DOES THE LAW EVER RUN OUT?

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Although laypeople commonly believe that a judge's job is to decide every case as the law requires, a broad consensus exists among legal scholars that the law not infrequently "runs out," leaving the judge to decide the case on extralegal grounds. This Article subjects that consensus to critical scrutiny. Tentatively, the Article concludes that none of the alleged sources of indeterminacy in the law—including permissive rules, balancing tests, vagueness, ambiguity, silence, contradictions, and uncertainty—actually causes the law to run out. More confidently, the Article maintains that the extent to which the law runs out, if it does at all, depends on difficult issues in the philosophy of law, language, and value—issues that parties to the consensus that the law runs out in a significant range of cases do not appear to have worked through to resolution. Casting doubt on the notion that the law runs out has important implications for judicial ethics, the scope of Auer *deference and other legal doctrines, and adjacent scholarly debates such as the debate over the interpretation-construction distinction.*

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INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court held that a court's obligation under § 706 of the Administrative Procedure Act to "decide *all* relevant questions of law" precludes deferring to an agency's resolution of statutory ambiguity.[1] But as the dissent pointed out, if statutory ambiguity is a place where "Congress's instructions have run out,"[2] such that how to resolve the ambiguity is "more a question of policy than of law," then deference does not violate § 706.[3] The majority replied by denying that Congress's instructions ever "run out."[4] "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning;"[5] hence, how to resolve statutory ambiguity is always a "question[] of law."[6]

The *Loper Bright* majority was endorsing what this Article calls "formalism," at least about statutory interpretation: the claim that the law directs the judge to an outcome in all or nearly all cases.[7] The contrary claim endorsed by the dissent is what this Article calls "realism": the claim that in a significant range of cases the law does not direct the judge to any one outcome.[8]

However popular formalism may be among laypeople, it is a veritable object of scorn among academics.[9] Scholars deride the view as "tremendously arrogant"[10] and a "myth,"[11] a reflection of "false hopes,

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1 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) (quoting 5 U.S.C. § 706 (2018)).

2 *Id.* at 2294 (Kagan, J., dissenting).

3 *Id.* at 2299 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).

4 *Id.* at 2266 (majority opinion) (quoting *id.* at 2294 (Kagan, J., dissenting)).

5 *Id.*; *accord* Hughes Gen. Contractors, Inc. v. Utah Lab. Comm'n, 322 P.3d 712, 717 & n.4 (Utah 2014) (rejecting *Chevron* as applied to legal questions because "questions of law . . . ha[ve] a single 'right' answer," *id.* at 717 n.4 (alteration in original) (quoting Murray v. Utah Lab. Comm'n, 308 P.3d 461, 472 (Utah 2013))).

6 5 U.S.C. § 706 (2018).

7 *See* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 111–13 (2010) (using "formalism" in a similar sense). For convenience, this Article usually refers to "the judge" as the one deciding a case, though at trial the factfinder is often the jury, and on appeal a panel of judges or justices decides the case.

8 *See id.* at 112–13 (using "realism" in a similar sense). For this Article's purposes, both claims should be understood as claims about the American legal system, not all possible legal systems.

9 *See, e.g.*, Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006) (recognizing "Hamilton's view of the judge as one who exercises judgment but not will, and Blackstone's view of judges as the oracles of the law," as the "conventional" understanding of the judicial role but adding that "[n]o serious person" believes it (footnote omitted)).

10 Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1077 (2006).

11 John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 217.

at best, or conscious delusions masking ulterior motives at worst."[12] When then-Judge Roberts during his confirmation hearing likened judges to umpires insofar as their role is limited to applying preexisting rules,[13] Erwin Chemerinsky lampooned the analogy as "disingenuous" and "at odds with what every first year law student learns."[14] When then-Judge Sotomayor affirmed during her confirmation hearing that the law "compels conclusions" even in hard cases,[15] Louis Michael Seidman declared himself "disgusted"[16]:

> If [Sotomayor] was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. . . . How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate . . . .[17]

Other scholars rushed to agree.[18] Sotomayor was denounced as ignoring "what any legal professional knows—that the law does not always supply the answer."[19]

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12 David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 BUFF. L. REV. 529, 533 (2014).

13 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of then-Judge Roberts).

14 Chemerinsky, *supra* note 10, at 1070.

15 Transcript, *Sotomayor Confirmation Hearings, Day 2*, N.Y. TIMES (July 14, 2009), http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html [https://perma.cc/W6M9-74XF].

16 Louis Michael Seidman, Wendy Long, Matthew J. Franck, Thomas C. Goldstein, Scott Moss, David R. Stras & Edward Whelan, *The Sotomayor Nomination, Part II*, FEDERALIST SOC'Y (July 13, 2009), https://fedsoc.org/commentary/publications/the-sotomayor-nomination-part-ii [https://perma.cc/9NAA-7W57].

17 *Id.*

18 *E.g.*, Randy Barnett, *Mike Seidman on Sotomayor*, VOLOKH CONSPIRACY (July 14, 2009, 9:08 PM), https://volokh.com/posts/1247620080.shtml [https://perma.cc/4PGF-FVA8] ("[Seidman] deserves much credit for speaking his mind about a continued refrain that really grated on me as well.").

19 Robert Alleman & Jason Mazzone, *The Case for Returning Politicians to the Supreme Court*, 61 HASTINGS L.J. 1353, 1377 (2010); *accord, e.g.*, Brian Leiter, *The Roles of Judges in Democracies: A Realistic View*, 2019 REVISTA FORUMUL JUDECĂTORILOR, no. 1, at 46, 59 (Rom.) ("Every serious scholar who has written about legal interpretation over the last century . . . has recognized that interpretive norms in a given legal system accord judges latitude, perhaps great latitude, in saying what the law is."); Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019, 2021 (2015) ("American lawyers, to one degree or another, all subscribe to the notion that . . . [i]n nearly all interesting cases, . . . there is enough slack [in the law] that a court can come out either way."); MARK C. MURPHY, PHILOSOPHY OF LAW: THE FUNDAMENTALS 76 (2007) (observing that "[a]lmost everyone agrees" that sometimes "the judge is not compelled by the authoritative legal sources to reach one decision rather than another").

This Article offers a tentative defense of formalism. If nothing else, this Article hopes to show that the debate between formalism and realism turns on difficult questions in the philosophy of law, language, and value—questions that formalism's critics do not appear to have worked through to resolution. The point is not so much to demonstrate that formalism is true as it is to challenge those who profess certainty that formalism is false to show their work.[20]

At stake is more than a philosophical disagreement. The Court may have settled the debate over the doctrine from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* in *Loper Bright*.[21] But the viability of other important doctrines—including *Chevron*'s sister doctrine from *Auer v. Robbins*[22]—also turns on whether sometimes the law runs out. Additionally, the formalist-realist debate matters for judicial ethics and scholarly debates in constitutional and other areas of law.

This Article is organized as follows. Part I clarifies the formalist's thesis. Part II motivates the remaining Parts' defense of formalism by explaining formalism's relevance to judicial ethics, contested legal doctrines, and other scholarly debates. Part III presents a positive argument for formalism. Parts IV through VII respond to objections based on permissive rules, balancing tests, vagueness, ambiguity, silence, contradictions, and uncertainty.

I. WHAT IS FORMALISM?

The formalist's thesis—that in all or nearly all cases, there is an outcome that the law directs the judge to reach—contains three key terms. Section A clarifies the meaning of a case's "outcome," Section B states this Article's assumptions about what constitutes "the law," and Section C clarifies the meaning of "directs."

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20 Notably, this Article's argument bears little resemblance to that of the "one well-known defender" of formalism, Ronald Dworkin. Leiter, *supra* note 7, at 116 n.25, 115–16; *see* Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). Whereas Dworkin defended formalism by arguing that moral principles necessarily contribute to determining the content of the law, *see* RONALD DWORKIN, LAW'S EMPIRE 225–58 (1986), this Article accepts the "core insight[] of positivism . . . that law is ultimately just a complex social practice," Charles F. Capps, *The Weaker Natural Law Thesis*, 36 RATIO JURIS 333, 347 (2023). That said, this Article's relationship with positivism is a complicated issue, one best left for another day. *See id.* at 346–47 (arguing that the Public Trust Thesis, which this Article invokes in Part IV, supports a modest natural law theory); Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 LEGAL THEORY 533, 537–39 (1998) (suggesting that positivism requires officials to be able to "recognize law with a high degree of certainty most of the time," a requirement that Part V's epistemicism about balancing tests and vague legal language might not satisfy).

21 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

22 Auer v. Robbins, 519 U.S. 452 (1997).

A. The Scope of the Thesis

When this Article refers to the "outcome" of a case, it means the disposition of the merits or liability phase of litigation. This includes not only decisions "on the merits" in a narrower sense, such as summary judgment, but also dismissals for lack of jurisdiction or for other reasons such as failure to state a claim, as well as dispositions of cases on appeal. The Article's argument is also meant to extend to determinations of the parties' legal rights in the context of the case, such as evidentiary rulings and venue transfers.

The argument is not meant to extend to case administration such as scheduling. It also excludes choice of remedy. This Article's arguments do suggest that, in the criminal context, for example, there is an optimal sentence length that the law requires the judge to aim for (even if she cannot hope to nail it exactly) if she is to impose a prison sentence. But the availability of fines, probation, various forms of community service, and other alternatives in addition to or in lieu of incarceration raises questions about whether there might be multiple optimal sentencing packages in equipoise with each other. A similar point applies in the civil context. Accordingly, this Article stops short of claiming that the law always or nearly always directs the judge to a particular remedy once the defendant is found liable.[23]

B. The Constituents of Legal Content

Although formalism does not entail any view of what constitutes legal content, this Article's defense of formalism presupposes a view in line with the following principles.

A basic distinction in linguistics and the philosophy of language is between what a statement means, which this Article calls the statement's "semantic" content, and what a speaker means by the statement, which this Article calls the statement's "communicative" content.[24] Ironic, idiomatic, and other nonliteral uses of language all involve the use of a statement with one meaning to communicate another meaning. Such uses of language are possible because communication is governed by norms, which this Article follows H.P. Grice in calling "maxims," that a statement's audience can presume the speaker is following.[25] In circumstances where the speaker would be

23 *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 71 (1978) (excluding remedies from his one-right-answer thesis).

24 *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487–89 (2013).

25 *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 22–40, 269–82 (1989).

inexplicably violating these norms if she meant what her statement means, she presumably means something else.[26]

For example, suppose that someone in miserable weather announces that the weather is pleasant. It would so obviously violate Grice's "maxim of Quality," which prohibits communicating what one believes is false or has no evidence is true, to mean that the weather is pleasant that the audience can infer that the speaker means something else.[27] Presumably, this something else is that the weather is miserable: the speaker is using sarcasm to communicate the opposite of what her statement means.

According to one version of what has been dubbed the "standard picture" of law, the legal content of authoritative legal texts is equivalent to their communicative content.[28] This Article agrees with this version of the standard picture that the legal content of authoritative legal statements is equivalent to their communicative content by default, at least in the American legal system.[29] But this Article also agrees with William Baude and Stephen E. Sachs that other rules of law can override this default.[30] Specifically, American law includes second-order rules, which this Article follows Baude and Sachs in calling "priority rules," that resolve conflicts between the communicative contents of first-order legal rules by limiting or voiding the legal content of the rule(s) on one side of the conflict.[31] Priority rules are especially relevant in Part VI, which discusses alleged contradictions in the law.

These assumptions about the constituents of legal content are minimal enough to enjoy widespread even if not universal assent.[32] At any rate, defending them lies outside this Article's scope. Henceforth,

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26 *See* John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 393 (2013).

27 *See* GRICE, *supra* note 25, at 27, 22–40.

28 Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot*, 28 LEGAL THEORY 59, 59–60 (2022) (borrowing the term "standard picture" from Mark Greenberg).

29 This formulation glosses over complications irrelevant here. In addition to the two that Watson discusses, *id.* at 81–82, 85–87, it would be more accurate to identify a text's legal content with *what the publicly available evidence indicates is* the text's communicative content. For texts produced by lawmaking assemblies, this is a distinction without a difference for the reasons explained in subsection V.C.3. Not so for a district court opinion. One should not revise one's view of the opinion's legal content simply because the judge later remarked that she expressed herself poorly and really meant something other than what one would think from reading the opinion.

30 *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017).

31 *Id.* at 1110.

32 *But see* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014) (articulating a theory incompatible with these assumptions).

this Article takes for granted the distinctions introduced in this Section among semantic, communicative, and legal content.[33]

C. Directing the Judge to an Outcome

According to the formalist, the law "directs" the judge to an outcome in all or nearly all cases. To say that the law "directs" the judge to an outcome is to say more than just that there is an outcome that the law uniquely determines as correct. It is also to say that the law guides the judge to this outcome. In other words, the rules that determine the legally required outcome must be rules that a competent judge can follow. Like morality, law is supposed to guide deliberation.[34]

Of course, this guidance may route through other rules. Just as morality might direct a dinner guest to the conduct dictated by the applicable social conventions, the law might direct a judge to the outcome dictated by custom, other jurisdictions' laws, or even morality. So the claim is not that the law "directs" the judge to an outcome "directly," as it were, without referring the judge to extralegal rules. That claim does occasionally go under the label "formalism" in the literature,[35] but it is not the claim at issue here.[36] The claim at issue here is simply that, one way or another, the law directs the judge to an outcome.

Consider an analogy. Obviously, a rule that instructs a person to select any number between one and twenty does not direct the person to a particular number, because there is no number that the rule uniquely determines as correct. But a rule that instructs a person to guess which number between one and twenty a random-number generator selected does not direct the person to a particular number either. Although there is a number that the rule uniquely determines as correct, the rule does not guide the person toward the number because the person cannot even estimate which number it is. All she can do is make a random guess. Whereas a rule that instructs a person to select the number of squares occupied by a full team of chess pieces

33 These distinctions apply primarily to posited rather than customary law. This Article makes no controversial assumptions about the constituents of customary legal content.

34 *See* Holly M. Smith, *Moral Realism, Moral Conflict, and Compound Acts*, 83 J. PHIL. 341, 342–43 (1986) (morality); Brian Leiter, *Law and Objectivity*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 969, 983 (Jules L. Coleman et al. eds., 2004) (law).

35 *E.g.*, JOSEPH RAZ, *On the Autonomy of Legal Reasoning*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 326, 330 (rev. ed. 1995).

36 Nor is it very interesting. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 193 (2010) ("Although it has often been pinned on 'formalists,' the notion that law is autonomous from society is inconceivable, and no U.S. jurist of note has advocated it.").

does direct the person to a particular number, albeit "indirectly" through the rules of chess.

The idea that the law not only determines an outcome but directs the judge to that outcome is especially relevant in Part VII, which considers the objection that even if there is a legally required outcome in close cases, the judge cannot know what it is. Part VII responds by suggesting that the judge can always make at least a minimally educated guess at the right outcome, even if she cannot be confident that her guess is correct. From the perspective of a diligent and competent judge, the trail left by the law never runs out even if sometimes it grows faint. Judges cannot be expected to get every case right according to the law, but they can always try.

II. WHY IT MATTERS WHETHER FORMALISM IS TRUE

The debate between formalism and realism implicates difficult philosophical issues. Before wading into these murky waters, it is worth pausing to explain why the debate matters.

A. Judicial Ethics

First, the extent to which formalism is true should matter to judges and their law clerks. Judges have a pro tanto moral obligation to use their considerable power for good.[37] But judges also take an oath to discharge the duties of their office faithfully.[38] Their oath places judges under a moral obligation to follow the law (or else resign), an obligation that generally overrides the pro tanto obligation to use their power for good to the extent that the two obligations conflict.[39]

This means that judges occupy a morally precarious position. They walk a fine line between being irresponsible stewards of their power and violating their oath of office. The inclination to use their power for good is a moral imperative when (if ever) the law does not direct them to an outcome.[40] But the same inclination is a temptation when the law does direct them to an outcome.[41] Of course, it is possible

37 *See* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 438–39 (2018).

38 28 U.S.C. § 453 (2018).

39 *See* Letter from Joseph Story to Ezekiel Bacon (Nov. 19, 1842), *in* 2 LIFE AND LETTERS OF JOSEPH STORY 430, 431 (William W. Story ed., London, John Chapman 1851) (explaining that his oath required doing his "duty as a Judge . . . be the consequences what they may").

40 *See* Bernstein, *supra* note 37, at 439 (arguing that instead of "[a]sking judges to give up the[ir] discretion . . . we should demand that they exercise that authority well").

