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Statutory Interpretation and Denotational Disagreement

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Abstract

Can Hartian positivism adequately explain disagreements, among U.S. officials, about the correct method of statutory interpretation? Ronald Dworkin influentially argued it cannot. Dworkin maintained that (1) debates about the correct method of statutory interpretation are 'theoretical' disagreements; and (2) Hartian positivism cannot explain theoretical disagreements, except by positing implausible confusion or disingenuity on the part of legal officials. I show here that (1) is false. A disagreement about the correct method of statutory interpretation need not involve a theoretical disagreement of any kind. It may instead involve a purely 'denotational' disagreement among officials—i.e., a disagreement about the denotation of a concept appearing in a criterion of legal validity that all officials accept. I argue that, since the U.S. statutory interpretation debate plausibly is a purely denotational one, it does not pose the difficulties for Hartian positivism that Dworkin and other critics have supposed.

Keywords: *Legal Positivism; Statutory Interpretation; Theoretical Disagreement*

1. Introduction

In *The Legal Process*, Henry Hart and Albert Sacks famously observed that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[1] This observation seems as apt today as it was in 1951. Despite Justice Kagan's remark in 2015 that "[w]e're all textualists now,"[2] there persist substantial disagreements among U.S. judges about how to correctly interpret statutes.[3] Many U.S. judges

1. Henry M Hart, Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed by William N Eskridge, Jr & Philip P Frickey (Foundation Press, 1994) at 1169.
2. Harvard Law School, "The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes" (25 November 2015) at 00h:08m:29s, online (video): *YouTube* www.youtube.com/watch?v=dpEtszFT0Tg. But see Kagan, J, dissenting: "It seems I was wrong." *West Virginia v EPA*, 597 US 697 at 779 (2022).
3. See Abbe R Gluck & Richard A Posner, "Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals" (2018) 131:5 Harv L Rev 1298 at 1303-05.

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resist being labeled as 'textualists'.[4] And even among those who accept this label, there is substantial disagreement about what, exactly, 'textualism' requires.[5]

Ronald Dworkin influentially argued that the disagreement among U.S. judges about how best to interpret statutes poses a serious problem for Hartian positivism.[6] The problem arises because the debate over which method of statutory interpretation is correct would seem to be a debate about what our criteria of legal validity actually are.[7] And according to Hartian positivism, the correct way to settle a dispute about the criteria of validity is by ascertaining which criteria are, in fact, routinely accepted and applied by the officials of a legal system.[8] However, this is not how participants in the statutory interpretation debate have actually proceeded. When Justice Scalia, for example, advocated for textualism in the late 1980s, he did not argue that textualism was the method of interpretation that other judges routinely accepted.[9] He knew full well that it was not. And yet, he argued—for a variety of other reasons—that textualism was the correct method of statutory interpretation.

Hartian positivism therefore seems to face a formidable challenge. It must reconcile the following claim about how the criteria of legal validity are fixed with the observed realities of the statutory interpretation debate:

> [Acceptance]: The criteria of legal validity of a legal system *S* are those criteria that are generally accepted and applied by the officials of *S*.

It must reconcile [Acceptance] with facts like the following:

> Judges sometimes assert that their preferred method of statutory interpretation is legally correct, even though it is not generally accepted among legal officials.

Brian Leiter offers two strategies for attempting to reconcile [Acceptance] with facts like the above.[10] The first he calls the "Disingenuity account."[11] According to this account, when a judge asserts that textualism is the law, despite the fact that textualism is not generally accepted by other officials, they may be speaking *insincerely*. They may know, more or less consciously, that their assertion is false, and nevertheless make it in the hope of surreptitiously influencing other judges to accept textualism.

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4. "Our findings reveal the academic *cliché de mode*—'we are all textualists now'—to be an overstatement." *Ibid* at 1310 [footnote omitted].
5. See generally Tara Leigh Grove, "Which Textualism?" (2020) 134:1 Harv L Rev 265.
6. See Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) at 15-23, 37-44; see also Scott J Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" in Arthur Ripstein, ed, *Ronald Dworkin* (Cambridge University Press, 2007) 22.
7. Textualists, for example, maintain that a norm (e.g., "You must not drive faster than 55 mph") is legally valid if it is derivable from a statute by one method of interpretation; purposivists, by another method; intentionalists, by yet a third.
8. See Brian Leiter, "Explaining Theoretical Disagreement" (2009) 76:3 U Chicago L Rev 1215 at 1222.
9. See e.g. *Green v Bock Laundry Machine Co*, 490 US 504 at 528 (1989).
10. See Leiter, *supra* note 8, at 1224-25.
11. *Ibid* at 1224.

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The second strategy Leiter calls the "Error Theory account."[12] On this account, when judges make assertions about the criteria of legal validity that are ill-supported by the actual practice of officials, they may simply be making a good-faith mistake. The speaker may know that the criteria they assert are not generally accepted by officials, and nevertheless fail to recognize that they are speaking falsely.

The Disingenuity and Error Theory accounts are both committed to a certain amount of error on the part of legal officials (whether as confused speakers, or as confused hearers).[13] Both accounts therefore raise the difficult question of just how much official error a theory of law can credibly posit.[14] Without purporting to answer this question, this paper will attempt to offer a solution to Dworkin's challenge that does not require that U.S. officials are ever mistaken about what the criteria of legal validity are.

I shall argue that Dworkin's challenge to Hartian positivism rests on a false premise: that the U.S. statutory interpretation debate is a theoretical disagreement. "[T]heoretical disagreement" is Dworkin's term for a disagreement about the "grounds of law"—i.e., about the criteria of legal validity.[15] If the debate about statutory interpretation *were* a theoretical disagreement, then positivists would indeed need to explain why officials do not attempt to settle the debate by ascertaining which criteria of validity other officials generally accept. But I shall argue that there is no reason to think that the debate is a 'theoretical' one, in Dworkin's sense.

I argue that even when officials disagree about the correct method of statutory interpretation, they may nevertheless be in perfect agreement about the criteria of legal validity. This is possible because officials may be engaged in a purely 'denotational' disagreement: a disagreement about the denotation of a concept appearing in a criterion of validity that all officials accept. I argue that since the U.S. statutory interpretation debate plausibly is a purely denotational disagreement, its existence does not pose any obvious threat to Hartian positivism.

The paper proceeds as follows: Section 2 explains why it may be tempting to infer that officials who disagree about the correct method of statutory interpretation must be having a theoretical disagreement. Section 3 demonstrates that this tempting inference is invalid. Using two fictional examples of denotational disagreements, I show that officials who disagree about whether textualism or purposivism is the correct method of interpretation may nevertheless be in perfect agreement about the criteria of legal validity. Section 4 compares the U.S. statutory interpretation debate to these fictional examples and argues that it, too, may stem from a purely denotational disagreement. Section 5 concludes.

