Interpreting Textualist Slogans

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ABSTRACT: Slogans are a blunt instrument—they may convey something of the truth, but they rarely do so undented. So too is the case with the influential textualism slogans "the text is [the] law," "only the text [is] the law," and "[o]nly the written word is the law." In his insightful Article, Professor Erik Encarnacion shows why these statements are false, as they are category errors. He then observes that these slogans are unnecessary to establishing the core theses of textualism and that these slogans misunderstand and confuse features of textualism. And he is right about all of that.

In this short Response, I consider what these slogans for textualism and interpretation are more generally. First, I show that the category-error argument is potent: It shows that "X is law" statements are generally false. Instead, they must be charitably translated. The problem, however, is that the most plausible translations of the textualist slogans are false; they either require textualists to embrace absurd positions or require textualists to retreat from the very claims that make textualism a distinct theory. The slogans are essentially a Motte and Bailey maneuver: They make bold, ambitious claims, and when challenged, they transform to more defensible, modest claims. In this way, even though the slogans are false, they accurately represent the Motte and Bailey that is modern textualism.

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INTRODUCTION

Slogans are a blunt instrument for conveying truth. For anything with even a modicum of nuance, catchy slogans are likely to do some damage. For a subject as complex as law, slogans—with the quintessential trait of simplicity—are ill-fitting. In his Article, *Text Is Not Law*, Professor Erik Encarnacion challenges the prominent textualist slogans of the form "[o]nly the written word is the law," "the text is [the] law," "only text counts as law," and the like.[1] He elegantly explains why these slogans are technically false—because they are category errors.[2] He then observes the assertion—that "the text is [the] law"—is not even required for the principal thesis of textualism.[3] Thereafter, Encarnacion makes the compelling case that the conflation of text and law has substantial detrimental consequences: it perpetuates mischaracterizations and uncharitable understandings of textualism;[4] it allows for selective use of literalism, instead of context sensitive textualism;[5] and it confuses the public about the true role of (appellate) judges.[6] Indeed, he takes his diagnosis further, explaining why the conflation of text and law will continue, arguing that it aids utterers—principally textualists—in avoiding the hard linguistic and jurisprudential questions.[7] All throughout, Encarnacion makes clear that his target is not textualism, rather, he is focusing on this genus of slogans that he thinks muddies the genuine debate between textualists and anti-textualists.[8]

I am in vast agreement with Encarnacion's analysis of the textualist sloganeering. I think, however, Encarnacion's observation that text is not law[9] has potentially broader implications, both for textualism and legal interpretation more generally. This Response proceeds in three Parts: First, I analyze Encarnacion's argument that text is not law and consider how that form of argument—the category-error objection—applies more broadly, including to similar slogans of interpretive methodologies. Second, I contend that these slogans may have plausible, nearby translations which are not subject to the category-error objection. Third, I consider the merit of these best possible translations. I explain why I think these best possible translations are still unpersuasive but I suggest that this is because they reveal core problems with textualism. In that way, they at least fulfill one function of a slogan: they accurately encapsulate the position they represent. Finally, I briefly conclude.

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1. Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2031–36 (2022) (footnotes omitted).
2. *Id.* at 2036–41.
3. *Id.* at 2041–46.
4. *Id.* at 2047–51.
5. *Id.* at 2051–64.
6. *Id.* at 2064–68.
7. *Id.* at 2068–74.
8. *Id.* at 2030–31.
9. *Id.* at 2031.

I. TEXT ISN'T LAW, BUT WHAT ELSE ISN'T?

After setting forth myriad examples of textualist jurists, scholars, and commentators repeating some version of the slogan "the text is [the] law," Professor Encarnacion proffers his argument about why the statement is, in fact, false.[10] Consider first a clarification of what "the text is [the] law" might mean: "statutory text t = legal norm l."[11] This assertion seems to be incomplete; for example, a draft bill and the same bill after passage may have the same text—but only the bill that has been passed is the law. So, the simple formulation—that "text t = legal norm l"[12]—requires further conditions. Consider then the following conditional formulation: If text t is duly enacted, then text t constitutes legal norm l.[13]

Even this formulation fails, but for another reason. That is because text and law are different kinds of things. Text is a string of symbols, whereas "law is the set of norms—rights, duties, powers, permissions—that a legal system delivers or comprises."[14] It is a "category mistake," Encarnacion argues, to consider these equal to each other.[15]

Encarnacion offers the example of a university.[16] Imagine prospective students on a campus tour.[17] The tour guide shows the students the "classrooms, buildings where academic departments are housed, dormitories, and administrative offices."[18] Thereafter, the prospective students ask the guide to show them the university.[19] The prospective students are making a category mistake because the university is not simply a building; it is "constituted in part by a collection of people occupying certain roles, the buildings already encountered on tour where they work, budgets, and other facilities."[20]

Another argument for why text and law are not equal emerges from the transitivity property of equality (namely, if $A = B$ and $B = C$, then $A = C$),[21] and the recognition that not all changes in text result in changes in the law.[22] Imagine there is a statute that imposes liability for false advertising. The same

10. *Id.* at 2036–41.