41 *See* George Bush, *The Interaction of the Legislative, Judicial, and Executive Branches in the Making of Foreign Policy*, 11 HARV. J.L. & PUB. POL'Y 1, 1 (1988) (recalling Justice Stewart

that sometimes the law directs the judge to identify and adopt the morally best outcome.[42] But even then, the normative basis for reaching that outcome would be the obligation imposed by the judge's oath of office, not the pro tanto obligation to use her power for good. The judge who disregards the law's guidance reaches the right outcome for the wrong reasons if it so happens that the outcome she reaches is the one the law requires.[43]

The point of describing the judge's position as morally precarious is not that judges are culpable anytime they make a mistake about when the law runs out, converting the inclination to seek the best outcome from a temptation into an imperative. Instead, the point is that any such mistake is morally serious. The person confronted with a choice where a mistake would be morally serious is not culpable if she deliberates carefully and makes what she sincerely but wrongly believes is the right choice.[44] But she is culpable if she makes the wrong choice after shrugging off the question as unworthy of deliberation.[45]

Judges should therefore take seriously questions about the extent to which formalism is true. Judges who wish to be responsible stewards of their power cannot assume uncritically that formalism is true. When (if ever) the law runs out, responsible stewardship of power requires independent pursuit of the morally best outcome.[46] But judges who wish to be true to their oath likewise cannot assume uncritically that formalism is false. When the law does direct the judge to an outcome, the judge's oath requires her to reach that outcome.[47] In sum, for judges who want to be both faithful to their oath and responsible stewards of their power, as well as for law clerks who seek to assist judges in these endeavors, the formalist-realist debate matters.

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saying that his "greatest difficulty on the bench was to avoid the temptation to allow his sense of what was good policy to substitute for his judgment of what the law required").

42 *See infra* Part IV.

43 As Ethan J. Leib and Stephen R. Galoob explain, judicial norms "are deliberation sensitive" in that they "directly impose requirements on how judges deliberate," not just on what outcomes they reach. Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1849, 1849–51 (2016).

44 *See* William J. FitzPatrick, *Moral Responsibility and Normative Ignorance: Answering a New Skeptical Challenge*, 118 ETHICS 589, 612 (2008).

45 *See id.* at 607 (concluding that someone who does something not realizing it is morally wrong might be blameworthy if he "could reasonably have been expected to have done a better job of informing himself morally"); THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 6, art. 8 (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (explaining that ignorance is culpable if "one does not actually consider what one can and ought to consider" or "does not take the trouble to acquire the knowledge which one ought to have").

46 *See* Bernstein, *supra* note 37, at 441 ("[F]acing indeterminacy head on serves our democratic aspirations better.").

47 *See* Letter from Joseph Story to Ezekiel Bacon, *supra* note 39, at 431.

B. Legal Doctrine

Second, the formalist-realist debate has important implications for concrete legal doctrines. Take *Auer* deference, which operates like *Chevron* deference applied to agencies' interpretations of their own regulations. Under *Auer*, a court must defer to an agency's reasonable interpretation of its own regulations when, but only when, "th[e] legal toolkit is empty and the interpretive question still has no single right answer."[48] That is, the court should defer to the agency when, but only when, "the law [otherwise] runs out."[49] But if formalism is true, then the law virtually never otherwise runs out. Therefore, if formalism is true, then courts should virtually never invoke *Auer* deference.[50]

Arguably, the only way to avoid this conclusion is to frame the Court's insistence that *Auer* deference applies only when "the law [otherwise] runs out"[51] as an exaggeration. For example, one might argue that what the Court really meant was that courts should defer to the agency when the question is sufficiently difficult.[52]

The problem is that expanding *Auer* deference in this way renders it vulnerable to the charge of unlawfulness. Similarly expanded, the *Chevron* doctrine appeared to violate § 706, as the Court noted in *Loper Bright*, and the same logic applies to the expanded *Auer* doctrine.[53] Moreover, the expanded versions of both doctrines have a deeper, constitutional problem. Insofar as they require deferring to the agency even when the law directs the court to an outcome, they cede the authority to settle disputes about parties' legal rights and obligations to the agency. Yet the Constitution confers this authority on the judicial branch,[54] and the Constitution's separation of powers bars the judicial branch from delegating its authority to the executive branch.[55] Critics

48 Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

49 *Id.*

50 *See id.* at 2430 (Gorsuch, J., concurring in judgment) (criticizing *Auer* on the ground that judges can always use their "interpretive toolkit, full of canons and tie-breaking rules, to reach a decision about the best and fairest reading of the law").

51 *Id.* at 2415 (majority opinion).

52 *E.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (arguing that *Chevron* prescribed deference "not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist").

53 *See Kisor*, 139 S. Ct. at 2432–33 (Gorsuch, J., concurring in judgment) (arguing that *Auer* violates § 706).

54 *See* U.S. CONST. art. III; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

55 *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–25 (1995).

of *Chevron* and *Auer* routinely attack them on this ground,[56] which may explain why courts have reverted time and again to the narrow formulations of the doctrines that describe them as applying only when the law runs out.[57]

Thus, formalism has implications for *Auer* deference as well as *Chevron* deference. Formalism suggests that both doctrines must land in either the frying pan of irrelevance or the fire of unlawfulness.[58]

Interestingly, formalism cuts *in favor of* agency discretion in another context. Under 5 U.S.C. § 701(a)(2), agency action "committed to agency discretion by law" is exempt from ordinary procedures of judicial review.[59] The Court has held that this is "a very narrow exception"[60] applicable only when the governing statute is "drawn in such broad terms that . . . there is no law to apply."[61] If formalism is true, then this interpretation makes § 701(a)(2) a virtual nullity. This suggests that the category of agency actions falling under § 701(a)(2) is broader than the Court has recognized.

Nor is the doctrinal relevance of the formalist-realist debate limited to administrative law. Consider an example from civil procedure. Under *Erie Railroad Co. v. Tompkins*, a federal district court sitting in diversity must apply the substantive law of the state in which it sits.[62] "Where there is no state law [on] point, the federal court must determine what the state supreme court likely would do when faced with a similar case."[63] Courts routinely conduct "*Erie* guesses" after concluding that there is no state law on point.[64] Yet if formalism is true of the

56 *E.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2274–75 (2024) (Thomas, J., concurring); *Kisor*, 139 S. Ct. at 2437–40 (Gorsuch, J., concurring in judgment); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1209–10 (2016).

57 *See, e.g.*, *Kisor*, 139 S. Ct. at 2415 (*Auer*); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) (*Chevron*); *accord* Frederick Liu, Chevron *as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 291 (2014). *But see Loper Bright*, 144 S. Ct. at 2274–75 (Thomas, J., concurring) (arguing that this response avoids the problem of delegation of judicial authority only to create a problem of delegation of legislative authority).

58 To be sure, counterarguments are available. *E.g.*, *Loper Bright*, 144 S. Ct. at 2301–03 (Kagan, J., dissenting) (arguing that *Chevron* deference is consistent with § 706 if understood as a standard of review). This Section suggests only that formalism is relevant to debates about administrative deference doctrines, not that it is dispositive.

59 5 U.S.C. § 701(a)(2) (2018).

60 Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

61 *Id.* (quoting S. REP. NO. 79-752, at 26 (1945)). *But see* Webster v. Doe, 486 U.S. 592, 607 (1988) (Scalia, J., dissenting) ("Our precedents amply show that 'commit[ment] to agency discretion by law' includes, but is not limited to, situations in which there is 'no law to apply.'" (alteration in original) (quoting Doe v. Casey, 796 F.2d 1508, 1517 (D.C. Cir. 1986))).

62 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71–80 (1938).

63 Holler v. United States, 724 F.2d 104, 105 (10th Cir. 1983).

64 *See, e.g.*, Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475, 482–84 (5th Cir. 2008).

relevant state's legal system, then an *Erie* guess is virtually never appropriate, because there is virtually always state law on point.

True, courts sometimes describe *Erie* guesses as appropriate whenever "the state supreme court has not yet addressed the issue."[65] Insofar as state law may dictate a position on the issue before the state supreme court weighs in, this formulation allows for *Erie* guesses even if formalism is true. But like expanding *Chevron* and *Auer* to all difficult questions, expanding the doctrine of *Erie* guesses in this way risks rendering it unlawful. By statute, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[66] Thus, formalism suggests that the doctrine of *Erie* guesses also must land in either the frying pan of irrelevance or the fire of unlawfulness.[67]

C. Other Scholarly Debates

Third, this Article's arguments have independent relevance to other scholarly debates. Consider two debates about the interpretation-construction distinction, where interpretation seeks the meaning of the legal text and construction the legal effect of the text once its meaning has been established.[68] First, many scholars claim that the "construction zone" is sizable—especially in the constitutional context—because the search for meaning often fails to yield a determinate answer.[69] This Article's arguments lend support to scholars on the other side of the debate who maintain that the construction zone is

65 *E.g.*, Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc., 249 F.3d 450, 454 (6th Cir. 2001).

66 28 U.S.C. § 1652 (2018); *see also Erie*, 304 U.S. at 71 (quoting 28 U.S.C. § 725 (1934)).

67 Again, counterarguments are available. One could argue that the best prediction of what the state supreme court would decide always tracks the legally required outcome, either because no state supreme court ever gets a case wrong or because every state's rule of recognition is such that what the state supreme court will do constitutes the legally required outcome. *But see* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 270 (1997) (noting the "manifestly silly implications" of the latter idea, including that "a [state supreme court justice] who sets out to discover the 'law' on some issue upon which she must render a decision is really just trying to discover what [the court] will do").

68 *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013).

69 *See, e.g.*, Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 80–81 (2016).

small.[70] Second, many scholars treat adjudication in the construction zone as "political" rather than legal.[71] Again, this Article's arguments lend support to scholars on the other side of the debate who maintain that construction no less than interpretation is guided by law.[72]

To take just one more example, consider the debate over whether common law adjudication is limited to law finding or whether it also involves lawmaking. Long out of fashion, the traditional conception of common law adjudication as an exercise in law finding rather than lawmaking is experiencing a resurgence.[73] This Article's arguments lend support to that resurgence by casting doubt on the notion that lawmaking is inevitable because often there is no law to find.[74]

III. THE CASE FOR FORMALISM

So much for why it matters whether formalism is true. Is it? This Part offers two reasons to think that it is. First, formalists are better positioned than realists to explain why judges who have flipped coins to decide the kinds of close questions where realists claim the law runs out have been sanctioned for doing something legally improper.[75] Second, formalists are better positioned to explain why in their opinions judges virtually always purport to be following the law to an outcome.

Start with the first point. The formalist can say that the coin-flipping judges were sanctioned because what they did was, in fact, legally

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70 *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 958–59 (2021).

71 KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–17 (1999); *see also* Solum, *supra* note 68, at 472 ("[C]onstruction is essentially driven by normative concerns."); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 70 (2010) (stressing the need for "a normative theory for how to construe a constitution when its meaning runs out").

72 *E.g.*, Baude & Sachs, *supra* note 30, at 1129–30. Insofar as it remains guided by law, "construction" may be a misleading term for adjudication after interpretation runs out. *Cf.* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 117–24 (2017) (suggesting that burdens of proof may guide courts faced with interpretive indeterminacy).

73 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2275–76 (2024) (Gorsuch, J., concurring); Tyler B. Lindley, *Interpretive Lawmaking*, 111 VA. L. REV. 253, 255–61 (2025); Micah S. Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279, 285 (2022); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 529 (2019).

74 *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938). *But see* JOSEPH RAZ, *The Inner Logic of the Law*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS, *supra* note 35, at 238, 249–50 (observing that the law can direct the judge to an outcome by directing the judge to a new legal rule to make).

75 *See* Jud. Inquiry & Rev. Comm'n v. Shull, 651 S.E.2d 648, 659–60 (Va. 2007); BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 106 (1993); E.R. Shipp, *Friess Is Barred from Ever Being New York Judge*, N.Y. TIMES (Apr. 7, 1983), https://www.nytimes.com/1983/04/07/nyregion/friess-is-barred-from-ever-being-new-york-judge.html [https://perma.cc/4P8D-YLUF].

improper. True, the law *can* direct a judge to an outcome by means of a random procedure like a coin toss. A rare real-world example is venue in multicircuit challenges to agency actions.[76] But the questions that the law requires judges to decide by means of a random procedure like a coin toss are precisely the questions that judges would not be sanctioned for deciding in that way. On all other questions, there is a different way by which the law directs the judge to an outcome. That is why a judge who decides those questions by coin toss is likely to face censure.

Explaining decisions to sanction judges who have decided close questions by coin toss is harder for the realist. Unlike the formalist, the realist does not have the option of saying that flipping a coin to decide the kinds of questions where she claims the law runs out is, in fact, legally improper. Realists have tried saying this. But they have no way to reconcile it with their realism.

For example, Joseph Raz suggests that when the law runs out, the judge has a professional obligation to select the morally best outcome; hence, the judge who decides a close question by flipping a coin violates a legal duty insofar as she turns to something other than morality for an answer.[77] But as a source of professional obligations for a legal official, the norm to select the morally best outcome when the law has otherwise run out is a legal norm—a point that, his commitment to hard positivism notwithstanding, Raz cannot dispute given that he appeals to the norm to explain why the judge who decides a close question by coin toss "violate[s] a *legal* duty."[78] So if this norm directs the judge to an outcome, then the law directs the judge to an outcome. And if the norm does not direct the judge to an outcome (that is, if morality runs out too), then no explanation has been offered for why deciding the question by coin toss is legally improper.

Timothy Endicott offers another suggestion: to ensure that judges do not indulge the temptation to give up before reaching the legally required outcome when one does exist, they must cultivate a strict habit of "not at any stage giv[ing] up and say[ing] that there is no answer."[79] This means "always tr[ying] to give effect to the rights of the

76 *See* 28 U.S.C. § 2112(a)(3) (2018) ("The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed . . . , and shall issue an order consolidating the petitions for review in that court of appeals.").

77 Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 843 & n.37, 847–48 (1972).

78 *Id.* at 847 (emphasis added).

79 TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 201 (2000). Endicott does not say whether he regards this as a legal or merely moral duty. Because a merely moral duty cannot explain why flipping a coin is legally objectionable, this Part considers Endicott's suggestion interpreted as proposing a legal duty.

parties" even when doing so is impossible because the parties have no legal rights to which a decision can give effect.[80] "The need for judicial discipline is a conclusive reason not to flip coins, even in secret, even when (if ever) it is clear to the judge that the law does not resolve the matter."[81]

One problem with Endicott's suggestion is that the judge who realizes that the law has run out cannot but give up the search for the right answer. For a judge in that situation, any way of making a decision is doing something other than "tr[ying] to give effect to the rights of the parties."[82] Given the judge's duty to decide even close cases,[83] this means that the law not only permits but requires the judge to give up trying to follow it to an outcome.

But the more fundamental problem with Endicott's suggestion is that, like Raz's, it plays right into the formalist's hand. If the realist wishes to appeal to the norm to try to vindicate the parties' legal rights even when the law has run out to explain why deciding close questions by coin toss is legally improper, then the realist must recognize this norm as a legal norm. Thus, if the norm directs the judge to an outcome, then the law directs the judge to an outcome. And if the norm does not direct the judge to an outcome, then no explanation has been offered for why deciding the question by coin toss is legally improper.

The failure of Raz's and Endicott's suggestions illustrates the futility for the realist of explaining why flipping a coin is legally improper by pointing to a decision procedure that the judge is professionally obligated to follow instead. If the decision procedure yields an outcome, then the realist has conceded to the formalist; if the decision procedure does not yield an outcome, then the realist has not explained why flipping a coin is legally improper.

The alternative strategy for the realist who wants to say that deciding close questions by coin toss is legally improper is to suggest that although no one decision procedure is legally required when the law has otherwise run out, certain decision procedures are legally prohibited. And one of them is flipping a coin.

But this will not do either. The realist cannot plausibly limit the prohibition to coin tosses. For starters, other random procedures are equally objectionable. Some propose a general prohibition against

80 *Id.*

81 *Id.*

82 *Id.*

83 Roy Sorensen, *Vagueness Has No Function in Law*, 7 LEGAL THEORY 387, 391 (2001) ("[T]he judge has a professional obligation to adjudicate the case and so must issue a decision.").

luck-based decision procedures,[84] but this is still too narrow: it would permit flipping a weighted coin or holding a trial by combat. The narrowest prohibition that *is* broad enough to suit the realist's needs is a norm against decisionmaking that is arbitrary in the sense that it is insensitive to "what is important in the choice situation."[85] Yet this prohibition is too broad for the realist to endorse. As Elijah Millgram points out, "Selection techniques whose results are not *entirely* explicable in terms of their sensitivity to what is important in the choice situation will to that extent produce results that are arbitrary with respect to what is important in that choice situation."[86] Thus, if ever the balance of relevant considerations failed to favor either outcome, then any way of selecting an outcome would be arbitrary. Given the judge's duty to decide the case, this means that the law would not only permit but require the judge to render an arbitrary decision. So the realist who wishes to explain why flipping a coin is legally improper must insist that the balance of relevant considerations always favors one outcome over the other. And this plays right into the formalist's hand, because the only nonarbitrary decision when the balance of relevant considerations favors one outcome is to select that outcome.