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12. *Ibid.*

13. While the Disingenuity account is not an error theory in name, it does presuppose that officials can be deceived about the criteria of legal validity. Were this not the case, there would be little to be gained from disingenuous assertions, the falsity of which would readily be detected by the speaker's colleagues, and potentially raised to public attention in scathing dissents.

14. *Cf* Luís Duarte d'Almeida, "The Grounds of Law" in Wil Waluchow & Stefan Sciaraffa, eds, *The Legacy of Ronald Dworkin* (Oxford University Press, 2016) 165 at 193-94.

15. Dworkin, *supra* note 6 at 5, 4. See also Leiter, *supra* note 8 at 1216.

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2. The Case for Theoretical Disagreement

Since I shall argue that the U.S. statutory interpretation debate does not involve a theoretical disagreement, it is helpful to first explain why one might naturally suppose that it does.

According to Hartian positivism, there is, at the foundation of any legal system, a rule that specifies the conditions under which a particular norm (e.g., "No vehicles in the park") is legally valid in that system. Hart dubbed this rule the "rule of recognition."[16] A rule of recognition *R* exists in a particular legal system *S* in virtue of two facts: (1) the officials of *S* routinely apply the criteria of validity set forth in *R* when identifying valid legal norms; and (2) the officials of *S* regard these criteria of validity as ones that they and other officials ought to apply.[17] I will refer to the conditions of validity set forth in a system's rule of recognition as that system's 'ultimate criteria of legal validity'.

Proponents of different schools of statutory interpretation clearly disagree, to some extent, about how to identify valid legal norms. Textualism and purposivism, the two most prominent schools of interpretation in the United States, prescribe different techniques for deriving valid legal norms from legislative enactments. Two conclusions might seem to follow from this fact. The first is that proponents of these views disagree about the conditions under which a norm is legally valid. Each maintains that a norm is valid when it is derivable from a statute by their own preferred method of interpretation, yet each subscribes to a different method. The second conclusion is that the U.S. rule of recognition must be silent about which interpretive method is correct. There is, after all, no consensus among U.S. officials about the correct method. A rule of recognition cannot, by definition, incorporate a criterion of validity about which officials pervasively disagree.

However, if one accepts that the U.S. rule of recognition is silent about which of these methods of interpretation is correct, then all of the difficult questions surveyed in the Introduction immediately follow. Why do textualists speak as if there is a fact of the matter about whether textualism is the correct method of statutory interpretation? Why do neither their colleagues nor other persons deeply acquainted with the legal system correct these mistaken assertions?

To avoid these difficult questions, a Hartian positivist might be tempted to resist the conclusion that U.S. officials are in fact engaged in a theoretical disagreement. But it is not at all obvious how to do so. Bill Watson makes a valiant but unsuccessful attempt.[18] He argues that, although textualists and purposivists disagree about many things, they all accept certain "platitudes" about statutory interpretation.[19] In particular, they all agree that a statutory text's "meaning"

16. HLA Hart, *The Concept of Law,* 3rd ed (Oxford University Press, 2012) at 94.
17. See *ibid* at 100-01.
18. See Bill Watson, "How to Answer Dworkin's Argument from Theoretical Disagreement Without Attributing Confusion or Disingenuity to Legal Officials" (2023) 36:1 Can JL & Jur 215.
19. *Ibid* at 228.

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is the appropriate target of interpretation.[20] They simply disagree about what 'meaning' means.[21]

Watson acknowledges the objection that such 'agreement' might not really be agreement at all, since there is no single proposition that all participants in the debate accept.[22] But he argues that the force of this objection is blunted by the fact that the word 'meaning' is polysemous, and that the meanings assigned to it by textualists and purposivists are "related."[23] Although proponents of these views

> understand "meaning" differently, the difference is marginal. It is not as though they disagree over which of a pair of homonyms (like "bank" as in a riverbank versus "bank" as in a financial institution) grounds legal content. If that were the case, then their agreement would be truly illusory.[24]

This reply does not, however, seem adequate to overcome the objection. According to Hartian positivism, the rule of recognition of a legal system *S* incorporates a criterion of validity *c* only if the officials of *S*: (1) routinely apply *c* in identifying valid norms; and (2) believe that they ought to do so. But on Watson's proposal, there does not seem to be any single criterion of validity that all judges apply and accept: They merely use the same *words* to express their acceptance of different criteria.

It may be true that the word 'meaning' is polysemous, and that textualist and purposivist judges assign 'related' meanings to it. But 'agreement' of this kind generally does not suffice for the existence of a social rule.[25] 'Meaning' may be polysemous, but so is 'elk', which can refer both to the living animal and to its meat. If, in a given community, half of the population thought it polite to bring elk (meat) to a barbeque, and the other half thought it polite to bring (living, breathing) elk, there would be no sense in which a single social rule governing politeness existed. Acceptance of the same sentence does not entail acceptance of the same rule, unless the parties assign the same meaning to that sentence. Polysemes are no exception to this general principle.

One might also take issue with Watson's claim that the difference between a textualist's and a purposivist's understanding of 'meaning' is "marginal." What Watson seems to mean is that the textualist's assigned meaning and the purposivist's assigned meaning have "mostly overlapping extensions."[26] But even if this is true, it does not follow that the meanings are themselves remotely similar. To borrow an example from Quine, "creature with a heart" and "creature with a

20. *Ibid.*
21. "They disagree over which of two related senses of 'meaning'—with mostly overlapping extensions—grounds legal content." *Ibid* at 234.
22. *Ibid* at 233.
23. *Ibid* at 234.
24. *Ibid.*
25. A rule of recognition is a social rule. See Hart, *supra* note 16 at 100-01. So if a given kind of agreement is not sufficient to constitute a social rule, it is inadequate to constitute a rule of recognition.
26. Watson, *supra* note 18 at 234.

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kidney" also have mostly overlapping extensions.[27] Nevertheless, they mean very different things. If, in a given community, half of the population thought it polite to doff their caps to creatures with hearts, and half thought it polite to doff their caps to creatures with kidneys, they might all doff their caps to the very same things. But as Hart observes, the existence of a social rule requires more than such a convergence of behavior.[28] It also requires shared acceptance, from an internal point of view, of a standard characterizing that behavior as appropriate.[29]

Hart argues that a social rule exists in a community only when: (1) there is a shared "critical reflective attitude to certain patterns of behavior as a common standard"; and (2) this reflective attitude "display[s] itself in criticism (including self-criticism), demands for conformity, and in acknowledgement that such criticism and demands are justified."[30] It is difficult to see how the members of a community could satisfy these requirements without jointly accepting some proposition (or set thereof) describing how they ought to behave. If they accept differing propositions, they are apt to disagree about which "criticism and demands are justified." Notably, a requirement of shared propositional content is common to many different philosophical analyses of social norms and conventions.[31]

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27. WV Quine, "Two Dogmas of Empiricism" (1951) 60:1 Philosophical Rev 20 at 21-22.