11. *Id.* at 2036.

12. *Id.*

13. *Id.*

14. *Id.* at 2038 (quoting Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1385 (2018)).

15. *Id.* at 2038.

16. *Id.* at 2037.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Eric W. Weisstein, *Equal*, WOLFRAM MATHWORLD, https://mathworld.wolfram.com/Equal.html [https://perma.cc/HX26-TTU6].

22. Encarnacion, *supra* note 1, at 2038 (quoting Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 804–05 (2015)).

legal norm could have been produced by different text. Indeed, suppose the legislature clarifies the text, with the prefatory language that it does not intend to change the legal norm at all. If it were the case that text is law, then we would have nonidentical texts *A* and *C* each equal to the legal norm *B*, but $A \neq C$, violating transitivity.[23]

Indeed, reflecting on categories may reveal myriad errors in commonplace equivalences. Consider the phrase, "Coffee is happiness," that one might see on a chalkboard in front of a coffee house. No, it is not. Happiness is a mental state of individuals. Coffee is a bean-infused liquid. They cannot be the same.

Consider also the example of a story, like Franz Kafka's *The Trial*.[24] I read the story through text in a book, black in color, with the words "Franz Kafka" and "*The Trial*" on the cover. Suppose I said to a friend, "You would love *The Trial*, it is a brilliant story." Handing them the book, I say, "Here ***it*** is, take ***it***, read ***it***, and give ***it*** back to me." On similar reasoning as above, I have committed a category mistake: The story is an account of the imaginary character Josef K. and his inexplicable killing.[25] The "it" in the sentence is the book I have handed over—it is a bound collection of papers with text on them. The bound and inked papers are not themselves an account of Josef K. They communicate the account, but the papers are not the account themselves. Those are different kinds of things; they belong to different categories.

So, we see that the category-error argument is potent. Indeed, the argument that text is not law has a generalizable form applicable to other slogans of interpretive methodologies. Consider purposivism, often considered a chief alternative methodology to textualism.[26] In interpreting legal language, it places the focus on the underlying purposes for such legal language.[27] That is, purposivism is "an interpretive approach that directs

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23. *Id.*

24. FRANZ KAFKA, THE TRIAL (Breon Mitchell, trans., Schocken Books Inc. 1998) (1925).

25. *See generally id.*

26. David M. Driesen, Thomas M. Keck & Brandon T. Metroka, *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism*, 75 WASH. & LEE L. REV. 1781, 1800 (2018) ("The standard account suggests that the Court embraced textualism as an alternative to purposivism.") (footnote omitted); Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 151 (2019) ("[T]extualism is often described or pitched as an alternative to purposivism."); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266–67 (2020) (describing the academic debate as "focus[ing] on whether an interpreter, particularly a judge, should be a 'textualist' or a 'purposivist'"); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1119 (2011) ("'Plain' meaning, it turns out, is not so plain: it is just as capable of expanding the domain of statutes as is its primary competitor, purposivism, because it waffles between ordinary and legalist versions of plain meaning.").

27. Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1282 (2020). For further accounts of purposivism, see also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 195–96 (1986) (describing "growing skepticism about the traditional props of statutory interpretation, such as reference to purpose"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947) ("We do not delve into the mind of legislators or their draftsmen, or

courts to '[i]nterpret the words of the statute . . . so as to carry out the purpose as best [they] can.'"[28] The text serves as evidence as to what the purposes are, but the purposes are the key interpretive object. Thus, in comparing purposivism to textualism, we might create a similar slogan: "the purposes of the enactment are the law." However, that too would be a category error.

Generally, purposivism focuses on objectified intentions underlying an enactment.[29] As Professor Mark Greenberg explains, "an objectified intention is the intention that a reasonable person would attribute to the legislature under specified conditions."[30] It is an imputation—based on idealized assumptions—about why the relevant body would pass the enactment.[31] But here too, objectified intentions of enactment language are not themselves norms. Thus, again we can defeat the analogous identity claim "purposes are law" for the purposivist, due to a category-error.[32]

Now let's get back to the textualists. Encarnacion observes that modern textualists do appropriately focus on the meaning[33] of the text instead of the text alone.[34] So then, textualists might be led to embrace a nearby slogan: "the original public meaning of legal text is the law." But here too there is a mismatch.[35] Let us distinguish between the communicative content

committee members."); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119 (2011) (giving an account of traditional purposivism and contrasting with new purposivism); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation–and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 704–07 (2014) (defining and describing purposivm); Nourse, *supra* note 26, at 1147–48 (providing an overview of purposivm).