In sum, saying that deciding close questions by coin toss is, in fact, legally improper is not a viable option for the realist. She must find another way to explain the decisions to censure coin-flipping judges.

What other explanations are available? The realist could try construing the decisions as reprimands for doing something legally permissible but morally impermissible. But the institutions that censured the judges were not condemning alleged moral failings that were none of their business, like an overzealous moral vegetarian who fires a subordinate for eating meat even though vegetarianism is irrelevant to the subordinate's job. They were censuring the judges for allegedly violating their professional and thus legal obligations.[87]

Ultimately, the realist has two viable options: she can say that the censuring institutions were insincere, or she can say that they were confused. Both explanations are possible. Perhaps the institutions were insincere because they wanted to save face before a public deluded by formalism. Or perhaps they were insincere because they wanted to sustain the delusion. According to John Hasnas,

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84 *See, e.g.*, Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 447 & n.11 (2004).

85 ELIJAH MILLGRAM, ETHICS DONE RIGHT: PRACTICAL REASONING AS A FOUNDATION FOR MORAL THEORY 278 (2005).

86 *Id.* (emphasis added).

87 *See* Jud. Inquiry & Rev. Comm'n v. Shull, 651 S.E.2d 648, 658–59 (Va. 2007) (describing the coin toss as a violation of canons of professional conduct and an affront to "the judicial process," *id.* at 659).

> If it has been known for 100 years that the law does not consist of a body of determinate rules, why is the belief that it does still so widespread? . . . The answer is . . . that the rule of law is a myth and like all myths, it is designed to serve an emotive, rather than cognitive, function. The purpose . . . is to enlist the emotions of the public in support of society's political power structure.[88]

But although cynical stories like this are possible, they are not prima facie plausible. They are explanations to which one should resort only after exhausting simpler, more charitable alternatives. The same goes for the hypothesis that the institutions were confused. Though morally more charitable than the insincerity explanation, the confusion explanation is epistemically less charitable and equally convoluted; hence, it too should be entertained only after exhausting simpler, more charitable alternatives. And the much simpler and more charitable explanation for why judges, judicial-oversight institutions, and the public act as if judges have a professional obligation to decide even close questions by following the law is that judges do, in fact, have a professional obligation to decide even close questions by following the law.

Proceeding to this Part's second point, a similar dialectic plays out when the realist is asked to explain why judicial opinions read the way they do. Virtually never do judicial opinions acknowledge that the law has run out and confess to selecting a disposition on extralegal grounds. Instead, they consist of an argument that concludes with an assertion to the effect that a particular outcome is legally required.[89] But if realism is true, then often neither outcome is legally required. Thus, the realist must say that judges are either insincere[90] or confused.[91] Similarly, the realist must say that law clerks—especially at the appellate level—who always purport to follow the law to a recommended outcome in their bench memos are either insincere or confused. Once again, the realist must posit either insincerity or confusion to explain the data. Although both explanations are possible, neither is prima facie plausible. The much simpler and more charitable explanation is that the judges and their law clerks recognize that their job in all or nearly all cases is to follow the law to an outcome.

In conclusion, formalism offers the prima facie most plausible explanation both for why judges are disciplined for deciding even close

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88 Hasnas, *supra* note 11, at 217.

89 *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2012 (2002) (observing that "the Supreme Court's opinions rarely acknowledge . . . indeterminacy" and "are written to make it seem that there is only one correct result").

90 *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 194–212 (1997).

91 *See, e.g.*, Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 872–73 (1988).

questions by coin toss and for why in their opinions judges virtually always purport to be following the law to an outcome. If the realist can show that formalism is independently implausible, then it might become necessary to entertain other, more complicated explanations. But the burden of persuasion lies with the realist. The remainder of this Article considers the arguments that realists have advanced to carry this burden.

IV. PERMISSIVE RULES

The first argument is based on permissive rules.[92] Consider appellate review of claims that were forfeited—that is, not timely raised—in the trial court.[93] Although generally a court may not sustain a forfeited claim, Federal Rule of Criminal Procedure 52(b) provides that the court "may" (not "must") correct a plain forfeited error that affects substantial rights.[94] Thus, it seems that if an appellant forfeited a claim of error, but the error was plain and affected substantial rights and nothing else precludes or requires reversal (for example, the case is not moot), then the law permits but does not require the court to reverse. In that case, the law would not even determine an outcome, let alone direct the judge to it.

To see what this argument overlooks, consider what distinguishes a legal system from a sophisticated regime of mob rule. The mafia officials may have all the characteristic powers of legal officials, including the power to create, abolish, or alter the rules that their subjects generally obey[95] and the power to settle disputes about how those rules apply in particular cases.[96] What distinguishes legal officials from officials in a sophisticated system of mob rule is not their powers but their obligations. Unlike systems of mob rule, paradigmatic legal systems include a norm requiring their officials "to exercise whatever discretion the other rules of the system leave them in service of the common good."[97] "[W]hen a Mafia don terrorizes a neighborhood, we don't think that he has abused his power."[98] In contrast, officials in a paradigmatic legal system "who use their authority otherwise than in service

92 *See, e.g.*, Raz, *supra* note 77, at 846.

93 Occasionally the trial court must undertake the same review. *See, e.g.*, United States v. Mayes, 606 F. Supp. 3d 1127, 1130 & n.3 (W.D. Okla. 2022) (treating an argument first raised in a new-trial motion as forfeited).

94 FED. R. CRIM. P. 52(b).

95 *Cf.* H.L.A. HART, THE CONCEPT OF LAW 38–42, 94–96 (3d ed. 2012).

96 *Cf. id.* at 96–98.

97 Capps, *supra* note 20, at 342. This Article brackets any deontological constraints on means of pursuing the common good that this norm incorporates.

98 SCOTT J. SHAPIRO, LEGALITY 216 (2011) (emphasis omitted).

of the common good are open not only to moral criticism but also to criticism *qua* legal officials, for abusing their office."[99]

Call the norm requiring legal officials to exercise their discretion for the common good "the Public Trust Rule." As a paradigm case of a legal system, the American legal system includes the Public Trust Rule[100] (indeed, "the phrase [the Founders] used most often" to describe elected office "was 'public trust'"[101]). Hence, American legal officials have a professional obligation to exercise whatever discretion the other rules of the system leave them in service of the common good. And judges are legal officials. Therefore, American judges have a professional obligation to exercise whatever discretion the other rules of the system leave them in service of the common good.[102] As a professional norm of legal office, this obligation is not just moral but legal.[103]

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99 Capps, *supra* note 20, at 342.

100 *See, e.g.*, Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2120 (2019) (arguing that Presidents are legally obligated to exercise their power "in the public interest"); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1121 (2004) ("By the time of the American Revolution, therefore, both defenders and opponents of the Crown had adopted public trust views of government. Both sides agreed that public officials were bound by fiduciary-style obligations."); William Barton, *On the Propriety of Investing Congress with Power to Regulate the Trade of the United States* (1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 49, 52 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (describing "promot[ing] the 'mutual and general welfare'" of the nation as Congress's "business"). *But see* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1498–99 (2020) (warning against reading modern fiduciary-law principles into the Constitution).

101 Natelson, *supra* note 100, at 1086–87; *see, e.g.*, U.S. CONST. art. I, § 3, cl. 7; *id.* art. I § 9, cl. 8; *id.* art. II, § 1, cl. 2; THE FEDERALIST NO. 49, at 342, NO. 57, at 385, & NO. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961).

102 *Cf.* Leib & Galoob, *supra* note 43, at 1846–54 (treating judges as fiduciaries); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013) (same).

103 That the obligation is legal does not entail that it is judicially enforceable. The Senate has a legal obligation to convict only those impeached officers proved guilty at trial, but this obligation is not judicially enforceable. *See* Nixon v. United States, 506 U.S. 224, 231 (1993). The Supreme Court has a legal obligation to respect limits on its subject matter jurisdiction, but that obligation is not judicially enforceable. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) ("We are not final because we are infallible, but we are infallible only because we are final."). So although Samuel Bray, Paul Miller, and Seth Davis may be right that officials' public-trust obligations are not generally judicially enforceable, they trade on a false dichotomy when they conclude that therefore the obligations are merely moral or political. *See* Bray & Miller, *supra* note 100, at 1483 (claiming that the "long history in political thought of the use of trust and agency metaphors for governance" merely "offers moral guidance and political wisdom, not enforceable duties with remedies that can be awarded by courts"); Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1171 (2014) (challenging the idea "that

Return now to Rule 52(b).[104] There are two ways to interpret it. First, one might interpret Rule 52(b) as referring the judge to the Public Trust Rule by providing that the judge is *otherwise* free to correct or not to correct a plain forfeited error affecting substantial rights. On this interpretation, the judge remains under a legal obligation to select the outcome that best promotes the common good. Second, one might interpret Rule 52(b) as partially overriding the Public Trust Rule by providing that the judge is free *without qualification* either to correct or not to correct a plain forfeited error affecting substantial rights. On this interpretation, the judge has no legal obligation to select one outcome as opposed to the other.

The first interpretation is more plausible. Suppose that a judge facing a plain forfeited error affecting substantial rights flipped a coin to decide whether to correct the error. Or suppose that she decided as she did because she recognized that doing so would be *detrimental* to the common good. No doubt the judge would be subject to moral criticism, like the mafia official who exercises her discretion to settle a dispute in a way inconsistent with the common good. But unlike the mafia official, the judge would surely also be subject to criticism for failing to do her job properly. Rule 52(b) does not communicate permission to judges to act like mafia officials for purposes of plain-error analysis.

The point is not limited to Rule 52(b). I am unaware of any permissive rule of American law that is plausibly interpreted as communicating permission for judges to act with caprice.

Moreover, the formalist has a backup argument. Rightly or wrongly, the Supreme Court appears to treat permissive rules not as overriding but as referring the judge to background law. According to the Court, a grant of judicial discretion "does not mean that no legal standard governs that discretion. . . . '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'"[105] In the case of Rule 52(b), the Supreme Court has even narrowed the open-ended inquiry involved in applying the Public Trust Rule by focusing on three factors, holding that correcting a plain forfeited error affecting substantial rights is required if, and permitted only if, the error "seriously

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fiduciary government was a background understanding of legal rights at the Founding" on the ground that "when the Founders raised the theory of fiduciary government, they often did so in connection with political, not judicial, mechanisms for holding government accountable").

104 FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

105 Nken v. Holder, 556 U.S. 418, 434 (2009) (alterations in original) (quoting Martin v. Franklin Cap. Corp., 546 U.S. 132, 139 (2005)).

affects the fairness, integrity or public reputation of judicial proceedings."[106]

Accordingly, the doctrine of precedent requires lower courts facing a plain forfeited error affecting substantial rights to correct the error if and only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. And it requires the Supreme Court to do the same unless and until the conditions for overruling its own precedent are met.[107] This is true regardless of whether the best interpretation of Rule 52(b) is one on which Rule 52(b) overrides the Public Trust Rule. The doctrine of precedent requires courts to treat governing precedents as correct even if they are not.[108]

In sum, permissive rules pose no threat to formalism. They merely refer the judge to the Public Trust Rule. And even if they did not, precedent would require courts to treat at least some of them—such as Rule 52(b)—as if they referred the judge to the Public Trust Rule or a focused version of it.

Three points are in order before proceeding. First, it remains open to the realist to argue that sometimes the Public Trust Rule or the focused version of it prescribed by precedent fails to determine an outcome. But any such argument must rely not on permissions (the Public Trust Rule is not a permissive rule) but on another alleged source of indeterminacy, such as the incommensurability of the values that constitute the common good or the vagueness of precedents. Part V addresses arguments along these lines. For now, it is sufficient to note that permissive rules do not themselves present a problem for formalism.

Second, Congress could in theory override the Public Trust Rule by specifying circumstances where courts may resolve a case in any way whatsoever, with no obligation to promote the common good or apply any other legal rule.[109] Arguably, cases where those circumstances are present would then be counterexamples to formalism. Then again, one could argue that the statute would violate the Due Process

106 *See* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1906 (2018) (quoting United States v. Olano, 507 U.S. 725, 736 (1993)) (must if); *Olano*, 507 U.S. at 732 (quoting United States v. Young, 470 U.S. 1, 15 (1985)) (may only if).

107 *See generally* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (synthesizing the Court's stare decisis jurisprudence).

108 *See* Sachs, *supra* note 73, at 562–63. In this respect, precedent operates like estoppel, claim and issue preclusion, and waiver, all of which direct courts to reason from certain premises even if they are false. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 851 F.2d 742, 745 n.4 (5th Cir. 1988) (proceeding "as if the briefs in question were filed by all defendants," although they were not, because the issue had been "waived").

109 *Cf.* BIX, *supra* note 75, at 95 (noting the "obvious difficulties in making a global claim about legal determinacy" as "it always seems open to a society to create rules or review-processes which incorporate strong discretion" (emphasis omitted)).

Clause.[110] At any rate, the question is hypothetical: I am unaware of any statute that exists or is likely to exist anytime soon that overrides the Public Trust Rule.

Third, the issue of permissive rules is the issue on which this Article's version of formalism most closely resembles realism. Probably most realists think that the judge vested by law with discretion is obligated to decide the case in something like the way the Public Trust Rule requires. They just view this obligation as merely moral, not legal. For the formalist motivated by the idea that the law constrains judges' reliance on their policy views, simply showing that the obligation is legal may seem like an empty victory. Likewise, for someone who thinks that *Auer* applies when the law "runs out" in the sense that it ceases to constrain the judge's reliance on her policy views, showing that the law directs the judge vested with discretion to an outcome by way of her policy views may seem like an empty victory.

But it is important to remember that explicit grants of discretion to judges are rare, and they are not especially relevant to doctrines like *Auer*. Even assuming *Auer* applies whenever the law ceases to constrain the judge's reliance on her policy views,[111] this Part's argument would leave room for *Auer* deference only in special circumstances, such as perhaps where the party adverse to the agency forfeited an argument that the agency misinterpreted its own regulation. That is a small concession.

Of course, the concessions would add up if this Article offered equally conciliatory responses to realists' other arguments. But it does not.

V. GAPS IN THE LAW

The second—and biggest—challenge to formalism is based on the idea that the law contains "gaps," that is, places where it offers insufficient guidance to determine an outcome, let alone direct the judge to that outcome. Section A reviews the features that realists have claimed give rise to gaps in the law. Section B argues that even assuming these features give rise to gaps in the law, closure rules plug not just some but all of the gaps. Section C suggests that the features identified by the realists rarely give rise to gaps in the law anyway.

110 *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in judgment) (suggesting that "a scheme whereby a state official flipped a coin to determine whether to grant clemency" might violate procedural due process).

111 *But see supra* notes 53–58 and accompanying text.

A. Alleged Sources of Gaps in the Law

Alleged sources of gaps in the law include balancing tests, vagueness, ambiguity, and silence.

1. Balancing Tests

Part IV's analysis of permissive rules brings the formalist face-to-face with the challenge of balancing tests. According to Part IV, the judge who is not otherwise subject to legal guidance is legally required to resolve the case with an eye to the common good. But the common good encompasses the people's flourishing in multiple dimensions, including health, friendship, and knowledge. One might think that cases will arise where the candidate outcomes involve trade-offs among diverse values and neither outcome is better or worse than the other overall (rather than better or worse only as to a particular value). In such cases, it seems that the Public Trust Rule does not determine an outcome.[112]

The problem is present in other contexts, too. Balancing tests can be understood as mechanisms to constrain the judgment involved in applying the Public Trust Rule or some other value-laden standard. Whereas the Public Trust Rule directs the court to consider all factors relevant to the common good, balancing tests simplify matters by directing the court to focus on only a few factors. Some tests equip courts with instructions on how to proceed for every permutation of ways the factors could pull. For example, the three-factor test that the Supreme Court has developed to constrain courts' discretion in deciding whether to correct a plain forfeited error affecting substantial rights directs courts to correct the error if and only if *any* of the factors weighs in favor of doing so.[113] But other balancing tests' instructions on how to proceed when the factors pull in opposite directions are nonexistent or incomplete. The four-factor test for the fair use exception to copyright infringement is one example. "Congress, in the Copyright Act, spoke neither to the relative weight courts should attach to each of the four factors nor to precisely how the factors ought to be balanced."[114] Accordingly, courts have held that to assume that "each of the four factors [has] equal weight, essentially taking a mechanical 'add up the factors' approach," is a mistake, and that "a given factor may be more

112 *See, e.g.*, Wolitz, *supra* note 12, at 530–31 (arguing that if "normative theory" is supposed "to determine the single best answer," *id.* at 530, when the law otherwise runs out, the need to "choose between two [or more] incommensurable goods" means that "neither choice is the uniquely right answer," *id.* at 531).