28. See Hart, *supra* note 16 at 56-57.

29. An anonymous referee helpfully points out that, although 'creature with a heart' and 'creature with a kidney' have mostly overlapping extensions, they are not polysemes. The referee inquires whether perhaps the *combination* of (1) polysemy and (2) mostly overlapping extensions might suffice for the existence of a social rule. Perhaps the word 'meaning' exhibits *both* properties? The problem with this suggestion, as I see it, is that the word 'meaning' is used quite differently than other polysemes with mostly overlapping extensions. It therefore seems unlikely that it is such a term. Consider, for example, the word 'fruit', which has both a technical meaning (that includes tomatoes) and a colloquial meaning (which does not). In response to a question like, "Is a tomato a fruit?", one can therefore respond: "Yes and no. It depends on which meaning of 'fruit' you have in mind." If 'meaning' were a polyseme with a 'textualist' sense and a 'purposivist' sense, one would expect it to pattern similarly. But it does not appear to. Suppose that, in the context of a particular statute, textualism and purposivism dictate opposite answers to the following question: "Does the meaning of the statutory term 'Person' include limited liability companies?" It would be odd to respond: "Yes and no. It depends on which meaning of 'meaning' you have in mind."

30. Hart, *supra* note 16 at 57.

31. See e.g. Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1991), analyzing meaning-conventions as shared procedures to use an utterance-type to invite an audience to espouse an attitude to a particular "propositional content" (*ibid* at 128); Jonathan Bennett, *Linguistic Behaviour* (Cambridge University Press, 1976), proposing an analysis of linguistic conventions that requires a group to have "mutual knowledge" of several propositions (*ibid* at 177); Peter Vanderschraaf & Giacomo Sillari, "Common Knowledge" in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy* (Winter 2023), online: plato.stanford.edu/archives/win2023/entries/common-knowledge/, noting that mutual knowledge, like common knowledge, is a relation between a "set of agents" and a "proposition" (*ibid* at §2); David Lewis, *Convention: A Philosophical Study* (Blackwell, 2002), defending a general analysis of conventions requiring common knowledge, among a group, of five propositions (*ibid* at 78); Seumas Miller, *Social Action: A Teleological Account* (Cambridge University Press, 2001) proposing an analysis of social norms requiring common knowledge of two propositions (*ibid* at 139); Margaret Gilbert, "Rationality, Coordination, and Convention" (1990) 84:1 Synthese 1, analyzing convention using the notion of joint acceptance and observing that joint acceptance cannot require the use of language, since language presupposes the existence of conventions (*ibid* at 17).

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Watson argues that a social rule can exist in a group even if its members assign subtly *different* meanings to the words they use to express the rule.[32] He offers the following example. Suppose a group converges on the rule that "a war is just only if the harm it aims to avoid is proportional to the harm it causes."[33] Its members might still disagree about "how to compare the severity of harms."[34] I agree with Watson that such a situation is clearly possible. But I do not think it follows that a group can converge on a rule while disagreeing about the meanings of its constituent terms. In Watson's example, group members may simply disagree about the *extension* of the word 'proportional'.

Suppose, by analogy, that two people disagree about the best quick-and-dirty heuristic to use to determine which of two large, unwieldy pieces of furniture is heavier. The heuristics (e.g., visual size-up vs. partial lift) lead them to opposite conclusions about the right answer. Clearly, it does not follow from this disagreement that they disagree about the *meaning* of the word 'heavier'. They may simply disagree about which ordered pairs of furnishings fall into the *extension* of 'heavier'. Similarly, the individuals in Watson's example may disagree not about the meaning of 'proportional', but just about the pairs of harms that fall within the extension of this word. Disagreeing about the right method for determining a word's extension does not require disagreeing about its meaning.

Watson draws his proportionality example from Joseph Raz, who uses the example to illustrate what he calls the "relative independence of inter-related concepts."[35] Raz points out that people who share the very same "concept of a just war" can nevertheless disagree about "the truth conditions of propositions applying it," owing to an underlying disagreement about the truth-conditions of propositions employing the concept of proportionality.[36] This claim seems correct, but it does not follow from it that people can converge on a rule while disagreeing about the meanings of its constituent terms. The reason, in short, is that there is a difference between (i) disagreements about truth-conditions, and (ii) disagreements about meaning.

As Raz points out, truth-conditions can be characterized at different "levels of abstraction."[37] As an illustration, suppose that you and I understand the meaning of the descriptive name, "Jack the Ripper," in the same way: It refers to whichever individual committed certain murders in the Whitechapel district of London in 1888 (i.e., the so-called "canonical five"). But suppose we disagree, for a variety of substantive reasons, about who committed these murders. I am convinced that it was Mr. Aaron Kominski; you believe it was Prince Albert Victor. Do we then agree or disagree about the 'truth-conditions' of the sentence, "Jack the Ripper was a prince"? The question is ambiguous, but on at least one 'level

32. See Bill Watson, "Metalinguistic Negotiation in Legal Speech" (2023) 42:5 Law & Phil 487 at 521.
33. *Ibid.*
34. *Ibid.*
35. Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) at 72.
36. *Ibid* at 72, 74.
37. *Ibid* at 72.

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of abstraction', we disagree. On my view, it is true if and only if Mr. Kominski was a prince; on yours, if and only if Prince Albert Victor was a prince. This disagreement, however, is fully compatible with agreement about the meaning of the sentence.[38] And notably, there are more abstract ways of characterizing the truth-conditions of this sentence that we would both endorse.

So too for proportionality and just wars. I agree with Watson that members of a community can converge on the rule that "a war is just only if the harm it aims to avoid is proportional to the harm it causes," even while disagreeing—at some level of abstraction—about the truth-conditions of sentences involving the word 'proportional'. But I do not think it follows from this that they can converge on this rule while disagreeing about the *meaning* of 'proportional'. As the above example shows, a disagreement about truth-conditions (at one level of abstraction) can co-exist with agreement about meaning.[39] If it became clear that there was *no* characterization of the truth-conditions of sentences involving the word 'proportional' that all members of a community accepted, then it would be clear that they understood its meaning differently. But in such a case, I would not be tempted to say that they had successfully converged on a social rule.[40] As such, I do not think this example weighs very heavily against the commonplace view that shared acceptance of a sentence only suffices for the existence of a social rule when the members of a group assign the same meaning to that sentence.

