeeds is success.”²⁶⁵ Naturally, some officials have more capacity to produce this change than others, on account of, for example, their place in the judicial hierarchy, their prestige and influence, the relevance of the cases they address, and other such contingencies. This shapes the moral responsibility of each official regarding the choice of object in official practice, with those having a greater impact on the practice bearing a greater responsibility, and those having a lesser impact bearing a lesser responsibility. In this regard, officials have something like “common but differentiated responsibilities” for the legal settlement on the object of interpretation when this is brought about and sustained through their practices.²⁶⁶

This leads us to the systemic dimension of the prescriptive element in determining the object of interpretation. If the choice of the object of interpretation is not morally indifferent, then we would want a legal system to make the right choice. If choosing, for example, the text as the most morally appealing option in all cases because, say, the reasons of legal certainty backing that choice are stronger than other reasons—say, authority or possibility to adapt—then, it would be reasonable for the law to settle on this alternative.²⁶⁷ Similarly, if the most morally appealing option is to leave the choice to individual interpreters to allow them to adjust to different circumstances, then there should be no legal settlement of the object of interpretation. Legal recognition, either through rule or practice, should reflect this. Even when the object of interpretation is legally settled, this settlement can be evaluated morally. Agents with power over the settlement may have moral reasons to preserve it or to change it. As Professor Brian Bix puts it, “Whatever is settled is settled only for the moment.”²⁶⁸

The legal community has agency over its law. Law can be improved. This includes what is recognized as law, including the precise source of law and thus, the object of interpretation. Scientists and professors who teach heliocentrism do not have an analogous power over planetary movements.²⁶⁹ But in law, the free choices and actions of officials—individually and jointly—change the law. They should change it for the better.

CONCLUSION

“The text is the law, and it is the text that must be observed.”²⁷⁰ This view is intuitive to many and widely influential, as recent Supreme Court decisions

265. I borrow the phrase from HART, *supra* note 170, at 153. Though there, Hart was not referring exactly to the rule of recognition, but to courts expanding their jurisdiction.

266. The concept of “common but differentiated responsibilities” comes from international environmental law. See Paris Agreement, arts. 2, 4, Dec. 12, 2015, 80 Stat. 271, No. 16-1104. I am grateful to Larry Solum for raising this issue.

267. This applies obviously to rules mandating an approach to interpretation. Like with all rules, we would want their content to be just, reasonable, etc. But it also applies to recognitional norms and practices. See Green, *supra* note 174, at xxii (“Recognition rules are rarely believed to be wholly arbitrary . . .”).

268. Brian H. Bix, *Protestant Interpretation, Conventions, and Legal Truth*, in PHILOSOPHY OF LAW AS AN INTEGRAL PART OF PHILOSOPHY: ESSAYS ON THE JURISPRUDENCE OF GERALD J. POSTEMA 147, 155 (Thomas Bustamante & Thiago Lopes Decat eds., 2020).

269. See *supra* note 255 and accompanying text. I am grateful to Stephanie Barclay for this point.

270. SCALIA, *supra* note 71, at 22.

show.²⁷¹ “[W]e’re all textualists, now.”²⁷² Court opinions often “start with the text.”²⁷³ The text is often treated as the unquestionable object of interpretation.²⁷⁴

In truth, neither the text nor anything else is the only possible object of interpretation always. There are many possible objects of interpretation, none of which is necessary.²⁷⁵ Surely, the text could be the appropriate object of interpretation and could even be legally sanctioned as such. But the same could be said of the other alternatives. Sometimes interpreters should focus on one object, and sometimes on another. One cannot start the argument presupposing an object of interpretation—one must argue for it.

Even if the text is sometimes the object of interpretation, it does not need to always be the object of interpretation. This Article has argued that the object of interpretation is a source of law, and sources of law are never necessary. They are the product of what a legal system recognizes as a legal source.²⁷⁶ Because such recognition is contingent and depends on human choices, settling on an object of interpretation is also a matter for moral deliberation, choice, and judgment.²⁷⁷ There is, as a result, no obvious object of interpretation—there are several possible candidates.²⁷⁸ There is a range of both morally and, depending on the particulars of each legal system, legally legitimate alternatives for the object of interpretation.²⁷⁹ Whether at the level of the legal system or at the level of individual interpretations, the object of interpretation is a matter for choice—a choice that needs to be vindicated on normative reasons.

This Article mapped the territory: it explained what the object of interpretation is and provided a framework for determining it. But there is much more work to be done on the object of interpretation. Attention to the object of interpretation,

271. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020) (“Only the written word is the law”); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (“As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text.”); GORSUCH ET AL., *supra* note 9, at 48 (“We live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret text—constitutional, statutory, regulatory, or contractual.”); *id.* at 132 (“The text of the statute and only the text becomes law.”).

272. See HARVARD LAW SCHOOL, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:29 (Youtube, Nov. 25, 2015), <https://youtu.be/dpEtszFTOTg> (on file with author). See generally Kevin Tobia, *We’re Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243 (2023) (asserting that this claim accurately suggests that legal culture is largely textualist).

273. Tobia, *supra* note 272, at 244 (emphasis omitted); see also *id.* at 251–52 (“[W]e are all textualists now, in a way that was not true before: All judges start with (or at some point in interpretation, seriously consider) the text.”); *Garland v. Cargill*, 602 U.S. 406, 415 (2024) (“As always, we start with the statutory text”); *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (“[W]e start where we always do: with the text of the statute.” (alteration in original) (quoting *Van Buren v. United States*, 593 U.S. 374, 381 (2021))); *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (“[A]s we have stressed over and over again in recent years, statutory interpretation must ‘begi[n] with,’ and ultimately heed, what a statute actually says.” (quoting *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 583 U.S. 109, 127 (2018))).

274. See *supra* note 70 and accompanying text.

275. See *supra* Section I.B.

276. See *supra* Part II.

277. See *supra* Section III.C.

278. See *supra* Section I.B.

279. See *supra* Section III.C (moral choice); *supra* Section III.B (legal settlement).

for example, shows that there are many possible combinations between relevant meanings and objects of interpretation.²⁸⁰ Meanings and objects are not logically entailed by each other. At the same time, some objects seem to have an affinity with some meanings—they do not logically entail a particular meaning, but some meaning seems to be especially appropriate for them.²⁸¹ One example is lawmaking choice with intentional meaning, and another, perhaps, is text with some form of public meaning. Not surprisingly, some authors defending those meanings find support for them in some view of the object of interpretation.²⁸² But then, again, they cannot take a view of the object of interpretation as an uncontroversial premise; they need to argue for it.²⁸³

Judges and other interpreters cannot escape addressing this. The horizon of our possibilities is much broader than is often assumed, and we, the community whose law this is, have more agency over it than we might have thought.

280. *See supra* Section I.B.

281. The relation is not one of entailment, but practical: the normative reasons for an object are also reasons for a meaning. But this cannot be addressed here.

282. *See, e.g., supra* Section I.B.1; Section I.C.

283. Ekins is exemplary in this regard, as an author defending an account of the object of interpretation in line with his theory of legislation. *See supra* notes 81–86 and accompanying text.