113 *See supra* note 106 and accompanying text.

114 Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1260 (11th Cir. 2014).

or less important in determining whether a particular use should be considered fair under the specific circumstances of the case."[115]

Balancing tests that leave the weighing of a manageable number of factors to the court present the same kind of challenge to formalism as the Public Trust Rule, albeit on a smaller scale. If the factors implicate diverse values, then one might think that cases will arise where those values pull in opposite directions and the balancing test does not determine an outcome.[116]

Finally, common law adjudication can also be understood as partially constrained application of the Public Trust Rule. On this view, precedent establishes presumptions, which are absolute if the precedent is binding and defeasible if the precedent is the court's own which it has the power to overturn, that partially constrain the court's inquiry into what would constitute a just resolution of the case. The doctrine of precedent also informs the inquiry insofar as the precedential effect of the common law court's decision will constrain future decisions. Within the constraints set by past precedent, and sensitive to the new precedent it is setting, the court must resolve the case with an eye to the common good, which means weighing the many competing values at stake.[117]

For simplicity's sake, this Article groups applying the Public Trust Rule, balancing a set of enumerated factors, and common law adjudication together under the heading of applying a "balancing test." The challenge for the formalist is to explain how balancing tests that lack instructions on how to resolve conflicts among different factors can determine an outcome when those factors pull in opposite directions.

2. Vagueness

The second alleged source of gaps in the law is vagueness.[118] A predicate is vague when there is a range of cases where the predicate clearly applies, a range of cases where the predicate clearly does not

115 *Id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)). Another example is the ten-factor test governing "whether a particular defendant is 'in charge of' a project under the Structural Work Act." Noble v. United States, 231 F.3d 352, 357 (7th Cir. 2000) (citing Cockrum v. Kajima Int'l, Inc., 645 N.E.2d 917, 920 (Ill. 1994)). According to the Seventh Circuit, a court should "not just add up the factors" when deciding which party prevails under this test. *Id.* at 359.

116 *See, e.g.*, Virgílio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEGAL STUD. 273, 274 (2011).

117 *Cf.* DWORKIN, *supra* note 20, at 238–39. Because purely custom-based theories of common law adjudication pose less of a challenge to formalism, *see* Lindley, *supra* note 73, at 264–69, this Article sets them aside for argument's sake.

118 *See, e.g.*, ANDREI MARMOR, PHILOSOPHY OF LAW 147 (2011); Raz, *supra* note 77, at 846.

apply, and a range of borderline cases where the predicate neither clearly does nor clearly does not apply. For example, "yellow" is vague. It clearly applies to objects that emit light with a dominant wavelength of around 580 nanometers.[119] It clearly does not apply to objects that emit light with a dominant wavelength of around 600 nanometers; such objects are clearly orange.[120] But it neither clearly applies nor clearly does not apply to objects that emit light with a dominant wavelength of around 590 nanometers;[121] such objects lie on the vague borderline between yellow and orange.

Vagueness poses a serious challenge for the formalist.[122] One might think that there is no right answer to whether a vague predicate applies to a borderline case. Instead, between the cases where the predicate clearly applies and the cases where the predicate clearly does not apply, there is a buffer zone where it is indeterminate whether the predicate applies. In those cases, one might say that applications of the predicate are neither true nor false—this view is called "supervaluationism" in the philosophical literature on vagueness.[123] Or one might say that applications of the predicate are both true and false—this view is called "subvaluationism" in the philosophical literature on vagueness.[124] On either view, there is no basis for favoring the claim that the predicate applies over the claim that it does not apply, or vice versa.

Therefore, one might think, vague legal standards fail to determine an outcome in borderline cases. For example, imagine an ordinance prohibiting yellow houses. In enforcement actions brought against houses that are clearly yellow, the law requires the court to rule for the government. In enforcement actions brought against houses that are clearly not yellow, the law requires the court to rule for the defendant. But in borderline cases, it seems that the law provides no basis for ruling either way.

The problem is not merely hypothetical. Vague predicates are common in the law.[125] For example, "reasonable" is vague and appears

119 *See* HAZEL ROSSOTTI, COLOUR: WHY THE WORLD ISN'T GREY 22 tbl.1 (1983).

120 *See id.*

121 *See id.* at 22 & tbl. 1.

122 *See, e.g.*, McGinnis & Rappaport, *supra* note 70, at 940 ("Vagueness poses the most difficult issue of indeterminacy.").

123 *See* ROSANNA KEEFE, THEORIES OF VAGUENESS 2 (2000).

124 *See* Pablo Cobreros, *Paraconsistent Vagueness: A Positive Argument*, 183 SYNTHESE 211, 211 (2011).

125 John O. McGinnis and Michael B. Rappaport's important observation that "even if a term is vague in ordinary language, it may not be so in legal language" lessens but does not eliminate the problem for the formalist. McGinnis & Rappaport, *supra* note 70, at 946.

throughout the law.[126] Many constitutional provisions are vague.[127] Notably, administrative agencies often must interpret vague language in statutes or their own regulations.[128] And the cases most likely to present themselves for judicial resolution rather than settling out of court are the borderline cases where both parties estimate their chances of success as high enough to justify the expense of litigation.[129]

3. Ambiguity

The third argument for the existence of gaps in the law is based on ambiguity. Ambiguity occurs when there is more than one meaning that a statement can have.[130] For example, "the bank is nearby" can mean either that the riverbank is nearby or that the financial-deposit institution is nearby. Likewise, "the toddler demanded only the cookie" can mean either that the toddler demanded not to have anything besides the cookie or that the only demand the toddler made was to have the cookie.

Ordinarily, there is a right way to disambiguate an ambiguous statement: the statement has the meaning (or meanings—sometimes speakers use ambiguity to communicate a double meaning) that the speaker intends to designate with the words she is using.[131] But it seems that legal provisions authored by multimember institutional entities such as Congress are different. Such entities have no intentions regarding what meaning to designate by means of the words in their statements.[132] Hence, it seems that there is no right way to resolve ambiguities in their statements.[133] In cases that turn on how such an

126 *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam) (qualified immunity standard); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (summary judgment standard).

127 *See, e.g.*, U.S. CONST. amend. IV (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"). *But see* McGinnis & Rappaport, *supra* note 70, at 947–51, 965–66 (arguing that several constitutional provisions, including the Fourth Amendment, are not as vague as they seem).

128 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2411 n.3 (2019) (collecting examples).

129 *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

130 *See* Adam Sennet, *Ambiguity*, STAN. ENCYC. PHIL. (May 22, 2021), https://plato.stanford.edu/entries/ambiguity/ [https://perma.cc/5TAE-FFJL].

131 *See, e.g.*, Kepa Korta & John Perry, *Pragmatics*, STAN. ENCYC. PHIL. (Aug. 21, 2019), https://plato.stanford.edu/entries/pragmatics/ [https://perma.cc/DQ3A-36EU] (noting that linguists generally agree that "resolving ambiguity is a pragmatic process, involving determining which meaning the speaker intends to be exploiting").

132 *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1039 (2017).

133 *See* Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L.Q. 1095, 1100 (1995) ("Nor can interpretation disambiguate an

ambiguity is resolved, it seems that the law provides no basis for ruling in favor of either party.[134]

Again, the problem is not merely hypothetical. Like vagueness, ambiguity is common in the law. For example, in the Second Amendment, it is ambiguous whether "right" refers to a moral entitlement or a conventional entitlement.[135] And in 18 U.S.C. § 1028A(a)(1), the adverb "knowingly" in the phrase "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person"[136] is ambiguous in scope.[137]

4. Silence

The fourth alleged source of gaps in the law is silence: the law's failure to answer a question despite indicating, explicitly or implicitly, that the scope of a legal rule depends on how the law answers the question.[138] One could say that balancing tests, vagueness, and ambiguity all involve silence in this sense: balancing tests are gappy because they are silent about what the court is to do when neither outcome is better overall, vague standards are gappy because they are silent about what the court is to do in borderline cases, and ambiguous provisions are gappy because they are silent about what the court is to do when different disambiguations support different outcomes. But one might think that there are other instances of legal silence too.

One example might be where a statute stipulates that it is using a word or phrase not in its ordinary sense but as a term of art but then offers only an incomplete definition or no definition at all.[139]

Another might be where the law instructs the court that one factor of a balancing test is more important than the others but neglects to specify how much more important.[140] This creates a new problem for the formalist over and above the problem discussed in Section V.A that close value trade-offs seem to have no right answer. Even assuming

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utterance when the intentions of the speaker are unknown or even unknowable, as is often true with statutes or constitutional provisions.").

134 *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881 (1930) (arguing that because "[t]he 'intent of the legislature' is a futile bit of fiction . . . , several choices of results are open" to a judge confronted with statutory ambiguity).

135 U.S. CONST. amend. II; *see infra* notes 222–24 and accompanying text.

136 18 U.S.C. § 1028A(a)(1) (2018).

137 *See* Flores-Figueroa v. United States, 556 U.S. 646, 648–49 (2009).

138 The notion of "silence" employed here resembles Matthew Tokson's idea of a "legal blank slate." Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 601, 601–03 (2018) (defining a "legal blank slate" as "a situation where formal sources of law offer little to no guidance for courts in addressing a broad legal issue," *id.* at 601).

139 *See infra* sub-subsection V.C.4.a (discussing 21 U.S.C. § 848 (2018)).

140 *See, e.g.*, Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (discussing forum non conveniens).

that competing values could be weighed against each other with precision, it seems that by instructing the court to treat one factor as the most important, the law is directing the court to disregard the relevant values' true weights and to treat them as having the weights that the law assigns them. So if the law then fails to assign the values precise weights, it seems that the law provides the court with insufficient guidance on how to resolve cases where the precise weights matter.

An especially influential realist argument from silence is based on canons of construction. Karl Llewellyn famously observed that two or more canons of construction may apply to the same issue yet pull in opposite directions.[141] Pulling in opposite directions does not mean that canons of construction contradict each other. No canon operates as "an absolute requirement"—the canon of constitutional avoidance, for example, does not prohibit ever reaching constitutional questions in statutory interpretation.[142] But pulling in opposite directions does mean that canons of construction are in tension with each other. They are pro tanto principles that delimit each other holistically. The challenge for the formalist is to explain what weights the canons are to have when balanced against each other. It seems that the answer, if there is one, must be found in the law. But the law provides none.

B. Closure Rules as Gap Fillers

The formalist need not resist any of the arguments in Section V.A (though as explained in Section V.C, she certainly can). Even assuming the law would otherwise contain gaps, it includes "closure rules" that plug not just some but all of them.[143] An example of a closure rule is the rule of lenity, which requires resolving indeterminacy in a criminal law in the defendant's favor.[144] For this Article's purposes, it does not matter how many gaps closure rules such as lenity leave open. Whether the remaining gaps are many or few, each is closed by the law's ultimate tiebreakers: burdens of persuasion.[145] Burdens of

141 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

142 *See* Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539, 1552 (2007).

143 *Cf.* Baude & Sachs, *supra* note 30, at 1145–46 (discussing closure rules). *But see id.* at 1146 (conceding that closure rules do not plug all gaps in the law); Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1715 (2010) (asserting that in civil cases "there is no universal interpretive tiebreaker").

144 *See, e.g.*, Shular v. United States, 140 S. Ct. 779, 787 (2020).

145 Anthony D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63, 78–79 (1979) (concluding that thanks to burdens of persuasion, "there are no 'gaps' in the law," *id.* at 79); *see also* LAWSON, *supra* note 72, at 123 ("The adjudicative application of any legal theory can

persuasion instruct the court to adopt the position adverse to the party with the burden unless that party demonstrates from the record by the applicable standard of proof that her position is true.[146]

It is sometimes said that "[q]uestions of law do not have burdens of persuasion."[147] Not so. Summary judgment is a "purely legal inquiry,"[148] yet "the moving party has the burden of persuasion."[149] A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) presents a "purely legal question,"[150] yet the movant has the burden of persuasion.[151] Even if invoked more often to break factual ties, burdens of persuasion are also available to break legal ties.[152]

Burdens of persuasion plug every kind of gap that realists claim to find in the law. If neither of the options that a balancing test instructed the court to weigh were better than the other, then it would not be true that the option favoring the party with the burden of persuasion is better. If ever there was no right way to disambiguate a legal provision, then it would not be true that the disambiguation favoring the party with the burden of persuasion is correct. And if ever a case arose where the law simply did not speak to the critical issue, then it would not be true that the law vindicates the position favoring the party with the burden of persuasion. In each case, the law would require ruling for the party without the burden of persuasion.

Vagueness gaps would be the most interesting. Imagine that the government sues to enforce the ordinance prohibiting yellow houses against a house on the vague borderline between yellow and orange. Assume that the government bears the burden of persuasion and that no other closure rule (such as lenity) applies. On a supervaluationist account of vagueness, it is neither true nor false that the house is yellow. Therefore, the government cannot carry its burden to persuade the court that the house is yellow, and the court must rule for the defendant. But on a subvaluationist account of vagueness, it is both true and false that the house is yellow. Therefore, the government *can* carry its burden of persuading the court that the house is yellow, and the

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handle as much interpretative indeterminacy as the world can throw at it, provided that it knows how to allocate the burden of proof.").

146 *See, e.g.*, Pa. R.R. Co. v. Chamberlain, 288 U.S. 333, 339 (1933), *abrogated on other grounds by* Lavender v. Kurn, 327 U.S. 645 (1946).

147 Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 630 (2019).

148 Avenoso v. Reliance Standard Life Ins. Co., 19 F.4th 1020, 1025 (8th Cir. 2021).

149 Firemen's Fund Ins. Co. v. Thien, 8 F.3d 1307, 1312 (8th Cir. 1993).

150 Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 835 (3d Cir. 2011).

151 *See* Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

152 *See* LAWSON, *supra* note 72, at 117; *see also* Palian v. Dep't of Health & Hum. Servs., 242 A.3d 164, 171 (Me. 2020) ("[W]e review questions of law de novo, and [the appellant] bears the burden of persuasion.").

court must rule for the government. Subvaluationism transforms the burden of persuasion into a privilege of persuasion.

This Article is not the first to point out that closure rules, including burdens of persuasion, can plug gaps that might otherwise exist in the law.[153] Realists have offered two responses.

The first is based on higher-order vagueness.[154] Not only is the first-order borderline between yellow and not yellow vague, but so is the second-order borderline between yellow and the first-order borderline between yellow and not yellow. So it seems that the ordinance fails to determine an outcome in cases where the house is on the borderline between yellow and borderline yellow: there is no right answer to the question whether the judge should (1) treat the house as yellow and rule for the government or (2) treat the house as borderline yellow, invoke the burden of persuasion, and rule for the defendant. Of course, the formalist could posit a second-order closure rule to plug the gap left by the vague second-order borderline. But that would send the formalist off on a regress, because the third-order borderline between (1) yellow and (2) the second-order borderline between (a) yellow and (b) the first-order borderline between (i) yellow and (ii) not yellow is also vague. No matter how many orders of closure rules the formalist posits, the realist can keep pointing out that vagueness exists at an even higher order.[155]

What this response overlooks is that the burden of persuasion covers not only first-order borderline cases but all borderline cases, first- and higher-order alike. Given that the government bears the burden of persuading the court that the house violates the ordinance, the law requires the court to rule for the government if and only if it is true that the house is yellow. And if (as the supervaluationist claims) a vague first-order borderline between yellow and not yellow means that it is neither true nor false of objects on this first-order borderline that they are yellow (as well as neither true nor false that they are not yellow), then a vague second-order borderline between yellow and borderline yellow means that it is neither true nor false of objects on this second-order borderline that they are yellow (as well as neither true nor false that they are borderline yellow). Likewise, if (as the subvaluationist claims) a vague first-order borderline between yellow and not yellow means that it is both true and false of objects on this first-order borderline that they are yellow (as well as both true and false that they are not yellow), then a vague second-order borderline between yellow

153 *See, e.g.*, sources cited *supra* note 145.