Although I do not think that Watson's explanation of why textualists and purposivists are not having a theoretical disagreement ultimately succeeds, I am in full agreement that this argumentative strategy is a promising one. The remainder of this paper will attempt to show that participants in the statutory interpretation debate may not, in fact, disagree about what the ultimate criteria of legal validity are. They may instead be engaged in what I call a 'denotational' disagreement. The next section will attempt to clarify this concept.

3. Denotational Disagreements

As observed above, from the premise that U.S. officials disagree about how to derive a valid legal norm from a statute, it is very natural to infer that they must also disagree about what the ultimate criteria of legal validity are. This section,

38. It could be objected that we do disagree about the meaning of 'Jack the Ripper', because we disagree about its denotation. But it seems implausible that the denotation of a descriptive name is its meaning. The meaning of a word *w* is the property of *w*, knowledge of which enables speakers to understand sentences involving *w*. And we can understand sentences involving a descriptive name without having any idea who the name denotes. Nobody knows who Jack the Ripper was, but that does not interfere with our ability to competently use the term and understand sentences in which it appears.

39. This may be the point Raz has in mind when he critiques Dworkin for failing to "distinguish … between levels of abstraction in the description of the truth conditions" and framing all such disagreements as "theoretical disputes." Raz, *supra* note 35 at 72.

40. Watson may have something like this point in mind when he observes that a disagreement about meaning could be so extreme that there would be no possibility of a social rule having been constituted, and states that only "coarse-grained" agreement about meaning is needed to constitute a social rule. Watson, *supra* note 18 at 234.

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however, will demonstrate that this natural inference is invalid. Officials who disagree about the correct method of statutory interpretation may nevertheless be in perfect agreement about the ultimate criteria of legal validity.

If the natural inference is invalid, then it becomes far less obvious why the U.S. statutory interpretation debate is a problem for Hartian positivism. If textualists and purposivists *did* disagree about the ultimate criteria of legal validity, then it would indeed be challenging for Hart to explain why they do not resolve their disagreement by ascertaining which criteria of validity most U.S. officials accept. But if a disagreement about the correct method of statutory interpretation does not entail a disagreement about the ultimate criteria of validity, then there is no obvious reason to think that textualists and purposivists are having a theoretical disagreement. Dworkin's challenge to Hartian positivism is then significantly undermined.

To demonstrate why the natural inference is invalid, this section introduces two fictional examples of what I call 'denotational' disagreements. By a 'denotational' disagreement, I mean a disagreement in which the parties agree about what the ultimate criteria of legal validity are, but disagree about the denotation of a term appearing in a criterion that they all accept. To illustrate this notion, I begin with an example involving an empirical disagreement among officials. I then turn to an example involving a moral disagreement.

A. Factlandia

In the nation of Factlandia, legal officials are in perfect agreement about what the ultimate criteria of legal validity are. Factlandia's rule of recognition sets forth many such criteria. Among them is a criterion pertaining to statutory interpretation:

> (1) A norm is legally valid if it is derivable from a Factlandian statute by the method of statutory interpretation that the founder of Factlandia endorsed.

Although all officials accept the proposition expressed by (1), there is nevertheless quite a bit of disagreement about what the correct method of statutory interpretation is. The trouble is that the historical evidence about who founded Factlandia is rather equivocal. Some officials think—on the basis of what they take to be the most convincing evidence—that the founder was a textualist. A roughly equal number of officials are persuaded that the founder was a purposivist. As a consequence, Factlandian officials are sharply divided over whether textualism or purposivism is the correct method of statutory interpretation.

When debating this question, Factlandian officials rely exclusively on traditional methods of historical argumentation. No official has ever suggested resolving the dispute by conducting an official 'headcount' to see which method of interpretation is accepted by a greater number of Factlandian officials.[41] All agree

41. *Cf* Leiter, *supra* note 8 at 1222.

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that the answer to *that* question would be legally irrelevant, since most officials could be *mistaken* about the method of interpretation the founder actually endorsed. And according to (1), it is that method which must be applied in discerning valid legal norms.

From the perspective of Hartian positivism, it is not difficult to explain why Factlandian officials are not disposed to resolve their dispute by conducting an official headcount. To be sure, this would be an appropriate way of resolving a dispute about what the ultimate criteria of legal validity actually were.[42] But as noted above, Factlandia's ultimate criteria of validity are not in dispute. Officials all accept the proposition semantically expressed by (1), and agree that they ought to apply *the method of statutory interpretation that the founder endorsed.* They disagree merely about which method that is. It is in this sense that they are having a purely 'denotational' disagreement. Although all accept the same criterion of legal validity, they disagree about the denotation of a concept that is embedded in that criterion.[43]

There are two important lessons to be gleaned from this example. The first is that officials can agree about what the ultimate criteria of legal validity are without also agreeing about the correct method of statutory interpretation. In a denotational disagreement like the one above, officials may agree about the former without agreeing about the latter. It would therefore be a mistake to conclude—from the mere fact that officials disagree about what the correct method of statutory interpretation is—that they are having a theoretical disagreement. What I referred to above as the 'natural inference' is therefore invalid.

The second lesson—closely related to the first—is that, even if Hartian positivism is correct, we should not expect legal officials to settle every disagreement about the correct method of statutory interpretation by conducting an official headcount. That would be an unreasonable way to settle the denotational disagreement in this example, which turns on a historical debate, rather than a debate about the ultimate criteria of legal validity. Since these criteria are not in dispute, Factlandian officials are not confronted with any question that an official headcount could answer. A historical debate cannot be settled by majority vote.

Since the debate among Factlandia's officials is, at base, an empirical one, it might be tempting to conclude that every denotational disagreement will turn on some disagreement about the empirical facts. I think this temptation should be resisted. As the next section will illustrate, denotational disagreements can also arise in the context of purely moral debates.[44]

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42. After all, according to [Acceptance], the ultimate criteria of legal validity in any legal system *S* are the ones that the officials of *S* routinely accept and apply.

43. This is not a disagreement about the *meaning* of (1), unless one thinks that definite descriptions have a directly referential semantics. The more common view, even among those who accept a Fregean analysis of descriptions, is that their denotation can vary as a function of world and time. "Fregean presuppositional theories do not make definite descriptions into directly referential terms; when combined with a world parameter, for example, Fregean definite descriptions can pick out different objects in different worlds." Paul Elbourne, "Presupposition, assertion, and definite descriptions" (2021) 44:6 Linguistics & Philosophy 1215 at 1217.