28. Krishnakumar, *supra* note 27, at 1282 (quoting *see* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

29. Mark Greenberg, *Legal Interpretation*, STAN. ENCYC. PHIL. (2021), https://plato.stanford.edu/entries/legal-interpretation [https://perma.cc/72ME-ZE3V].

30. *Id.*

31. *Id.* Greenberg further observes, "[f]or purposivists, the meaning of the words is to be subordinated to, and interpreted in light of, the purpose of the provision." *Id.*

32. The purposivist use of the slogan is not as common in my review of the literature, but it does exist. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23–24 (1988) ("The actual words used by the legislature may be strong evidence of its intent, but they are merely windows on the legislative intent (or purpose) that is the law.").

One might also focus on the subjective intentions of the legislators. Sometimes this view is referred to generically as "Intentionalism." Greenberg, *supra* note 29. This can be complicated, because determining the subjective intentions of multimember bodies may be impossible or difficult. *Id.* But regardless, note here that "legislative intentions are the law" commits a category-error as well, because the subjective intentions—the actual intentions of real individuals—are desires, which are in turn not norms. Thus, again, we have objects of two different categories.

33. Textualists of different stripes use various adjectives for "meaning"—like public meaning, plain meaning, original public meaning, etc. I will use "original public meaning" as a stand in.

34. Encarnacion, *supra* note 1, at 2041–42.

35. Encarnacion later makes this same point. Encarnacion, *supra* note 1, at 2075 (quoting HRAFN ASGEIRSSON, THE NATURE AND VALUE OF VAGUENESS IN THE LAW 8 (2020)).

of a legal text—what the text means—and the legal content of the legal text—what the text contributes to the body of norms that count as law.[36] The ordinary meaning of a legal text has communicative content. But such communicative content is not equal to the text's legal content. The meaning of a text is simply different from the norms that make up the body of the law. Thus, scholars Mark Greenberg, Mitchell Berman, and Hrafn Asgeirsson have observed that it is a category mistake to state that the linguistic meaning of a legal text is the legal content of that legal text.[37] Thus, as an instantiation, it is a category mistake to state that the ordinary meaning of a legal text is the law.

At this juncture, one might accede to these examples but maintain that there is still something that rings true in these slogans. Coffee is not happiness, but we understand that when one says that they mean that coffee produces in the drinker a mental state of happiness. The university is more than any particular building, but prospective students on university tours are wanting to see particular features of the university that they will contact most saliently. A story is distinct from the text that communicates the story, but there is a very close relationship between the story and the text one reads to know of it. And about interpretation—though it is true that text, the purposes behind the text, and the text's ordinary meaning are not identical to law, these slogans are inexact but coherent abbreviations.

II. WHAT MIGHT THE SLOGANS REALLY MEAN?

It behooves us then to ask, if the "*X* is the law" slogans are not to be taken literally but rather are simplifications of more fulsome but coherent propositions, what might they actually mean?

As a first matter, what do we do with the obvious category errors? It is true that communicative content and legal content are not the same, but statements like "text/purposes/original public meaning of text is law" are used and understood widely in law. We can observe that "is" may not represent identity, but rather it may represent that there is a very strong relation between the connected terms. Consider the following relation: *X* "is the most important or probative information for determining" *Y*. Substituting this relation for "is" in the slogan, we get the translated statements:

> (1) The text *of an enactment* is the most important information for determining the law.
>
> (2) The original public meaning of the text *of an enactment* is the most important information for determining the law.
>
> (3) The purposes underlying *an enactment* is the most important information for determining the law.

Notice that interpreted this way, we no longer have a category mismatch. Text, original public meaning of the text, and purposes are all types of information.

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36. *Id.* at 2074–75.
37. *Id.* at 2075 (collecting citations).

Thus, this kind of translation—interpreting "is" not as identity but another strong relationship—parries the most devastating objection from Encarnacion.[38]

We could also understand the statements as making claims about what interpretive method is required. Consequently, we could translate the statements "text/purposes/ordinary meaning" thusly:

> (1) In determining the legal content of an enactment, one should privilege the text of the enactment.
>
> (2) In determining the legal content of an enactment, one should privilege the original public meaning of the text of the enactment.
>
> (3) In determining the legal content of an enactment, one should privilege the purposes underlying the enactment.