154 *See, e.g.*, ENDICOTT, *supra* note 79, at 62; BIX, *supra* note 75, at 31–32; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 73–74 (1979).

155 *See* RAZ, *supra* note 154, at 73.

and borderline yellow means that it is both true and false of objects on this second-order borderline that they are yellow (as well as both true and false that they are borderline yellow). So if supervaluationism is true, then the burden of persuasion requires the court to rule for the defendant whose house is on the second-order borderline between yellow and borderline yellow, because it is not true (albeit not false either) that the house is yellow. And if subvaluationism is true, then the burden of persuasion requires the court to rule for the government, because it is true (albeit false too) that the house is yellow.

The fact that the burden of persuasion covers all borderline cases allows the formalist to turn the tables on the realist. The realist posits a first-order borderline to introduce a gap between clear cases on either side of the borderline. Seeing that the burden of persuasion covers the gap introduced by the first-order borderline, the realist then posits a second-order borderline to introduce a gap between the first-order borderline and the clear cases. But no sooner has the realist introduced a second-order borderline than the burden of persuasion stretches to cover that borderline too. So the realist must posit a third-order borderline, only to see the burden of persuasion stretch to cover that borderline as well. It is now the realist who is off on a regress. No matter how many orders of vagueness she posits, the burden of persuasion will cover them all.

Is there any way out for the realist? Endicott thinks that there is. The argument above relies on the idea that no matter how many orders of buffer zones the realist posits, she will always be stuck with sharp lines where the highest-order buffer zones meet the clear cases on either end. But Endicott proposes a model of vagueness that disavows any talk of a buffer "area"[156] yet insists that, when a predicate φ is vague, there is not only a category of objects x of which we should assert "x is φ" and another category of objects x of which we should assert "x is [not] φ," but also a third category of objects x of which we should both "declin[e] to assert" that "x is φ" and "declin[e] to assert" that "x is [not] φ."[157]

Endicott rightly points out that arguments like the one above gain no traction against a view that does not entail the existence of any buffer area at all.[158] The problem is that it is extremely hard to see how Endicott—or anyone who wants to exploit vagueness to create trouble for formalism—can avoid this entailment. After all, Endicott's third

156 ENDICOTT, *supra* note 79, at 135–36 (arguing that we "should not picture indeterminacy as an area within which neutrality is appropriate," *id.* at 135–36, and "should deny that there is any gap between true and false statements, and also that there is a sharp boundary between them," *id.* at 136).

157 *Id.* at 65–66.

158 *See id.* at 68–69.

category of objects looks an awful lot like a buffer area. Endicott objects to the use of spatial metaphors,[159] but avoiding words like "area," "range," "zone," or "gap" does not make the problem disappear. We could say that without a buffer "area," there is no "gap" for the formalist to close in the first place—or, less metaphorically, we could say that without a third category of objects other than (1) those to which the application of a vague predicate is true (and not false) and (2) those to which the application of the predicate is false (and not true), there are no cases without a right answer to the question whether the predicate applies. Formulated with or without spatial metaphors, the point is the same.

Of course, it remains open to the realist to argue that even if burdens of persuasion enable the law to *determine* an outcome in cases involving higher-order vagueness, uncertainty over where the clear cases end and the highest-order borderline begins prevents the law from *directing* the judge to that outcome. Part VII will address this argument. For now, it is sufficient to conclude that the realist's prospects of showing that closure rules cannot so much as determine an outcome in cases involving higher-order vagueness are dim.

Realists' second response to burdens of persuasion is to observe that the same features that give rise to gaps in other legal provisions can be present in the closure rules themselves, including burdens of persuasion.[160] Perhaps the rule that purports to allocate the burden of persuasion is vague or ambiguous. Perhaps it directs the court to use a balancing test to determine who bears the burden of persuasion. Or perhaps the law is simply silent as to who bears the burden of persuasion. The formalist could speculate that higher-order closure rules might close gaps in lower-order closure rules. But then the formalist is off on a regress: no matter how many orders of closure rules the formalist posits, the realist will keep pointing out that the same features that create gaps in lower-order closure rules can be present in the higher-order closure rules too.[161]

This response fares no better than the first. In the American legal system, the party asking the court to do something—typically, the

159 *Id.* at 135–36; *see also id.* at 90 ("The only way out of these difficulties is a conclusion that graphical representations of the truth values of vague statements are systematically misleading.").

160 *See id.* at 70; HART, *supra* note 95, at 126; *cf.* Baude & Sachs, *supra* note 30, at 1146 (conceding that "there can be uncertainty or disagreement about closure rules too," leading to cases where "closure rules run out").

161 *See* F.E. Guerra-Pujol, *Probabilistic Interpretation*, 38 U. LA VERNE L. REV. 1, 2–6 (2016).

plaintiff—bears the burden of persuasion by default.[162] The law can and sometimes does override this default, for example, by assigning the defendant the burden of persuasion on affirmative defenses.[163] But by default, the burden of persuasion on any given issue lies with the party asking the court to do something.[164] Consequently, the realist cannot appeal to the possibility of indeterminacy as to who bears the burden of persuasion to produce a counterexample to formalism. Who bears the burden of persuasion is itself a legal question; hence, unless the law has provided otherwise, the party asking the court to do something bears the (second-order) burden of persuading the court that the opposing party bears the (first-order) burden of persuasion on the underlying issue.

For example, suppose that a case turns on whether a given standard for assessing the plaintiff's claims is met, and the law instructs the court to use one balancing test to determine whether the standard is met and another to determine who bears the burden of persuasion. And suppose that the impossibility of weighing competing factors precludes an answer *both* as to whether the standard is met *and* as to who bears the burden of persuasion. Then the court must treat the plaintiff as bearing the burden of persuasion because the plaintiff failed to persuade the court that the defendant bears the burden of persuasion, and rule for the defendant.

The default rule that the party asking the court to do something bears the burden of persuasion allows the formalist to turn the tables on the realist once again. Given the default rule, the law has provided closure in advance for any gap that the realist might find in the law. To prevent the default rule from closing a gap in Rule A, the realist must point to a Rule B purporting to override the default rule by reallocating the burden of persuasion as to Rule A and must show that Rule B itself contains a gap. But then the default rule will have already provided closure for this gap too, by allocating the burden of persuading the court on the second-order Rule B issue of who bears the burden of persuading the court on the first-order Rule A issue. To prevent the default rule from closing the gap in Rule B, the realist would need

162 *See, e.g.*, Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005) (starting "with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims"). In a criminal case, the party asking the court to do something is the government. On appeal, it is the appellant. Thus, appeals can involve nested burdens of persuasion, where the defendant-appellant bears the burden of persuading the appellate court that the plaintiff-appellee failed to carry its burden of persuasion below. The same applies to directed-verdict or new-trial motions made by the defendant to the trial court. For motions brought during the litigation, such as motions to exclude evidence or for summary judgment, the movant is the party asking the court to do something.

163 *See id.* at 57.

164 *See id.* at 57–58.

to point to a Rule C purporting to override the default rule as to Rule B and show that Rule C too contains a gap. And so forth. Again, it is the realist who ends up off on a regress. No matter how many gappy higher-order rules purporting to allocate the burden of persuasion the realist posits, the default rule will close the gap in the last rule of the series. And once the gap in the highest-order rule has been closed, the judge can roll up the entire series and reach a decision on the first-order legal question.

Again, it is hard to see a way out for the realist. Maybe, if she is creative enough, she could produce an example where there seems to be no right answer to which party is the one asking the court to do something and thus no right answer to which party bears the burden of persuasion by default. But I cannot think of one.[165] Thus, the realist's prospects for showing that closure rules cannot plug all gaps in the law because closure rules cannot plug gaps in themselves are dim.

C. How Gappy Is the Law Anyway?

This is bad news for the realist, because if she wants to rely on the existence of gaps in the law, then she cannot afford to lose the debate over closure rules. But the formalist can. Even assuming closure rules do not plug *any* of the gaps due to balancing tests, vagueness, ambiguity, or silence, the formalist has strong backup arguments that the gaps due to these features are vanishingly thin anyway. "That explains why [closure rules such as] the rule of lenity rarely come[] into play"[166] and why burdens of persuasion are rarely invoked to break legal ties.

1. Balancing Tests

Start with balancing tests. To make things concrete, consider the *Anderson-Burdick* framework for assessing the constitutionality of burdens on the right to vote.[167] Subject to complications that this

165 Daniel Bodansky suggests interpleader. *See* Daniel Bodansky, Non Liquet *and the Incompleteness of International Law*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 153, 161–62 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999). But the usual rule is that "[e]ach claimant [in an interpleader action] bears the burden of proof in establishing its respective interest." EnerVest Operating, LLC v. Sebastian Mining, LLC, 676 F.3d 1144, 1146 (8th Cir. 2012) (applying Arkansas law). Thus, if the claims were in equipoise, then it is plausible that the court should encourage the claimants to strike a Coasean bargain and, if they fail, return the res to the plaintiff with a declaration that neither claimant carried its burden.

166 Shular v. United States, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring). I owe this observation to Rick Garnett.

167 *See generally* Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992).

subsection ignores for simplicity's sake,[168] the *Anderson-Burdick* framework requires the court to "weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'"[169]

Now, imagine a case where *Anderson-Burdick* balancing clearly favors the government and a case where *Anderson-Burdick* balancing clearly favors the plaintiff. For example, suppose that a jurisdiction has historically operated polling places with generous hours of 6:00 a.m. to 10:00 p.m. on election day. Due to staffing difficulties and safety concerns, the jurisdiction decides to enact a law reducing these hours. A law establishing hours of 6:00 a.m. to 9:00 p.m. clearly should survive *Anderson-Burdick* balancing. A law establishing hours of 6:00 a.m. to 6:01 a.m. clearly should not.

Between these two extremes lies a spectrum of possible laws: one establishing hours of 6:00 a.m. to 6:02 a.m., another establishing hours of 6:00 a.m. to 6:03 a.m., and so forth. Near each extreme is a range of cases where *Anderson-Burdick* clearly determines an outcome. For example, a law establishing hours of 6:00 a.m. to 8:00 p.m. clearly should survive *Anderson-Burdick* balancing, whereas a law establishing hours of 6:00 a.m. to 6:07 a.m. clearly should not.

The controversy centers on the middle of the spectrum. The argument presented on the realist's behalf in subsection V.A.1 that balancing tests are gappy presupposes that there is a buffer zone between the cases where the burdens on the right to vote outweigh the government's asserted benefits and the cases where the government's asserted benefits outweigh the burdens on the right to vote. Buffer-zone theories come in multiple varieties. One would assert that in the buffer zone the benefits are on par with the burdens—not necessarily equal to, but also not greater or less than.[170] Another would assert that the benefits and burdens are not comparable at all.[171] Either way, there is a range of cases where the burdens on the right to vote neither outweigh nor are outweighed by the government's asserted benefits.

But buffer-zone theories are not the only options for analyzing value trade-offs. The epistemicist about value trade-offs would say that, as the closing time moves from 6:01 a.m. toward 9:00 p.m., the burdens on the right to vote continue to outweigh the government's asserted

168 *Compare, e.g.*, Mazo v. N.J. Sec'y of State, 54 F.4th 124, 137 (3d Cir. 2022) (interpreting *Burdick* to prescribe a "sliding scale approach" only if the burden is not severe), *with* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210 (2008) (Souter, J., dissenting) (stating that when applying *Anderson-Burdick*, "we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis").

169 *Crawford*, 553 U.S. at 190 (plurality opinion) (quoting *Burdick*, 504 U.S. at 434).

170 *See, e.g.*, Ruth Chang, *The Possibility of Parity*, 112 ETHICS 659, 662–63 (2002).

171 *See, e.g.*, ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 171 (1969).

benefits up to a point. The epistemicist may or may not allow for a precise point of equipoise. But the epistemicist would assert that the scale flips as soon as another minute—or second—is added to the hours, at which point the government's asserted benefits outweigh the burdens on the right to vote. The epistemicist would recognize that we cannot know for certain where exactly the scale tips from the plaintiff to the government. But the epistemicist would insist that the scale tips somewhere.[172]

The debate between buffer-zone theorists and epistemicists is hotly contested and the subject of a large literature in the philosophy of value. This Article cannot hope to settle the debate. But it does suggest that epistemicism is at least plausible.

Start by considering the primary objection to epistemicism. Epistemicism entails the idea that there is a point on the spectrum of polling hours where adding a tiny amount of time to the polling hours would make the outcome of *Anderson-Burdick* balancing flip from the plaintiff to the government. Even epistemicists concede that "this implication of epistemicism is counterintuitive."[173]

But buffer-zone views imply not one but two such sharp transition points, each of which is at least as counterintuitive as the epistemicist's transition from better to worse.[174] The idea that a small addition to one side can make the difference to which side outweighs the other is at least consistent with the context in which the term "outweighs" has its literal application: when a scale is closely balanced, adding a tiny weight to one side *can* make the difference to which side outweighs the other. Likewise, everyone understands the saying "the straw that broke the camel's back." In contrast, the notion of "parity" as distinct from equality is hard to grasp in the first place, and the idea that a tiny difference could mark the transition from a relation of better and worse to this relation of parity is no easier. And the notion that a tiny difference could mark the transition from options being comparable as better and worse to options not being comparable at all is even more bewildering.[175]

The buffer-zone theorist could try introducing two more buffer zones to eliminate the two sharp transitions that her theory implies.

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172 For defenses of epistemicism, see Moritz Schulz, *Parity Versus Ignorance*, 73 PHIL. Q. 1183 (2023); Paul Forrester, *Epistemicism and Commensurability*, INQUIRY, Dec. 20, 2022, at 1, https://doi.org/10.1080/0020174X.2022.2155870; Edmund Tweedy Flanigan & John Halstead, *The Small Improvement Argument, Epistemicism and Incomparability*, 34 ECON. & PHIL. 199 (2018).

173 Forrester, *supra* note 172, at 14.

174 *See id.*

175 *See id.* at 15 ("How could a small change in one good render it impossible to compare that good with another good, when before the change they were comparable?").

On this view, the spectrum of polling hours would divide into five zones: (1) a zone where the burdens on the right to vote outweigh the government's asserted benefits, (2) a second-order buffer zone between this zone and the first-order buffer zone of parity or incomparability, (3) the first-order buffer zone of parity or incomparability, (4) another second-order buffer zone between this zone and the zone where the government's asserted benefits outweigh the burdens on the right to vote, and (5) the zone where the government's asserted benefits outweigh the burdens on the right to vote.

This only makes the problem worse: the buffer-zone theorist is now committed to *four* sharp transitions. To eliminate them, the buffer-zone theorist would need to introduce four third-order buffer zones. And that would again only make the problem worse, leaving the buffer-zone theorist with eight sharp transitions. The strategy of adding higher-order buffer zones is as hopeless as the strategy of killing a hydra by cutting off its heads. For every sharp transition a buffer zone eliminates, the buffer zone creates two more.

Thus, as far as counterintuitive implications about sharp transitions are concerned, the buffer-zone theorist is no better off, and arguably worse off, than the epistemicist. Quantitatively, the buffer-zone theorist is committed to at least two sharp transitions, whereas the epistemicist is committed to just one. Qualitatively, a sharp transition from better or worse to on par, or from better or worse to incomparable, is at least as counterintuitive as, and arguably more counterintuitive than, a sharp transition from better to worse. Most embarrassingly of all, unless the buffer-zone theorist is willing to multiply higher-order buffer zones endlessly, she must at some point resort to the very kind of epistemic theory she criticizes to account for the sharp transitions with which she is left: because she cannot plausibly claim that we know exactly where these transitions lie, she must insist that the sharp transitions exist despite our ignorance of their precise location.