44. For this reason, the notion of a 'denotational disagreement' is distinct from Dworkin's notion of an "empirical disagreement"—i.e., a disagreement about the 'actual, historical facts' of a

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B. Moralandia

Moralandia is a nation similar to Factlandia in several important respects. For one thing, its officials are in perfect accord about what Moralandia's ultimate criteria of legal validity are. But whereas Factlandia's 'statutory interpretation' criterion raises a controverted question of historical fact, Moralandia's criterion raises a controversial moral question:

> (2) A norm is legally valid if it is derivable from a Moralandian statute by the method of statutory interpretation that is morally correct.

Moralandia is a relatively monolithic society, in which just about everyone is some variety of Kantian deontologist. Despite this fact, officials frequently disagree about what is morally required of them. This is true even in matters of statutory interpretation. Some officials believe that, to respect the autonomy of citizens, judges must give effect to the intentions of their elected representatives, even when the content of those intentions differs from the semantic content of the enacted text.[45] Others argue that autonomy is only respected if judges enforce statutes according to their letter, to ensure that citizens can know what the law is.

Neither of these arguments in favor of textualism or purposivism has yet carried the day. Consequently, officials continue to muster new, recognizably Kantian arguments in the hope of recruiting their colleagues to their favored method of statutory interpretation. To date, no official has ever suggested resolving the dispute by conducting an official headcount. After all—or so they reason—a method of statutory interpretation is only legally correct, under (2), if it is morally correct. And *most* officials could surely be mistaken about what morality requires.

While Moralandia differs from Factlandia in numerous ways, it is similar in one important respect. Although Moralandian officials agree about what the ultimate criteria of legal validity are—and in particular, accept the proposition that is semantically expressed by (2)—they have widely diverging views about which method of statutory interpretation is legally correct. This is possible because acceptance of the proposition expressed by (2) does not necessitate acceptance of any particular view about the denotation of the concept, *the method of statutory interpretation that is morally correct*. Officials can agree about what the ultimate criteria of legal validity *are* without also agreeing about what follows from them. And if this is the situation they find themselves in, they will have little use for an official headcount, which is merely a procedure for discerning what the ultimate criteria of legal validity are.

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given legal system. Dworkin, *supra* note 6 at 5. While some denotational disagreements are 'empirical', in Dworkin's sense, others clearly are not.

45. *Cf* Andrei Marmor, "The Immorality of Textualism" in *Law in the Age of Pluralism* (Oxford University Press, 2007) 197 at 201-02.

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Like the Factlandian dispute, the Moralandian dispute shows that the natural inference involves a logical non-sequitur. It does not follow from Hartian positivism that, if officials disagree about what the correct method of statutory interpretation is, they are having a theoretical disagreement that can be resolved via official headcount. They may well be having a denotational disagreement that must be settled by alternative means. And although that disagreement could turn on some controverted matter of empirical fact (as in the Factlandia example), the example of Moralandia suggests that it need not do so. Denotational disagreements may also be rooted in fundamental moral disagreements.[46]

4. The U.S. Rule of Recognition

I have so far shown that what I called the 'natural' inference is logically invalid. One cannot validly infer—from the premise that the officials of a legal system disagree about the correct method of statutory interpretation—that they also disagree about the ultimate criteria of legal validity. This raises an important question about the U.S. statutory interpretation debate: Why should we think that it involves a theoretical disagreement? Might not U.S. officials, like the officials of Factlandia and Moralandia, be having a purely denotational disagreement? If they are, there is no reason to expect that they would try to resolve the dispute via official headcount, or that they would refrain from making obviously controversial assertions about what the correct method of statutory interpretation is.

The reader might, however, find it difficult to imagine how the U.S. statutory interpretation debate *could* be a purely denotational one. The goal of this section will be to illustrate this possibility more vividly. The proposal I advance will necessarily be sketchy, since without conducting a detailed empirical investigation of the attitudes and practices of U.S. officials, I could not hope to specify the exact content of the U.S. rule of recognition. My aim will be considerably more modest: I will merely argue that it is *plausible* that the U.S. statutory interpretation debate stems from a denotational disagreement.

Before proceeding, it will be useful to dwell for a moment on what it is that Factlandia and Moralandia have in common. In both nations, there is significant disagreement among officials about what the legally correct method of statutory interpretation is. But there is nevertheless widespread agreement about the desiderata a method of statutory interpretation must satisfy to be legally correct.

46. A skeptic might argue that *any* disagreement about the denotation of a moral predicate must involve some disagreement about what the predicate means. If that is correct, then participants in a moral dispute are invariably using the same moral predicates to express different meanings. That would mean that the Moralandian debate is not a denotational dispute, since there is no single proposition expressed by (2) that all officials accept. For criticism of this view, see François Schroeter, Laura Schroeter & Kevin Toh, "The Limits of Metalinguistic Negotiation: The Role of Shared Meanings in Normative Debate" (2022) 52:2 Can J Philosophy 180 at 186-93. For a defense, see David Plunkett & Tim Sundell, "Disagreement and the Semantics of Normative and Evaluative Terms" (2013) 13 Philosopher's Imprint 1.

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In Factlandia, the sole desideratum is a historical one: It must be the method that the founder of Factlandia endorsed. In Moralandia, the desideratum is a normative one: The method must be morally correct.

An important lesson to be drawn from these examples is that a shared acceptance, among officials, of a set of ultimate criteria of legal validity need not manifest itself as a shared acceptance of any particular method of statutory interpretation. It may instead manifest itself as a shared acceptance of a desideratum, or set thereof, that a legally correct method must satisfy. This raises the question of whether there *are* any generally accepted premises among U.S. officials about the conditions that a method of statutory interpretation must satisfy to be legally correct.

In both Factlandia and Moralandia, officials manifest their shared acceptance of desiderata through common methods of argumentation. Factlandian officials, for example, attempt to vindicate their claims about the correct method of interpretation by advancing historical arguments about who the founder of Factlandia was. If there are shared assumptions among U.S. officials about the desiderata that a method must satisfy, it is natural to expect that they, too, would manifest themselves in common methods of argumentation. And indeed, there are striking similarities in how U.S. officials attempt to vindicate their assertions about which method of statutory interpretation is legally correct. Both when advocating for a particular method of interpretation and when critiquing alternatives, officials appeal—with great frequency—to the value of faithful agency.[47]

As numerous legal scholars have observed, it is a generally accepted premise among U.S. judges that, when interpreting a statute, courts "must act as Congress's faithful agents."[48] Influential textualist John Manning has termed this view the "faithful agent theory."[49] On this view, the relationship between an enacting legislature and an interpreting court is a special kind of principal-agent relationship, in which the court, as fiduciary, must discern and execute the will of its multi-member principal, subject to the limits imposed by the U.S.