Each of these has multiple putative meanings. They could mean that a method of determining the legal content of an enactment that privileges certain information will produce better results in the world. We can understand these to be kinds of normative interpretations of the slogans.[39] They could also mean that to accurately determine the actual legal content of an enactment, one needs to privilege certain information. We can understand these to be kinds of descriptive interpretations of the slogans.[40] The distinction as applied to law can be blurry,[41] because many claims about the law have both descriptive and normative features. Thus, as a result, these slogans may be polysemous, advancing both normative and descriptive claims.

Importantly, regardless of how we interpret these claims on the normative–descriptive distinction, they are not susceptible to the

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38. I observe that nothing I say here detracts from a core point advanced by Encarnacion. That is, he contends that even if there are plausible non-literal interpretations of phrases like "text is law" that are best construed as the meaning of those phrases, the literal constructions have a life of their own and cause great harm. Encarnacion, *supra* note 1, at 2038. And he contends such harm counsels in favor of dispensing with the phrases from our legal discourse. *Id.* at 2064-68. I agree with him there, but think that examining the non-literal interpretations is nevertheless revealing.

39. Adam J. Kolber, *How to Fix Legal Scholarmush*, 95 IND. L.J. 1191, 1196 (2020).

40. Kolber, *supra* note 39, at 1196.

41. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8–9 n.17 (2009) (stating "when it comes to constitutional theories, a neat divide between the normative and purely descriptive is usually elusive" and collecting cites).

The canonical version of the distinction comes from Hume's "is-ought" problem. *See generally* DAVID HUME, 3 A TREATISE OF HUMAN NATURE, bk. 3, pt. 1, § 1 (L.A. Selby-Bigge ed., Oxford Clarendon Press) (1739); *see also* Max Black, *The Gap Between "Is" and "Should,"* 73 PHIL. REV. 165, 165–81 (1964).

I observe that some, like moral realists and natural law theorists, claim that there are propositions which are both normative and descriptive. As such, it might be better to say there are multiple distinctions—between normative and non-normative claims, and between descriptive and non-descriptive claims. Still others define descriptive claims to exclude value judgments, and thus as non-normative claims. For our purposes, little turns on the precise contours of the distinction. I use it as a loose guide to observe that the slogans may have different meanings for us to assess.

category-error objection. The claims state positions about the beneficial results or accuracy/veridicality of using a particular interpretive method.

III. ARE THE TEXTUALIST SLOGANS AT ALL REDEEMABLE?

At this juncture, we have candidate plausible translations of the "*X* is the law" slogans that are not subject to the category-error objection. The next question is how these translations fare as slogans. On this front there are at least two relevant questions: (1) Are they clearly true, such that they provide the utterer with argumentative leverage? (which we can call *lucidity*);[42] and (2) Do they properly represent the utterer's position? (which we can call *representation*).

Before we proceed, because we are focusing on textualism, my focus here will be on translations of the textualist slogans above—(1) and (2)—and I will combine my analysis of them as they differ only in that (2) specifies that it is the meaning of the text that is crucial. As far as the purposivist slogan, a similar analysis could apply to that motto as well.[43] I forewarn here that my consideration will be fairly summary, invoking existing literature, and incomplete, because one cannot hope to touch on all the problems with textualism (and their purported solutions). But given that we are talking about slogans, my main contention is that these pithy assertions, even charitably translated, are not clearly true and thus do not provide the proponents with any argumentative leverage.

The translations I have proffered use the term "privilege." Now, textualists may take different positions on the strength of privilege that the textualist object must receive. On one side, some suggest that it may have primary importance with a very limited set of exceptions where textual meaning does not carry the interpretive day.[44] Then there are those who think textual meaning is lexically prior; that interpreters first look to textual meaning, and only if it is ambiguous do you move to any other forms of information.[45] Finally, there are those who contend textual meaning is exclusively the information to be considered.[46]

There is internal disagreement among textualists about the strength.[47] I will not seek to resolve that dispute here, but I note that in order for textualism to be a distinct theory from the generic pluralist interpretive

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42. One might ask why slogans should be clearly true. They need not be. But one main advantage of pithy slogans is that they seem obviously true, and then can be used in service of advancing the utterer's position. That is the benefit that *lucidity* is supposed to capture.

43. For example, just as with textualism, if purposivists embrace the absurdity doctrine, that too may show that purposivists cannot so strongly privilege the objectified intentions above other data.

44. *See* T. Alexander Aleinikoff, *supra* note 32, at 22.