Meanwhile, epistemicism has a major advantage over buffer-zone theories: it is more parsimonious. The epistemicist posits at most three value relations, each of which is familiar: better, worse, and equal. The buffer-zone theorist posits at least one more, less familiar relation: "on par" or "incomparable." A theory should not multiply categories needlessly. If we are to believe in the existence of such value relations as "on par" and "incomparable," then they must earn their theoretical keep by contributing to an explanation of the phenomena that we want to explain. And the only candidate explanatory need for these relations to satisfy is the apparent need to explain why there is no sharp transition from better to worse. But we have just seen that positing a relation of parity or incomparability to satisfy this apparent need creates two more apparent needs that are at least as urgent: (1) to explain

why there is no sharp transition from worse to on par or incomparable and (2) to explain why there is no sharp transition from on par or incomparable to better. So adding a relation of parity or incomparability to a theory of value leaves the theory with no more, and arguably less, explanatory power. Given that no theory can avoid a sharp transition somewhere, it is better to bite the bullet at the beginning: accept only one sharp transition, from better to worse, and limit the inventory of value relations to the three familiar relations of better, worse, and equal.[176]

At this point, the buffer-zone theorist might protest that, notwithstanding these alleged advantages, epistemicism remains a nonstarter absent a plausible account of how one side of a trade-off between incommensurable values could be better overall than the other. "[I]n the absence of any metric which could commensurate the different criteria," the buffer-zone theorist can insist, neither option can "have a supremacy" over the other prior to the decisionmaker's choosing between them.[177]

But like the objection to a sharp transition, the incommensurability objection also applies to buffer-zone theories. It would be absurd to deny that one side of a lopsided value trade-off is better than the other.[178] Everyone should agree that reducing polling hours to one minute fails *Anderson-Burdick* scrutiny. Likewise, even if health and knowledge are incommensurable, everyone should agree that being cured of a debilitating disease is better than learning how many times George Washington blinked during the seventy-ninth day of his presidency. Thus, everyone—including the buffer-zone theorist—bears the burden of explaining how one side of a trade-off between apparently incommensurable values can be better overall than the other. And there is no reason to assume in advance that the best explanation for how one side of a lopsided trade-off can be better than the other will not apply to closer trade-offs as well.

Furthermore, the epistemicist has a variety of options for meeting the explanatory demand anyway. The most straightforward is to reject value pluralism and claim that all value is reducible to a single

176 *See id.* at 32 (concluding that epistemicism is more "parsimonious" than its rivals and "minimize[s] the number and maximize[s] the plausibility of the sharp transitions between evaluative relations").

177 John Finnis, *On Reason and Authority in* Law's Empire, 6 LAW & PHIL. 357, 374 (1987).

178 *See* Ole Martin Moen, *An Argument for Intrinsic Value Monism*, 44 PHILOSOPHIA 1375, 1380 (2016) ("[W]hen we seek to commensurate two kinds of values, then no matter how different they are, we always seem to be able to arrive at a clear verdict when one of the values in question is made sufficiently large while the competing value is made sufficiently small.").

"supervalue" such as pleasure or preference satisfaction.[179] But rejecting value pluralism is not the epistemicist's only path forward. Instead of identifying options' choiceworthiness with the quantity of a single value they instantiate, the epistemicist could identify options' choiceworthiness with a function of the quantities of the several values they instantiate.[180] No doubt this approach to value trade-offs faces challenges, but one reason to take it seriously is that it provides an intuitive explanation for why one side of a lopsided trade-off is obviously better than the other: the large advantage that one side has as to one value outweighs its small disadvantage as to another value. And the epistemicist has other options, too. She could concede that some value trade-offs do not present themselves to the decisionmaker with either side better than the other but could argue, following Elijah Millgram, that the process of deliberation can itself cause one side to become better than the other.[181] Or the epistemicist could defend an account of "the faculty of *phronesis*, i.e. practical wisdom," on which it enables agents to perceive directly which side of a trade-off is better without further reasoning beyond what is required to understand the options.[182]

Obviously, a thoroughgoing defense of any of these theoretical options for the epistemicist exceeds the scope of this Article. For present purposes, it suffices to conclude that epistemicism is at least plausible as an account of value trade-offs. And if epistemicism is true, then balancing tests virtually always determine an outcome.

The only exceptions are cases of perfect equipoise. Some balancing tests do determine an outcome in equipoise cases, by specifying which side must outweigh the other (as opposed to merely not being outweighed by the other) to prevail. For example, the requirement to admit evidence of a defendant-witness's prior felony conviction for impeachment purposes is triggered if and only if "the probative value of the evidence outweighs its prejudicial effect to that defendant."[183] If

179 *See, e.g.*, *id.* at 1375 (arguing "that there is only one intrinsic value"). *But see* Eden Lin, *Pluralism About Well-Being*, 28 PHIL. PERSPS. 127 (2014) (defending value pluralism).

180 This function may be a simple weighted or unweighted, linear or nonlinear, piecewise or nonpiecewise; it may or may not include interaction terms; and it may or may not be qualified by deontological side constraints. For simple versions of the idea, see Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 CARDOZO L. REV. 1179, 1224–26 (2005), and David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 77 (1990).

181 *See* MILLGRAM, *supra* note 85, at 273–74.

182 *See* Christian Blum, *Value Pluralism Versus Value Monism*, 38 ACTA ANALYTICA 627, 631 (2023) (listing representative defenders of this view).

183 FED. R. EVID. 609(a)(1)(B) (providing that the evidence must be admitted if the probative value outweighs the prejudicial effect); *see also* United States v. Caldwell, 760 F.3d 267, 286 (3d Cir. 2014) (holding that the evidence must be admitted only if the probative value outweighs the prejudicial effect).

the probative value and prejudicial effect are in equipoise, then the probative value does not outweigh the prejudicial effect; hence, the evidence need not be admitted. Other times, though, the language of the relevant standard may simply instruct the court to decide the issue by balancing a given set of factors, without specifying which side prevails in the case of a tie. The *Anderson-Burdick* standard is an example.[184] Even assuming epistemicism is true, balancing tests like *Anderson-Burdick* that lack a built-in tiebreaker contain a gap where the factors that they direct the court to balance are in perfect equipoise. But this is the only concession that the formalist must make, even after setting aside closure rules for argument's sake. And the concession is minimal, because a gap covering only cases of perfect equipoise is vanishingly thin.

In sum, on what is arguably the best theory of value trade-offs, balancing tests always determine an outcome, except in equipoise cases arising under balancing tests without built-in tiebreakers. To be sure, it may be difficult or even impossible to have any confidence in which outcome is better in close cases. The realist can exploit this uncertainty to argue that even if balancing tests *determine* an outcome in close cases, they do not *direct* the judge to that outcome.[185] Part VII will address this challenge. For now, it suffices to conclude that if epistemicism about value trade-offs is true, as this subsection suggests it plausibly is, then the realist's argument that balancing tests do not so much as determine an outcome fails except in equipoise cases arising under balancing tests without built-in tiebreakers. It is only in these rare cases that the formalist needs to rely on closure rules.

2. Vagueness

For similar reasons, the formalist can resist the idea that vagueness gives rise to gaps in the law. Recall subsection V.A.2's example of an ordinance prohibiting yellow houses. Suppose that Bob builds twenty-one houses, numbered 580 through 600, where each house's number corresponds to the dominant wavelength in nanometers of the light reflected by the paint on the house. The government brings an enforcement action against Bob as to all twenty-one houses. The judge must decide which houses violate the ordinance. Clearly, House 580

184 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (plurality opinion).

185 *Cf.* Matthew H. Kramer, *When Is There Not One Right Answer?*, 53 AM. J. JURIS. 49, 54–56 (2008) (arguing that the epistemicist's precise moral principles are useless as a guide in close cases because they are unknowable).

is yellow and thus violates the ordinance; clearly, House 600 is not yellow and thus does not; but what about the houses near the middle?[186]

The realist's argument for vagueness gaps presented in subsection V.A.2 presupposes that there is a buffer zone between the houses of which it is true and not false that they are yellow and the houses of which it is false and not true that they are yellow. Like buffer-zone theories of value trade-offs, buffer-zone theories of vagueness come in multiple varieties. As noted in subsection V.A.2, the supervaluationist would say that it is neither true nor false of houses in the buffer zone that they are yellow, whereas the subvaluationist would say that it is both true and false of houses in the buffer zone that they are yellow. Either way, there is a range of cases where there is no basis for favoring the claim that the house in question is yellow over the claim that the house in question is not yellow, or vice versa.

But buffer-zone theories are not the only options for analyzing vagueness. Like her cousin the epistemicist about value trade-offs, the epistemicist about vagueness asserts the existence of a sharp transition even if we cannot know exactly where it is.[187] The houses are yellow up to a point where they immediately flip to being not yellow. According to the epistemicist, the lack of clarity associated with vagueness is epistemic rather than semantic: it arises from limits in our knowledge of the meanings of terms rather than limits in those meanings themselves.[188] The meaning of a vague predicate is such that its applications to borderline cases are always true or false. But our limited knowledge of the predicate's meaning is such that, when faced with a borderline case, we cannot be confident in our assessment of whether application of the predicate is true or false. For example, the epistemicist might hold that a predicate's extension is a complicated function of, *inter alia*, language users' dispositions regarding when to apply the predicate.[189] Competent language users have a general idea of when other language users are disposed to apply a vague predicate, but no one knows with precision the contours of every language user's dispositions. Therefore, although the line between true and false applications of the vague predicate is precise, no one knows precisely where it is.

Like the debate about value trade-offs, the debate about vagueness is hotly contested among philosophers and the subject of a large literature. This Article cannot hope to settle the debate. But it can highlight some reasons favoring epistemicism over buffer-zone theories.

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186 *See* Ólafur Páll Jónsson, *Vagueness, Interpretation, and the Law*, 15 LEGAL THEORY 193, 194–95 (2009) (proposing a similar example).

187 *See generally* TIMOTHY WILLIAMSON, VAGUENESS (1994).

188 *See id.* at 185–247.

189 *See id.* at 206–07.

One reason is that buffer-zone theorists about vagueness encounter problems with higher-order vagueness that are analogous to the problems that beset their cousins in the debate about value trade-offs.[190] The primary objection to epistemicism about vagueness is that it entails the existence of sharp transitions where there seem to be none—for example, a sharp transition from yellow to not yellow. But for every counterintuitive sharp transition that epistemicism entails, buffer-zone theories entail at least two.[191] The only way for buffer-zone theorists to avoid a sharp transition from yellow to borderline yellow as well as a sharp transition from borderline yellow to not yellow is to posit two second-order buffer zones to cover the second-order vagueness in the term "borderline yellow." But that would only multiply their problems: They would then be stuck with four sharp transitions separating the five zones of (1) yellow, (2) the second-order borderline between yellow and the first-order borderline between yellow and not yellow, (3) the first-order borderline between yellow and not yellow, (4) another second-order borderline between this first-order borderline and not yellow, and (5) not yellow. And adding four third-order buffer zones would only multiply the buffer-zone theorist's problems once more. As in the debate about value trade-offs, adding higher-order buffer zones is like cutting off the heads of a hydra. For every sharp transition that a buffer zone eliminates, the buffer zone creates two more.

Thus, once again, the buffer-zone theorist is no better off, and arguably worse off, than the epistemicist as far as counterintuitive implications about sharp transitions are concerned. And most embarrassingly of all, the buffer-zone theorist must at some point resort to the very kind of epistemic theory she criticizes to account for the sharp transitions with which she is left. These are sharp *semantic* transitions whose precise location the buffer-zone theorist cannot plausibly claim we know. For example, the buffer-zone theorist who, for each end of the yellow portion of the color spectrum (the end adjacent to green and the end adjacent to orange), posits just a single buffer zone between true and false applications of "yellow" is left with two sharp second-order transitions between true and false applications of "borderline yellow," transitions that appear just as vague as the first-order transition between true and false applications of "yellow." To explain these two transitions, the buffer-zone theorist must offer an account of how the determinants of a term's meaning—such as its use by

190 *See id.* at 156–61.

191 ENDICOTT, *supra* note 79, at 77 (observing that "theories . . . that seek to solve the sorites paradox, but also to postulate indeterminacy in borderline cases" risk "denying one sharp boundary only to end up with two").

competent members of the relevant linguistic community—can establish precise boundaries whose location we cannot know with precision. It is hard to see on what grounds the buffer-zone theorist can object to the epistemicist's deployment of exactly the same account to the first-order boundary between true and false applications of "yellow." If we must give an epistemic account of the vagueness of "borderline yellow" anyway, then why not offer the same account of the vagueness of "yellow"?

Meanwhile, epistemicism about vagueness has major advantages over buffer-zone theories, including advantages that have no obvious analogy in the debate about value trade-offs. For example, few supervaluationists will deny the law of excluded middle, which holds that, for any proposition *p*, either *p* or not-*p*. But if *p* is an application of a vague predicate to a borderline case, then the supervaluationist must deny both that *p* is true and that not-*p* is true. This puts the supervaluationist in the unenviable position of having to affirm that either *p* or not-*p* while denying both that *p* is true and that not-*p* is true. For example, the supervaluationist must affirm that either House 591 is yellow or House 591 is not yellow, yet insist that "House 591 is yellow" is not true and "House 591 is not yellow" is not true, either.[192]

For these and other reasons, epistemicism is a plausible account of vagueness.[193] And if epistemicism is true, then vagueness in the law does not give rise to cases where the law fails to determine an outcome.[194] The formalist does not even need to concede the existence of a gap in equipoise cases. Instead, following Timothy Williamson, she can say that "false" is the default truth value in the sense that a proposition is false unless it is true.[195] So in a case where the dispositions of language users and any other relevant determinants of a vague predicate's meaning are perfectly balanced, application of the predicate is not true and hence is false by default.[196]

In sum, on what is arguably the best theory of vagueness, there are no vagueness gaps in the law. To be sure, it may be difficult or even

192 *See* WILLIAMSON, *supra* note 187, at 162–63.

193 *See id.* at 146–54 (raising other problems with supervaluationism).

194 ENDICOTT, *supra* note 79, at 99 ("If [epistemicism] succeeds, then the indeterminacy claim is false, and there is a right answer to any question of the application of vague language used in law-making.").

195 *See* WILLIAMSON, *supra* note 187, at 208.

196 *See id.* John Burgess argues that Williamson's strategy fails because, given a spectrum between orange and red, there is no basis for privileging either color where the spectrum reaches equipoise. John Burgess, *Vagueness, Epistemicism and Response-Dependence*, 79 AUSTRALASIAN J. PHIL. 507, 519 (2001) (Austl.). But Williamson can deny that the color where the spectrum reaches equipoise is either orange or red. The epistemicist must insist on sharp transitions from orange to not orange and from not red to red. She need not insist on a sharp transition from orange to red.

impossible to be confident in whether a vague predicate applies in borderline cases. As with balancing tests, the realist can exploit this uncertainty to argue that even if vague legal standards *determine* an outcome in close cases, they do not *direct* the judge to that outcome.[197] Part VII will address this challenge. For now, it suffices to conclude that if epistemicism about vagueness is true, as this subsection suggests it plausibly is, then the realist's argument that vagueness gives rise to cases where the law does not so much as determine an outcome fails.

3. Ambiguity

What about realists' argument from ambiguity? Recall from subsection V.A.3 that the argument runs as follows: (1) nothing but the author's intentions regarding what meaning to designate by her words can determine the right way to disambiguate an ambiguous statement; (2) the author of legislation produced by an assembly is the assembly; (3) assemblies lack intentions regarding what meaning to designate by their words; therefore, no right way of disambiguating legislation produced by an assembly exists.

The argument proves too much. For example, it implies that there is never a right way to disambiguate federal statutes. And sometimes there is obviously a right way to disambiguate a federal statute. Consider 18 U.S.C. § 2191, which criminalizes "flog[ging], beat[ing], wound[ing], or without justifiable cause, imprison[ing] any of the crew of [a] vessel" within the United States' jurisdiction.[198] It is ambiguous whether the victims that § 2191 makes it a crime to flog, beat, or wound are qualifying vessels or qualifying vessels' crew members. Yet surely there is a right way to disambiguate § 2191: it criminalizes flogging, beating, or wounding qualifying vessels' crew members, not qualifying vessels.

The falsity of the conclusion that there is never a right way to resolve ambiguity in federal statutes means that one of the premises that led to that conclusion must be false. Premise (1) is unassailable. Absent authorial intent, a series of marks or sounds lacks meaning and is not a statement at all.[199] As part of the process of reconstructing the

197 *See* Alex Silk, *Theories of Vagueness and Theories of Law*, 25 LEGAL THEORY 132, 143–44 (2019).

198 18 U.S.C. § 2191 (2018).