47. See Frank H Easterbrook, "Text, History, and Structure in Statutory Interpretation" (1994) 17 Harv JL & Pub Pol'y 61, defending textualism on the grounds that courts "are supposed to be faithful agents, not independent principals" (*ibid* at 63); Richard A Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution" (1986) 37:2 Case W Res L Rev 179, defending purposivism on faithful agency grounds (*ibid* at 189-90); Amy Coney Barrett, "Substantive Canons and Faithful Agency" (2010) 90:1 BUL Rev 109, observing that textualists and purposivists both endorse "the principle that federal courts must function as Congress's faithful agents" (*ibid* at 113); Thomas W Merrill, "Faithful Agent, Integrative, and Welfarist Interpretation" (2010) 14:4 Lewis & Clark L Rev 1565 at 1568; Cass R Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103:2 Harv L Rev 405 at 415; Marmor, *supra* note 45 at 203. See also *West Virginia Univ Hospitals, Inc v Casey*, 499 US 83 at 115 (1991) (Stevens, J., dissenting); *Estate of Cowart v Nicklos Drilling Co*, 505 US 469 at 503 (1992) (Blackmun, J., dissenting); *Zuni Public School District No 89 v Department of Education*, 550 US 81 at 105 (2007) (Stevens, J., concurring); *Thomas v Reeves*, 961 F (3d) 800 at 823 (5th Cir 2020) (Willett, J., concurring).

48. John F Manning, "Textualism and the Equity of the Statute" (2001) 101:1 Colum L Rev 1 at 5 [footnote omitted]. See also *supra* note 47.

49. Manning, *supra* note 48 at 6 [footnote omitted].

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Constitution.[50] Obvious as this proposition might sound to American ears, it clearly does not express any kind of necessary truth about the legal duties of courts to legislatures. A legal system could, for example, delegate to courts the responsibility to construe statutes so as to make the legal system as morally just as possible, without regard for the enacting legislature. American judges would likely regard such an interpretive method as lawless; but this reflects only a contingent fact about the American legal system. The faithful agent theory is therefore a substantive one, in the sense that it expresses something about the American system that could have been otherwise.

While the faithful agent theory enjoys widespread support among U.S. officials, there is nevertheless significant disagreement about what exactly *follows* from the theory. As many scholars have observed, although textualists and purposivists both endorse the principle that courts engaged in statutory interpretation "must function as Congress's faithful agents," they sharply disagree about how exactly a faithful agent would proceed in interpreting a statute.[51] Textualists, who begin from the premise that a statute's actual text is "the only reliable indication of congressional intent," unsurprisingly conclude that a faithful agent will give effect to a statute's text whenever its meaning is clear.[52] Purposivists, who reject the claim that the only intention of Congress that is knowable is the intention to enact a particular text, unsurprisingly draw the opposite inference.

The fact that textualists and purposivists agree about the desideratum that an interpretive method must satisfy, but disagree about which method satisfies that desideratum, raises the possibility that the U.S. statutory interpretation debate may not be so different from the Factlandian or Moralandian debates. In particular, it raises the possibility that U.S. officials may accept, from an internal point of view, the same criterion of legal validity, but disagree about the denotation of a concept embedded in that criterion.[53]

Here is a natural way of giving flesh to this hypothesis. U.S. officials accept, as one of their ultimate criteria of legal validity, the proposition that is semantically expressed by (3):

> (3) A norm is legally valid if it is derivable from a U.S. statute by the method of statutory interpretation that a faithful agent of Congress would employ.

But textualists and purposivists strongly disagree about what follows from this proposition, since they have very different views about the denotation of the concept 'the method of statutory interpretation a faithful agent of Congress would

50. See Merrill, *supra* note 47 at 1567; Posner, *supra* note 47 at 189-90; Sunstein, *supra* note 47 at 415.

51. For example, Barrett observes that the "disagreement between textualists and purposivists is about the role of congressional intent in statutory interpretation, not about the principle that federal courts must function as Congress's faithful agents." Barrett, *supra* note 47 at 113.

52. *Ibid* at 112.

53. Jules Coleman may have this possibility in mind when he distinguishes between: (i) disagreeing about "what the rule *is*"; and (ii) disagreeing about "what *falls under* it." Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001) at 116 [emphasis added]. Coleman points out that judges can disagree about the latter without disagreeing about the former (*ibid*).

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employ'. Each side thinks it denotes their own preferred method. The disagreement does not arise because the parties assign different *meanings* to the words "faithful agent"; both construe the "faithful agent" as an interpreter who gives effect to the will of the enacting Congress. The disputants simply have radically different views about which interpretive methods can reasonably be expected to have this effect. Consequently, they strongly disagree about which methods the faithful agent would employ.[54]

Understood in this way, the U.S. statutory interpretation debate has the same essential structure as its Factlandian and Moralandian counterparts. Officials accept, from an internal point of view, the same ultimate criterion of validity (i.e., (3)) but disagree about how that criterion applies to the facts. If the truth of (3) were itself the subject of official dispute, then by Hartian lights it would be perfectly sensible for officials to resolve the dispute via official headcount. But since, by hypothesis, officials are not disagreeing about the ultimate criteria of validity, they have little use for such a procedure.

In section 2, I examined Watson's view that textualists and purposivists assign distinct but related interpretations to the word 'meaning', and I argued that agreement of this kind is insufficient to ground the existence of a social rule. It could reasonably be asked whether my own response to Dworkin is subject to the very same critique. After all, is a word's denotation not *part* of its meaning? And even if it is not, how is it possible for two people to disagree about a word's denotation without also disagreeing about its meaning? Does not meaning determine denotation?

It is certainly plausible that the meaning of *some* expressions is their denotation. A good example is so-called 'directly referential' terms, such as numerals. How could two people disagree about the denotation of the numeral '7' without also disagreeing about its meaning? Plausibly they could not. Things stand differently, however, with other expressions—for example, many definite descriptions. Suppose we are in perfect agreement about the meaning of the description 'the tallest building in the world'—i.e., both about the meanings of its constituent words and about how they compose to form the meaning of the whole. Would it follow that we also agreed about its denotation? No. You might (correctly) believe that it denotes the Burj Khalifa in Dubai, and I might (mistakenly) think that it denotes Merdeka 118 in Kuala Lumpur, for the simple reason that I was incorrectly told the Burj Khalifa burned down yesterday.[55] Our disagreement would be not about meaning, but about the state of the world. It would therefore

54. On this view, textualist and purposivist judges do in fact disagree about which norms are legally valid, due to a disagreement about the denotation of the concept 'the method of statutory interpretation a faithful agent of Congress would employ'. But it is worth noting, as Aaron Graham does, that even when judges agree about whether a norm is valid, they can still disagree about how to apply it to "an unforeseen and difficult fact-situation." Aaron Graham, "The Standard Picture and Statutory Interpretation" (2023) 36:2 Can JL & Jur 341 at 358. Graham draws on this distinction to offer a different response to the problem of theoretical disagreement, according to which officials disagree about the *application* of valid norms (*ibid*).