199 *See* Larry Alexander & Saikrishna Prakash, "*Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974–78 (2004). Thus, even "textualists necessarily believe in some version of legislative intent." John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005).

meaning that constitutes a series of marks or sounds as a statement, disambiguation requires appeal to authorial intent.[200]

Some deny premise (3), that legislative assemblies such as Congress have no communicative intentions.[201] But this premise is also true. If ever a group can have an intention,[202] it is only insofar as the group's members are cooperating toward "a shared objective."[203] In the case of Congress, the only goal necessarily shared among all members voting for a statute—let alone all members *tout court*—is the goal of enacting the statute's text. Thus, even assuming groups can have intentions, the only intention that can plausibly be attributed to Congress every time it enacts a statute is an intention to enact the statute's text—not an intention to communicate a specific content by means of that text.[204]

The true culprit is premise (2), that a legislative assembly such as Congress is the "author" in the relevant sense of its legislation. It would be more accurate to say that the author is a fictional individual. The communicative content of a federal statute is what the evidence would, *assuming Congress were an individual*, indicate that that individual meant by the words of the statute.[205] Thus, interpreting federal statutes requires indulging in a legal fiction: one must rely on all the contextual indicia of intent that one would rely on if Congress were an individual to determine both what this individual was saying (the statement's semantic content) and what the individual meant by saying it (the statement's communicative content).[206] Such indicia include

200 *See* Alexander & Prakash, *supra* note 199, at 977–78. Importantly, the relevant intention is about what to communicate, not what to accomplish by communicating it. *See infra* note 217.

201 *See, e.g.*, Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 53 (2014).

202 *But see* Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 341 (1992) (defending a reductive account of cooperative activity "in terms of the attitudes and actions of the individuals involved").

203 Ben Laurence, *An Anscombian Approach to Collective Action*, *in* ESSAYS ON ANSCOMBE'S *INTENTION* 270, 293 (Anton Ford et al. eds., 2011).

204 *See* Doerfler, *supra* note 132, at 998 ("[O]n any plausible account of shared agency, Congress . . . is reliably incapable of forming collective intentions other than the bare intention to enact text into law.").

205 *See* Baude & Sachs, *supra* note 30, at 1116 ("We read a statute *as if* it had been written by a sole legislator . . . ."); Doerfler, *supra* note 132, at 983 (arguing that "interpreters of statutes should accept the pretense that statutes have some singular author" even though really "statutes have no unitary author"); TONY HONORÉ, ABOUT LAW: AN INTRODUCTION 94 (1995) (arguing that "the interpreter [of a statute enacted by a legislative assembly] should treat the text as if it represented the views of a single individual" (emphasis omitted)).

206 *See* Doerfler, *supra* note 132, at 986 (defending "fictionalism about legislative intent").

structural features of the statute, other statutes (that is, other things that the same "individual" has "said" in the past), the broader legal context, current events, the needs of society that the statute could address, and so forth.[207] The formalist can say that it is because these indicia point so decisively to an interpretation of § 2191 on which § 2191 criminalizes flogging, beating, or wounding a qualifying vessel's crew members (as opposed to the vessel itself) that the right way to disambiguate § 2191 is so obvious.

The same logic applies to ambiguities in constitutional provisions, state statutes, and even foreign statutes, all of which federal courts are sometimes called upon to interpret.[208] Nearly always, on the fiction that the relevant lawmaking assembly is an individual, the evidence of what it intended to say when it employed ambiguous language favors one among the possible interpretations. All the formalist must concede is that ambiguity gives rise to a gap in the law when the evidence supporting competing interpretations is in perfect equipoise. Only in these rare cases must the formalist fall back on closure rules.

4. Silence

Finally, the formalist can deny that there are any other instances of legal "silence," that is, instances where the law provides, explicitly or implicitly, that the scope of a legal rule depends on how the law answers a question that the law then never answers. Whenever this seems to occur, the formalist can say, closer inspection reveals that (1) the law does answer the question, (2) the scope of the legal rule does not depend on how the law answers the question, or (3) there is no legal rule at issue in the first place. Each of the examples from subsection V.A.4 fits into one of these categories: incomplete definitions of legal terms typically fall into category (1), nonexistent or imprecise specifications of the weights of balancing tests' factors or opposing canons of construction fall into category (2), and missing definitions of legal terms typically fall into category (3).

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207 *See id.* at 1023 (explaining that claims about legislative intent "are made in relation to a context of enactment"); Solum, *supra* note 24, at 507 ("For interpretation of a legal text to succeed in recovering its communicative content, the interpreter must take context into account . . . .").

208 The contours of the fiction may vary by jurisdiction. For example, it may be part of the fiction in some but not all jurisdictions that the legislature is reasonable. *Compare* Doerfler, *supra* note 132, at 1023 (rejecting the assumption in the American context), *with* Kenneth Hayne, *Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?*, 13 OXFORD U. COMMONWEALTH L.J. 271, 277 (2013) (endorsing the assumption in the Australian context).

a. Incomplete Definitions

Consider 21 U.S.C. § 848, which establishes sentencing rules for defendants who were "engage[d] in a continuing criminal enterprise."[209] Section 848(c) explains that "a person is engaged in a continuing criminal enterprise if" certain conditions are met.[210] Notably, § 848(c) does not state that a person is engaged in a continuing criminal enterprise if *and only if* those conditions are met. Read literally, § 848(c) specifies only a set of jointly sufficient conditions for someone to be engaged in a continuing criminal enterprise; it does not specify any necessary conditions.

Thus, § 848 appears to contain a gap. The scope of its sentencing rules depends on not only what is sufficient but also what is necessary for something to constitute a continuing criminal enterprise. And the fact that "continuing criminal enterprise" is a defined term suggests that the court should look not to ordinary language but to the statute's definition to determine what is necessary and sufficient for something to constitute a continuing criminal enterprise. So the scope of § 848's sentencing rules appears to depend on how § 848(c) answers the question what is necessary for something to constitute a continuing criminal enterprise. But § 848(c) appears not to answer that question. Therefore, it seems that the scope of § 848's sentencing rules is indeterminate. They apply if the sufficient conditions specified in § 848(c) are met, but there is no right answer to when else they apply.

The problem with this argument is that semantic content is not the exclusive determinant of legal content. As noted in Section I.B, what a speaker means by a statement can diverge from what the statement means. Ironic, idiomatic, and other nonliteral uses of language involve the use of a statement with one meaning to communicate another meaning. And although Congress does not often employ irony or sarcasm, its statutes' semantic and communicative contents sometimes diverge in other ways. When they do, the statutes' legal content tracks their communicative content rather than their semantic content.

Take § 848, which exemplifies what philosophers of language and linguists call "scalar implicature": communicating the denial of stronger propositions than the proposition one is literally asserting.[211] Literally, the statute says only that a person is engaged in a continuing criminal enterprise *if* certain conditions are met; it does not say that a person is engaged in a criminal enterprise *only if* those conditions are

209 21 U.S.C. § 848(b) (2018).

210 § 848(c).

211 *See* Wayne Davis, *Implicature*, STAN. ENCYC. PHIL. (Jan. 10, 2024), https://plato.stanford.edu/entries/implicature/ [https://perma.cc/ZX6N-VRUB].

met.[212] Yet it is obvious that the biconditional "if and only if" is what Congress meant by the simple conditional "if." Otherwise, Congress would have violated the Gricean "maxim of Quantity," which requires conveying as much information as (albeit no more information than) the purposes of the communication require.[213] The statute's purposes require communicating sufficient *and* necessary conditions for engaging in a "continuing criminal enterprise."[214] Rather than attribute to Congress a flagrant violation of the maxim of quantity, the best interpretation of § 848(c) reads its statement that "a person is engaged in a continuing criminal enterprise if" certain conditions are met as implicating the denial of stronger propositions to the effect that a person is also "engaged in a continuing criminal enterprise if" those conditions are not met but others are.[215]

The use of scalar implicature pervades the law.[216] Where it appears, attorneys and courts routinely acknowledge the implicated content as authoritative.[217] Hyperliteralist interpretations of provisions like § 848 would strike most lawyers as not just erroneous but frivolous.

b. Balancing Tests and Canons of Construction

Balancing tests with imprecisely weighted factors and canons of construction are instances where the scope of the legal rule does not depend on how the law answers the question at issue. For balancing tests, the question is what weights to assign the factors. For canons of construction, the question is how to resolve tensions among opposing canons.

Consider balancing tests first. As explained in subsection V.A.1, balancing tests function as proxies for more complex normative inquiries. To the extent that a balancing test includes no or incomplete instructions regarding how to weigh its factors, the test leaves it to the

212 § 848(c).

213 *See* GRICE, *supra* note 25, at 30.

214 § 848(b).

215 § 848(c).

216 *See, e.g.*, United States v. Spivey, 926 F.3d 382, 385 (7th Cir. 2019) (using "if" to mean "if and only if" when articulating the standard for plain-error review).

217 *See, e.g.*, *id.* Frederick Schauer is thus mistaken to think that formalism requires "literalism." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 532, 530–32 (1988). Schauer reaches this conclusion because he thinks that the only alternative to literalism is purposivism, which is incompatible with formalism. *See id.* at 532–35. He overlooks the possibility that the content of a rule might consist of neither what the rulemaker intends to say as a means to communicating something (literalism), nor what the rulemaker intends to accomplish by means of communicating that thing (purposivism), but the thing that the rulemaker intends to communicate.

judge to decide the factors' weights by reference to the normative inquiry for which the test functions as a proxy.

For example, suppose that a balancing test is best understood as a proxy for how to promote the common good. In that case, the judge applying the test faces a constrained version of the inquiry that she would face if she were applying the Public Trust Rule. Rather than exercising unconstrained judgment regarding which outcome would best promote the common good, the judge must limit her inquiry to the factors specified in the balancing test. The judge must decide which outcome would best promote the common good on the fiction that the factors specified in the test exhaust the universe of relevant considerations. But it remains up to the judge to weigh the factors according to the best theory of the common good that respects the constraint that the factors exhaust the universe of relevant considerations (and, if applicable, the constraint that certain factors are more important than others). Thus, the legally required outcome does not turn on how *the law* answers the question what weight each factor holds in the common good. Instead, the legally required outcome turns on how *the best theory of value that respects the other parameters set by the law* answers the question what weight each factor holds in the common good.[218]

The same reasoning holds if the balancing test is a decision rule not for what would promote the common good but for some other value-laden question. Take the Bill of Rights' prohibitions against "abridging the freedom of speech,"[219] "infring[ing]" "the right of the people to keep and bear [a]rms,"[220] and "inflict[ing]" "cruel and unusual punishments."[221] As noted in subsection V.A.3, such provisions are ambiguous as to whether they protect moral rights,[222] or conventional rights such as historical legal rights,[223] or socially recognized

218 *Cf.* DWORKIN, *supra* note 20, at 225–75 (arguing that judges should balance fit and justification).

219 U.S. CONST. amend. I.

220 *Id.* amend. II.

221 *Id.* amend. VIII.

222 *See, e.g.*, Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 394 (1985) (arguing that "the great clauses of the Constitution . . . name real moral qualities"; hence, the judge should "seek the right answers to the questions of what process is due persons, what liberties of speech and religion are due them, what punishments are cruel, and the like").

223 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) (looking to "this Nation's historical tradition of firearm regulation" to determine the scope of the Second Amendment right to bear arms); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1895 n.28 (2021) (Alito, J., concurring in judgment) ("[T]he Free Speech Clause protects a right that was understood at the time of adoption to have certain defined limits.").

rights.[224] Suppose that the evidence of what the Constitutional Congress meant on the fiction that it was a person favors the first reading as to the Free Speech Clause. In that case, a judge applying a balancing test that the Supreme Court has established for use when applying the Free Speech Clause must assume that the scope of the moral right to free expression is a function of the factors enumerated in the test. The judge must then construct the best theory of the moral right to free expression that respects that assumption. The factors in the balancing test have whatever weight this theory assigns them.[225]

The exercise of this kind of partially constrained judgment is not only commonplace in the law; it is inevitable. The law can constrain a judge's exercise of judgment by limiting the universe of relevant considerations to a manageable set of factors, by stipulating what mental elements make someone culpable, by defining terms, etc. But the law cannot eliminate a judge's exercise of judgment altogether. For example, even if the law constrains a judge's exercise of judgment in interpreting a vague term by providing a definition, questions will arise about how to interpret the definition. At some point, the process of establishing rules about how to interpret other rules must stop, and the law must leave it up to the judge how to apply the last rule in the series.[226]

Canons of construction present a somewhat trickier problem for the formalist. Many canons of construction—the so-called "interpretive" canons—correspond to Gricean maxims of pragmatics.[227] For example, consider the canon of ejusdem generis, which "hold[s] that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."[228] Adapting one of Geoffrey Miller's examples, imagine an ordinance prohibiting bringing "cats, dogs and other animals" into a public museum.[229] Ejusdem generis would direct a court

224 *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (looking to "evolving standards of decency" to ascertain the scope of the Eighth Amendment right against cruel and unusual punishment).

225 *See generally* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011) (exemplifying this approach to free speech doctrine generally).

226 *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 201 (G.E.M. Anscombe trans., 2d ed. 1958) ("[T]here is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call 'obeying the rule' . . . in actual cases." (emphasis omitted)).

227 *See, e.g.*, Brian G. Slocum, *Conversational Implicatures and Legal Texts*, 29 RATIO JURIS 23, 35 (2016); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1194, 1226–27.

228 *Ejusdem Generis*, BLACK'S LAW DICTIONARY (12th ed. 2024).

229 Miller, *supra* note 227, at 1200.

to interpret "animals" consistently with the other items on the list, to refer to nonhuman animals only. This is what any normal member of the linguistic community would mean by the language in the ordinance, even though the literal meaning of "animals" encompasses humans. So ejusdem generis merely confirms one respect in which courts are to treat the legislature as a normal individual.

What about the so-called "substantive" canons, which do not correspond to ordinary maxims of pragmatics? There is a longstanding debate which this Article cannot hope to settle about how to understand substantive canons. But one way to think about substantive canons is as pious assumptions about the fictional individual "Congress" that give rise to presumptions about what Congress means when it says things, presumptions that may not hold about speakers in general.[230]

For example, one could argue that the canon of constitutional avoidance embodies a presumption that, being scrupulously faithful to the Constitution, Congress would not mean to enact a law that violates—or even comes dangerously close to violating—the Constitution.[231] One could argue that the "*Charming Betsy*" canon embodies a presumption that, being a model of international comity, Congress would not enact a law that violates international norms.[232] And one could argue that the preemption clear statement rule embodies a presumption that, being respectful of state sovereignty, Congress would prefer not to preempt state laws.[233] The early Supreme Court cases that

230 *See* Brian G. Slocum, *Big Data and Accuracy in Statutory Interpretation*, 86 BROOK. L. REV. 357, 367 n.59 (2021) ("It is possible to fit at least some substantive canons within the concept of communicative meaning, but doing so likely involves legal fictions.").

231 *See* Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing constitutional avoidance as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). On the two versions of constitutional avoidance, see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 138–43 (2010), and John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997).

232 *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

233 *See, e.g.*, Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (discussing "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), *superseded by statute on other grounds*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187 (1996))).

introduced these canons into the law contain language supporting such interpretations.[234]

If the understanding of interpretive and substantive canons of construction outlined here is correct, then their role in interpretation is to add to the data that courts have at their disposal when, operating under the fiction that Congress is an individual, they try to ascertain what that individual means by what it says in statutes. Interpretive canons confirm that Congress typically follows pragmatic maxims that speakers in general are presumed to follow. Substantive canons reflect norms that Congress in particular is presumed to follow.[235]

The upshot is that a court balancing opposing canons of construction is in exactly the sort of position that language users regularly find themselves in everyday conversations. When discerning what her conversation partner *means*, a language user must parse what her conversation partner *says* against a whole background of relevant pragmatic data, including not only ordinary Gricean maxims but also any habits or values that the language user knows her conversation partner has that bear on what her conversation partner might mean by what she is saying. The universe of relevant background data can and often does include opposing considerations. Yet language users manage to navigate these tensions according to the practices of the linguistic community and usually reach the right conclusion within a fraction of a second about what their conversation partners mean. The holistic analysis that a judge must undertake when faced with opposing canons of construction is no different.

In sum, it is plausible that the answer to how to resolve tensions among opposing canons of construction in any given case exists, just in the practices of the linguistic community rather than in the law. At most, the formalist might need to concede the existence of a gap that

234 *See, e.g.*, United States v. Coombs, 37 U.S. (12 Pet.) 72, 76 (1838) (applying what has become the constitutional avoidance canon because "a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 44 (1801) (adopting the interpretation recommended by what has become the *Charming Betsy* canon because "[b]y this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 443 (1821) (applying what has become the preemption clear statement rule because "[t]o interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately"; instead, the measure "would be taken deliberately, and the intention would be clearly and unequivocally expressed").