55. The Burj Khalifa and Merdeka 118 are, respectively, the first and second tallest buildings in the world.

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be implausible to identify the *meaning* of a definite description with its denotation. Agreement about the former does not entail agreement about the latter.[56]

Notably, on my account, the phrase that is the subject of the denotational disagreement among U.S. officials *is* a definite description—namely, "the method of statutory interpretation that a faithful agent of Congress would employ." I will say more about the semantics of this description below.[57] But given the behavior of other definite descriptions, it should not be surprising that two people could disagree about the denotation of this phrase without also disagreeing about its meaning. On my account, this is just the situation in which U.S. officials find themselves: They disagree about the denotation of a description whose meaning they understand in the same way.

* * *

In the previous section, I showed that a denotational disagreement among legal officials might take the form of either an empirical disagreement, as in Factlandia, or a moral disagreement, as in Moralandia. In light of this distinction, it is natural to wonder whether, on the view recommended here, the denotational disagreement among U.S. officials is Factlandian or Moralandian in character. I have argued that textualists and purposivists disagree about what interpretive methods a faithful agent of Congress would employ. But is this a disagreement about matters of empirical fact? Or is it rather a disagreement about morality?

The question must be framed carefully, since disagreements that are fundamentally factual can sometimes give rise to the appearance of fundamental moral disagreements. For example, two individuals might be in perfect agreement that an action is morally right if and only if it best promotes happiness. They might even be in perfect agreement about what happiness *is*. Nevertheless, they might still frequently disagree about whether various actions are morally correct, because of factual disagreements about which actions best promote happiness. Their disagreement would be fundamentally factual, and only derivatively moral.

Our question, then, is whether the disagreement among U.S. officials about which method of interpretation a faithful agent would employ is a fundamentally factual disagreement, a fundamentally moral disagreement, or both. Each of these possibilities seems worthy of further consideration. But it seems to me that the most obvious answer—and the answer that is consistent with the broadest range of positivist views—is that the disagreement is a fundamentally *factual* one.[58]

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56. Two additional considerations weigh against identifying the meaning of a definite description with its denotation. First, there are definite descriptions that intuitively seem to have meanings, but which clearly do not have denotations—e.g., "the largest integer." There is no largest integer, but the following sentence nevertheless seems true and meaningful: "Two is not the largest integer." Second, knowledge of a word *w*'s meaning is what enables one to understand sentences involving *w*. And one can understand sentences involving a definite description without knowing who or what it denotes (e.g., "the next pope").

57. To anticipate, I will argue that the phrase has a purely descriptive semantics, and that the denotational disagreement arises, as in the Burj Khalifa example, because of a disagreement about the state of the empirical world.

58. 'Soft' positivists, after all, do not deny that whether a norm belongs to a given legal system depends partly on matters of empirical fact. 'Hard' positivists, however, do not admit the existence of moral criteria of legal validity.

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Here is one way of developing this idea. U.S. officials agree that the correct method of statutory interpretation is the method that a "faithful agent of Congress would employ." Officials also agree that a "faithful" agent is one who reliably identifies and carries out the commands of the principal. But officials disagree about an important factual question: Which method of interpretation will enable reviewing courts to reliably do this? I will refer to this question, for short, as the question of which method of statutory interpretation is 'reliable'. Call a method *m* 'reliable' just in case courts employing *m* will, across the long run of cases, correctly identify the shared communicative intentions of enacting majorities more often than courts employing any alternative method.

By a 'communicative intention', I mean an intention to express a message of some kind using a particular set of words. Communicative intentions can be very specific, such as when a speaker uses a sentence with the intention to express a particular proposition. But they can also be quite general and abstract. For example, a group of legislators might enact a statutory provision with the shared *de dicto* intention to convey 'the message it expresses'—even while disagreeing about which message that is. Their shared *de dicto* intention would nevertheless count as a communicative intention, as I am using this term.[59]

To recapitulate, on the view I am proposing, the disagreement between textualists and purposivists is a disagreement about which method of interpretation is 'reliable'. The question of whether a method is 'reliable', in my sense, is a purely factual one. To see this, note first that it is a factual question whether the congressional majority that enacted a statute shared a given communicative intention in so doing. It is also a factual question whether courts employing a particular method of interpretation are statistically more likely to correctly identify the communicative intentions of enacting majorities. But since these factual questions are quite difficult ones, U.S. officials unsurprisingly have not achieved consensus about their answers—i.e., about which method of statutory interpretation is 'reliable'. Textualists maintain that a statute's text is "the only reliable indication of congressional intent." Purposivists disagree. Consequently, there persists significant denotational disagreement about which methods of interpretation a faithful agent would employ.[60]

It could be objected that my view's emphasis on shared communicative intentions renders it questionably consistent with textualism. After all, is it not a commitment of textualists that enacting majorities frequently *do not* understand

59. *X* intends, *de dicto*, to ϕ the ψ if *X* intends to ϕ what *X* conceives of as the ψ. For example, you and I can both intend, *de dicto*, to invite the greatest singer in the world to our party, without agreeing about who that is, so long as we each intend to invite who we conceive of as the greatest singer in the world.

60. To be clear, I do not purport to have *proven* that textualists and purposivists both accept (3), or that they understand the notion of a 'faithful agent' in the same way. My goal in presenting this hypothesis is just to assist the reader who (i) accepts that what I called the 'natural inference' is invalid, but (ii) nevertheless finds it difficult to imagine how the U.S. statutory interpretation debate *could* be a purely denotational one. My goal is simply to show that this is a coherent possibility—and one which Dworkin's argument from theoretical disagreement wrongly overlooks.

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statutory texts in the very same way and frequently have differing understandings of their purposes? This commitment, however, is perfectly consistent with the view I have articulated. As pointed out above, in enacting a statute, legislators can share a *de dicto* communicative intention without even agreeing about what the text means—much less about what purposes it is intended to achieve.

It might also be thought that my view conflicts with textualism for another reason. According to textualism, it might be objected, legislative intent is not a determinant of the content of the law. It therefore should not feature in a criterion of legal validity. This objection, I think, rests on a more serious misunderstanding. Textualists acknowledge that legislative intent is a determinant of the content of the law. Consider, for example, the doctrine of the scrivener's error, which both textualists and purposivists accept, and which Justice Scalia repeatedly endorsed.[61] The doctrine provides that, when it is absolutely clear that an enacting majority used a different word than the one it intended, courts should give effect to "the meaning genuinely intended but inadequately expressed" and "correc[t] [the] technical mistake."[62] This doctrine clearly acknowledges the legal relevance of communicative intent. Lawrence Solum is therefore right that "textualists should not, do not, and cannot reject the role of communicative intentions in the production of statutory meaning."[63]

If the view I have offered is correct, then what distinguishes textualists from purposivists is *not* that textualists regard communicative intent as legally irrelevant. Nor do textualists and purposivists disagree about the ultimate criteria of legal validity. Both accept (3), and both understand a "faithful agent of Congress" to be an agent who employs a reliable method of statutory interpretation. However, because they disagree about which method of interpretation is reliable, they also disagree about the denotation of the phrase, "the method of statutory interpretation that a faithful agent of Congress would employ." Each thinks it denotes their own preferred method.[64]

For simplicity's sake, I have so far written as though textualism and purposivism are the only plausible candidates for being "the method of statutory interpretation that a faithful agent of Congress would employ." It is worth noting that this is not really the case. A judge could reasonably think that faithful agency

61. See e.g. *United States v X-Citement Video, Inc*, 513 US 64 at 82 (1994) (Scalia, J., dissenting) [*X-Citement Video*]; *Green v Bock Laundry Machine Co*, 490 US 504 at 528-29 (1989) (Scalia, J.) (concurring in judgment).

62. *X-Citement Video, supra* note 61 at 82.

63. Lawrence B Solum, "Disaggregating *Chevron*" (2021) 82:2 Ohio St LJ 249 at 283 (2020). See also Ryan D Doerfler, "The Scrivener's Error" (2016) 110:4 Nw U L Rev 811, arguing that "with respect to communicative intention, even textualists are 'intentionalists' in the relevant sense" (*ibid* at 826 [footnote omitted]).

64. One advantage of this theory is that it explains why judges regard there as being a fact of the matter about what the law is in certain kinds of 'hard cases'—specifically, cases where different methods of statutory interpretation support different legal conclusions. Even while recognizing that not all judges are textualists, and that other methods of interpretation would support a different conclusion in a given case, a textualist judge might still believe that their own conclusion is the legally correct one, based on their belief that textualism is (in fact) the method of statutory interpretation that a faithful agent of Congress would employ.

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counsels in favor of a more eclectic, context-sensitive method, which more closely resembles textualism in some cases and purposivism in others. Abbe Gluck and Richard Posner have shown that eclecticism of this sort is the actual practice of many appellate judges.[65] The widespread use of such hybrid methodologies may indicate that, in the U.S. legal system, a commitment to faithful agency runs deeper than a commitment to any particular school of interpretation. On that supposition, it is unsurprising that judges would display a strong tendency toward eclecticism: Faithful agency might require the use of different tools in different cases.[66]

Although (3), by its terms, applies only to *statutory* interpretation, it might be wondered whether a similar 'faithful agency' criterion could be used to dissolve apparent theoretical disagreements in the realm of constitutional interpretation—e.g., the debate between originalism and living constitutionalism. I take no stance on that difficult question here.[67] Importantly, I do not pretend to have shown that there are *no* theoretical disagreements in the U.S. legal system; I have merely tried to show that certain apparently theoretical disagreements within the realm of statutory interpretation may not be theoretical after all.

5. Conclusion

This paper began with a puzzle: U.S. officials know that there is no consensus among themselves about which method of statutory interpretation is correct, yet they frequently speak as if there is an answer to this question. How can a Hartian positivist explain this fact? Does not the mere fact of official disagreement establish that the U.S. rule of recognition is silent about which interpretive method is correct? And if the rule *is* silent, should officials not realize that their assertions have no basis in fact?

In response to this puzzle, I have argued that even if officials of a given legal system disagree about which method of statutory interpretation is correct, they may nevertheless agree about the requirements that a valid method of interpretation must satisfy. If they do, their rule of recognition may not, in fact, be silent about which method is correct, but rather incorporate the requirements that are the subject of official consensus.

I illustrated this possibility with appeal to two imaginary legal systems, Factlandia and Moralandia, in which official disagreement about the correct method of interpretation coexists with official consensus about the requirements that a correct method must satisfy. I showed that, despite disagreeing about what

65. See Gluck & Posner, *supra* note 3 at 1313-14.

66. Surveyed judges observed that "[we] are doing what the legislature wanted" and "to the extent judges believe it is their job to find out what Congress meant, being eclectic is inevitable." *Ibid* at 1313.

67. At first blush, it might seem obvious that originalists are concerned with faithful agency and that living constitutionalists are less so. But this would be an oversimplification, given the possibility of reasonable disagreement about whether the framers intended the Constitution to be a living document.

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the correct method of interpretation is, Factlandian and Moralandian officials are in perfect agreement about the ultimate criteria of legal validity in their respective legal systems. They disagree only about which interpretive method satisfies a requirement set forth in a criterion that all officials accept. Factlandian textualists, for example, argue that textualism is "the method of statutory interpretation that the founder of Factlandia endorsed." Purposivists argue that it is purposivism that satisfies this description. The officials are therefore embroiled in a 'denotational' disagreement, in which all officials agree about what the ultimate criteria of legal validity are but disagree about the denotation of a concept embedded in a criterion that they all accept.

The possibility of purely 'denotational' disagreements, I argued, invalidates an important inference underlying the argument from theoretical disagreement: that if U.S. officials disagree about what the correct method of statutory interpretation is, then they must also disagree about the ultimate criteria of legal validity. I argued that, like the officials of Factlandia and Moralandia, U.S. officials might be embroiled in a denotational disagreement, in which officials merely disagree about which method of interpretation satisfies a requirement set forth in a criterion of validity that they all accept. If that is correct, then a U.S. textualist's assertion that textualism is the correct method of interpretation is no more surprising or puzzling than a Factlandian textualist's assertion. Each believes that the correctness of their own preferred method of interpretation is dictated by criteria of validity that are accepted even by their opponents.

If this analysis of the U.S. debate is correct, then it is no surprise that U.S. officials do not attempt to resolve their disagreement by conducting an official headcount. This would, according to Hartian positivism, be an appropriate way of settling a theoretical disagreement; but this is not the sort of disagreement they are having. Rather, they are having a disagreement about what follows from a criterion of validity that all officials accept.

Importantly, one need not accept the characterization of the U.S. rule of recognition advanced in section 4 to agree that the argument from theoretical disagreement stands in need of supplementation. To raise a *prima facie* problem for Hartian positivism, the argument must show that U.S. officials disagree about the ultimate criteria of legal validity. But as the examples of Factlandia and Moralandia show, one cannot establish the existence of such a disagreement merely by showing that officials disagree about the correct method of deriving valid legal norms from texts. To shore up the argument, its proponent must provide evidence that officials do not merely disagree about the denotation of a concept appearing in a criterion of validity that they all accept. But since the possibility of a purely denotational disagreement has not heretofore been clearly recognized, this essential showing has not yet been attempted.

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