235 *Cf.* Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 638 (2021) ("Legal interpretation thus includes both fictional principles as well as the sort of presuppositions and implied meanings that are an aspect of interpretation generally.").

only closure rules can plug in cases where weighing opposing canons of construction in accordance with these practices results in equipoise. But such cases will be rare.

c. Missing Definitions

Finally, instances where a statute omits to define what is clearly a term of art would likely be examples where there is no legal rule to contain a "gap" in the first place. Imagine a statute providing that federal contracts shall be voidable at the government's option if the contractor "'bliks,' as defined herein." The statute's definition section confirms that the term "does not take its meaning from ordinary language but rather carries the meaning herein stipulated." But the statute fails to specify what that meaning is. Eventually, the government invokes the statute as a defense to breach of contract. The court must decide whether the contractor "blikked." It seems that there is no right answer.

In fact, the court should rule for the contractor. By omitting to define the made-up word "blik," Congress did not make a gappy law; Congress failed to make law at all.[236] By default, legal content is equivalent to communicative content. And such nonsense as the statement that a contractor's "blikking" shall vest the federal government with the option to void the contract lacks semantic, let alone communicative, content. It is not a meaningful statement, even if dressed up in the surface grammar of one. The court should ignore it.

VI. GLUTS IN THE LAW

The third category of challenges to formalism is based on "gluts" in the law, that is, places where the law offers *too much* guidance to the court. This occurs whenever two legal rules contradict each other. In that case, the law as a whole includes a contradiction consisting of the conjunction of two rules. And as Jules Coleman and Brian Leiter point out, anything can be validly inferred from a contradiction.[237] Thus, it seems that if one part of the law determines one outcome as correct and another part of the law determines another outcome as correct, then there is no outcome that the law as a whole determines as correct: either outcome would be a valid inference from the law as a whole applied to the facts.[238]

236 *See* LON L. FULLER, THE MORALITY OF LAW 33–36 (rev. ed. 1969).

237 *See* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 572–73 (1993).

238 *See* Hasnas, *supra* note 11, at 206–07.

This Part responds as follows. Some putative contradictions in the law are mere tensions. Others are contradictions in the law's semantic content that are not present in the law's communicative content. Still others are contradictions in the law's communicative content that are not present in the law's legal content. And any contradictions that remain in the law's legal content are like permissive rules: they refer the judge to the Public Trust Rule.

A. Tensions

Some alleged contradictions in the law are really just tensions. Easiest for the formalist to account for are tensions in the values that shape the law. Much of the critical legal studies literature is devoted to identifying tensions in the values that shape the law, such as the tension between individual freedom and altruistic responsibility.[239] Although contributors to this literature have occasionally inferred from such observations that the law contains contradictions,[240] this inference is doubly unwarranted.[241] First, it exaggerates tensions into contradictions.[242] Second, it mistakenly "assumes that the forces and motivations which produce law become law."[243] Because formalism is a thesis about the determinacy of the law, not the determinacy of the forces and motivations that shape the law, contradictions in the forces and motivations that shape the law pose no threat to formalism. A fortiori, neither do mere tensions in the forces and motivations that shape the law.

The tensions within the law itself are tensions among defeasible principles such as canons of construction. As explained in subsection V.A.4, such tensions present a gap problem rather than a glut problem: the challenge for the formalist is to explain how the judge is to weigh the competing principles in the absence of legal guidance. Sub-subsection V.C.4.b responded to the challenge by suggesting that the judge must look to value theory in the case of balancing tests, and

239 *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713–24 (1976); *see also, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3–4, 13 (1987); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1006–07, 1006 n.10 (1985).

240 *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984) (boasting that "we [critical legal studies scholars] have shown that legal reasoning is indeterminate and contradictory").

241 *See* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFFS. 205, 220–21 (1986) (conceding that "CLS rhetoric often does make the invalid leap from the premise that there are competing principles which infuse settled doctrine to the conclusion that there must be pervasive legal indeterminacy").

242 *See* Coleman & Leiter, *supra* note 237, at 573–74 (observing that the "tension between our need for others and our fear of them," which critical legal studies scholars often treat as a "fundamental contradiction," "is not, of course, a contradiction," *id.* at 573).

243 Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 296 (1989).

to linguistic practice in the case of canons of construction, for the answer.

B. Semantic Contradictions

Other alleged contradictions are genuine but exist only in the law's semantic content. As explained in subsection V.C.3, interpreting legislation produced by a lawmaking assembly involves treating the assembly as if it were an individual. And Gricean maxims favor interpreting two statements by the same individual in a way that renders them consistent.[244] The presumption of consistency is not absolute, especially if the statements were made at different times. Individuals can change their minds. But the presumption of consistency tends to render the communicative contents of rules promulgated by the same authority consistent with each other. And if the statements were made at the same time, then the presumption of consistency is very strong: because a contradiction makes no sense, almost any interpretation of a statement is preferable to one that renders it contradictory.[245] Thus, courts are right to insist that provisions in the same statute should be read in harmony if possible.[246]

Often, the court need not stretch to find a harmonious reading. As noted in sub-subsection V.C.4.b, interpretive canons of construction can be understood as Gricean maxims that function as guides for inferring communicative content from semantic content. For example, recall sub-subsection V.C.4.b's example of an ordinance prohibiting bringing "cats, dogs and other animals" into a public museum. Ejusdem generis would direct a court to interpret "animals" consistently with the other items on the list, to refer to nonhuman animals only. Thus, ejusdem generis would dissolve any contradiction between the semantic content of the ordinance and other ordinances authorizing people to bring their children (and themselves) to the museum or requiring the presence of (human) security officers at the museum at night.

Substantive canons of construction can dissolve contradictions in a similar fashion. Recall sub-subsection V.C.4.b's suggestion that

244 *See* Miller, *supra* note 227, at 1211–12; *cf.* DWORKIN, *supra* note 20, at 165 (saying the law "speak[s] with one voice"); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 159 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (same). *But see* John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 743 (2014) (warning against overreliance on the one-voice metaphor, especially as applied to different authorities).

245 *See* Miller, *supra* note 227, at 1205, 1211–12.

246 *E.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009); Neang Chea Taing v. Napolitano, 567 F.3d 19, 27 (1st Cir. 2009).

substantive canons also function as guides from statutes' semantic content to their communicative content, albeit by reflecting not Gricean maxims that speakers in general are presumed to follow but rather norms that Congress in particular is presumed to follow. On this view, substantive canons of construction can also dissolve contradictions in the law's semantic content. For example, constitutional avoidance requires courts to stretch their interpretation of statutes to avoid a conflict (or, on another version of the canon, even the risk of conflict) with the Constitution. Similarly, the preemption clear statement rule requires courts to stretch their interpretation of federal statutes to avoid conflicts with state law. Both canons are defeasible: neither authorizes courts to exceed the bounds of a "plausible" interpretation.[247] Yet neither canon is idle: each directs courts to deviate to at least some extent from what would otherwise be "the best interpretation."[248] Thus, each dissolves some contradictions in the law's semantic content.

C. Communicative Contradictions

Sometimes contradictions do persist in the law's communicative content. But it does not follow that the contradiction exists in the law's legal content. Legal content may be equivalent to communicative content by default in the American legal system, but second-order legal rules can override this default.

Second-order rules dissolving contradictions in first-order rules' communicative contents are what Baude and Sachs call "priority rules."[249] To take just a few examples, the Supremacy Clause dissolves contradictions between the communicative contents of statutory and constitutional provisions and state and federal laws,[250] Article III dissolves contradictions between the communicative contents of Supreme Court and lower court opinions,[251] and the *Erie* doctrine dissolves contradictions between federal and state law in diversity actions.[252]

Priority rules eliminate almost all contradictions in the law's communicative content. They set up a hierarchy of authority by source (federal over state, appellate over trial, etc.) as well as hierarchies of authority within a given source by time (such as the last-in-time rule for conflicts between two federal statutes[253] and the first-in-time rule for

247 *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018); Gila River Indian Cmty. v. United States, 729 F.3d 1139, 1151 (9th Cir. 2013).

248 Barrett, *supra* note 231, at 124, 123–24.

249 *See* Baude & Sachs, *supra* note 30, at 1109–10.

250 *See* U.S. CONST. art. VI, cl. 2.

251 *See id.* art. III, § 1.

252 *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) (providing roughly that state law governs substance and federal law governs procedure).

253 *See* Baude & Sachs, *supra* note 30, at 1109–10.

conflicts between holdings by different panels in the same court of appeals[254]). This network of priority rules prevents most contradictions in the law's communicative content from persisting in the law's legal content.

D. Legal Contradictions

What if a contradiction were to evade resolution by priority rules and persist in the law's legal content? The formalist could argue that this is impossible.[255] But she need not press the point. If ever it occurred, Leiter and Coleman's point that anything can be validly inferred from a contradiction would imply that either outcome is permitted.[256] And that would trigger the court's obligation under the Public Trust Rule to decide the case with an eye to the common good.

VII. ESTIMATING THE RIGHT ANSWER

The final objection to formalism is based on the idea that even if objectively there is always a "right answer," subjectively the judge may have no idea which outcome it is.[257] In that case, the realist can argue, the law may *determine* an outcome, but it does not *direct* the judge to an outcome. The law directs the judge to an outcome only if trying to follow the law leads the judge to an outcome. And trying to follow the law will not lead the judge to an outcome if the law is so obscure that the judge cannot even make an educated guess as to which outcome the law determines as correct. The judge in that situation has no choice but to decide the case on extralegal grounds.[258]

The formalist can concede all this but deny that the law is ever so obscure as to leave a competent judge utterly at a loss as to how to proceed. Difficult, close cases do arise. Good faith efforts to follow the law may lead different judges to different conclusions.[259] It can happen, and at the appellate level often does, that two intelligent judges disagree in good faith about how a case should be resolved.[260]

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254 *See* Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (plurality opinion) (citing T.L. *ex rel.* Ingram v. United States, 443 F.3d 956, 960 (8th Cir. 2006)).

255 *See* Solum, *supra* note 24, at 510 (stating that "legal effects cannot be contradictory").

256 Coleman & Leiter, *supra* note 237, at 572–73.

257 *See* Leiter, *supra* note 34, at 977; Bodansky, *supra* note 165, at 154–55.

258 *See* Sorensen, *supra* note 83, at 400 (noting that if "the correct answer to a [legal] question" is in principle undiscoverable, such that the judge "can no longer even try to learn" it, then the judge trying to follow the law "is stuck").

259 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2430 (2019) (Gorsuch, J., concurring in judgment) ("Of course, there are close cases and reasonable judges will sometimes disagree.").

260 The analogy in ethics is where two people reach opposite conclusions after good faith deliberation about a difficult moral dilemma.

In that case, both judges satisfy their obligation to follow the law in the subjective, "internal" sense, even though at most one of them satisfies that obligation in the objective, "external" sense.

Thus, the common criticisms of formalism as implying that judicial decisionmaking is "mechanical"[261] or that when judges disagree "someone is either a fool or acting in bad faith"[262] are misplaced.[263] All that formalism implies is that the outcome determined by the law is always at least "estimable" in the sense that a competent judge can at least try to reach it by making an educated guess. And it is plausible that the outcome determined by the law is always estimable in this sense.

The hardest cases involve balancing tests, vagueness, and conflicting evidence. Even assuming epistemicism about value trade-offs, a judge faced with a case where the diverse values specified by the applicable balancing test seem evenly balanced may find it hard to form an opinion about which way the scale tips. Likewise, even assuming epistemicism about vagueness, a judge faced with a case deep within the fuzzy borderline of a vague legal standard may find it hard to form an opinion about on which side of the line the case falls. And even if the boundaries of the governing legal standard are clear and precise, the evidence may be closely balanced. Pointing out that burdens of persuasion determine an outcome in cases of legal or factual equipoise does not solve the problem, because it is no easier to recognize that a close case lies on the line of equipoise than it is to recognize that the case lies just to one side or the other.[264]

But even in legally or factually close cases, the decisionmaker's best guess at the outcome determined by the law is not entirely random—as it would be, for example, if the judge had to guess at a randomly generated number between zero and one hundred. Whatever practical wisdom the judge has accumulated in her life gives her something to go on when balancing competing factors. The familiarity with her fellow language users' dispositions that makes the judge a competent language user gives her something to go on when tracing the scope of a vague legal rule. And her experience forming beliefs in the face of conflicting evidence gives the factfinder something to go on when weighing conflicting evidence. This "something to go on" makes it possible for the decisionmaker to do her best—to try, at least, to reach the outcome determined by the law.

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261 Chemerinsky, *supra* note 10, at 1071.

262 Seidman et al., *supra* note 16.

263 *Cf.* TAMANAHA, *supra* note 36, at 27–43 (concluding that "there is no need to accept [the claim] that judges in the 'formalist age' reasoned in a bizarrely mechanical manner," *id.* at 43).

264 *See* Samaha, *supra* note 143, at 1672.

In ordinary life, people routinely follow instructions under similar epistemic conditions. Consider the person who guesses at where to aim the knife so as to cut from a stick of butter the two tablespoons called for by a recipe, or the person who guesses at when to stop pouring laundry detergent so as to leave the recommended volume in the cup. No one could hope to know with absolute precision where a stick of butter reaches two tablespoons or when the detergent level in a cup reaches the prescribed volume. Even if the butter wrapper or detergent cup has a measuring line, no one could hope to know with absolute precision where within the line's nonzero thickness the butter or detergent reaches the prescribed quantity. Nonetheless, people routinely follow the directions in recipes and on laundry detergent containers. Their inability to identify the prescribed quantity with absolute precision does not leave them paralyzed, with no choice but to look elsewhere for guidance on where to aim the knife or when to stop pouring. They just give it their best estimate.

So too in law. One might think that law is different because the stakes are higher; hence, whereas just "eyeballing it" is reasonable and appropriate in cooking and cleaning, the law demands more from the judge. After all, one *could* invest in costly measuring devices to improve the accuracy of one's volume estimates for butter and laundry detergent. But the diminishing marginal returns to accuracy would not justify the investments. So the normal person's "best estimate" of where the stick of butter reaches two tablespoons or the detergent level reaches the prescribed volume is not really the most accurate estimate that the person could possibly give but rather the most accurate estimate that the person can give after making but not exceeding a reasonable level of investment in improving her epistemic situation (by turning on the lights so she can see the line, say, but not acquiring expensive measuring devices). And one might think that the judge, having sworn to uphold the law, must take the task of improving her epistemic situation more seriously.

But the need for efficient resolution of disputes places a limit on how much investment is appropriate, and the law has provided for this need by relying on the parties' attorneys to marshal the best evidence and arguments on each side. Judges are not permitted to commission studies or do their own data gathering to determine with greater precision how to weigh competing values or where to draw the line around the extension of a vague term. Nor is the factfinder permitted to look beyond the record to reach a more confident conclusion about what

happened.[265] So a rough estimate like the ones people make when they measure butter or laundry detergent—or guess at the number of jelly beans in the jar at the dentist's office when the rules of the game prohibit opening the jar and counting the jelly beans by hand—is the best the decisionmaker can do. The law neither requires nor permits anything more.

CONCLUSION

"[S]ophisticated legal observers" are too quick to dismiss formalism.[266] The extent to which the law directs courts to an outcome is a difficult question. Formalism is not obviously true. But neither is it obviously false, as many scholars seem to think. Certainly, "to deny the force of Realism" is not "intellectually dishonest."[267] On the contrary, the formalist has a variety of promising options for handling the features of the law that realists claim give rise to cases where the law fails to direct the judge to an outcome, including permissive rules, balancing tests, vagueness, ambiguity, silence, contradictions, and uncertainty. Properly resolving the debate between formalism and realism will require courts and commentators to roll up their sleeves and grapple with thorny issues in the philosophy of law, language, and value—issues that this Article engages only on the surface.

At stake is more than a philosophical debate. If formalism is true, then judges should be resolute in resisting the temptation to take their eye off the law. Only if and when the law directs the judge to do so may the judge consider the equities of the case or the implications of her decision for future cases. To the extent that politics bleeds into the law, it is on the law's terms. Additionally, formalism suggests that courts should rarely if ever make *Erie* guesses or resort to *Auer* deference and that the Court should rethink its interpretation of 5 U.S.C. § 701(a)(2). This Article's arguments also suggest that the "construction zone" is minimal and law governed, and that it is a mistake to think that common law adjudication inevitably involves lawmaking because often the law runs out.

The bottom line is that, far from having been settled for more than "100 years,"[268] the debate between formalism and realism is very

265 The law even supplies a default presumption in case no one introduces evidence: the party with the "burden of production" loses. *See* Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries, 512 U.S. 267, 272 (1994).

266 Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169, 171 (2009) (reviewing PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008)).

267 *Contra* Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1218 (1981).

268 *Contra* Hasnas, *supra* note 11, at 217.

much alive and relevant. It remains a fruitful topic for further research.