45. *See* Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 157 (2018).

46. *See* Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465, 466 (2005) (discussing "exclusive textualism").

47. *See supra* notes 44–46 and accompanying text.

theory, the strength of the privilege for textualist meaning must be substantial. That is, consider a purported textualist theory that commands that we consider text among other things but ultimately weigh text alongside *and* among other things when interpreting the enactment. Such a theory is essentially just another pluralist theory because no serious theory of interpretation tells us to ignore the text altogether.

With that in mind, we consider the truth of the textualist slogans. As we observed, there are potentially normative and descriptive aspects to the claim.[48] As a normative claim, the slogan asserts that it would be best to privilege the text and its original public meaning of the enactment. What would make such a claim true? We would first need to fix a set of values to judge whether something is good and better. That is bound to be controversial, but we can proceed with commonly held values like promoting notice, efficiency, fairness, and justice, among other things.

The problem is that this translation of the slogan does not even pass the sniff test. As an initial point, the claim is certainly not obviously true as a categorical matter. Imagine a case with a scrivener's error: The legislature passes an act, it is transcribed incorrectly to include an errant "not," but in every nonofficial version—which constitute the vast majority of publicly seen versions—it is transcribed without the "not." Then there is a dispute about the meaning of the statute that turns on whether there is a "not" in the statute. How should we decide the legal impact of the statutory language in such a case? I am not suggesting the answer to the case is obvious, but I do contend it is *not* obvious that the ordinary meaning of the official text best promotes the aforementioned values in that case. The more general version is what does one do when the original public meaning of the text leads to absurd results. Many will abandon the text to avoid the absurdity. As Professor John Manning observes, "even the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine."[49]

Now, the die-hard textualist might parry that even if there are anomalous cases where privileging text is not best, heeding the ordinary meaning of the text in all cases will *overall on net* promote these values compared to alternative interpretive theories.[50] Yet that too is highly uncertain. There are easy cases—where text should win out—and hard cases—where we are unsure. The claim that we do best when we stick to the textual rule critically depends on whether we can separate easy from hard cases. If we could, then we might allow text to dictate easy cases, but allow for alternative, pluralist reasoning in hard ones. Incidentally, that is the strategy of many pluralist interpretive

48. *See supra* notes 39–41 and accompanying text.

49. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003).

50. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385–88 (2007).

theories.[51] Indeed, it is the strategy of most textualist theories as well. When we consider the fact that most textualists embrace the absurdity doctrine and, as Encarnacion details, that most textualists make exceptions for scrivener's errors,[52] we see that most textualist theories generally heed the text, except in the hard cases when they might not.

Now, I have no doubt that the textualist can gerrymander the set of considered values such that privileging text is best. I do think that such a gerrymander will render the force of the slogan a nullity: "If you agree with me on precisely what we should value, then always privileging text will over all cases result in net benefits." Just imagine if the *Bostock*[53] opinion had started like that.

Next, the textualist might argue that this is all too strict. Of course, there are some cases that will require other facts to trump the ordinary meaning of the text, but the slogan is generally true. Yet that gives away the game for the textualist. Most all interpretive theories agree that text matters and that, in the vast majority of cases, text wins. The problem is precisely the hard cases, and pluralist theories suggest that in those cases, text may need to give way to other facts, like evidence of intentions and purposes, precedent, history and tradition, and other background legal norms.[54] Thus, insofar as the textualist agrees, they have joined the pluralist party; they are just the ones who keep repeating they have somewhere else to be.

Additionally, the textualist may contend that this is a misunderstanding of the claim. Privileging the text and its ordinary meaning requires considering the context in which the assertion is made. Once one does that, many of the objections to textualism—especially by appeal to absurd cases—wash away. Indeed, contextualizing the text has been a popular move for the modern textualist.[55] But here too the textualist has given away the game. If the clear and ordinary meaning of a text can be washed away with context clues—that include consideration of evidence of intentions and purposes, precedent, history and tradition, and other background legal norms—the textualist has again just joined the pluralist party, but they did not bring anything.[56]

Now what about the descriptive aspects of the slogans? They might be asserting that in determining the legal content of an enactment, legal officials engage in a particular practice—that they privilege original public meaning

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51. *See, e.g.*, Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1383–92 (2018); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–210 (1987).

52. Encarnacion, *supra* note 1, at 2044–45.

53. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (holding, based on textualist reasoning, that Title VII's prohibition of discrimination based on an individual's "sex" encompassed sexual orientation discrimination).

54. *See, e.g.*, Berman, *supra* note 51, at 1383–92; Fallon, *supra* note 51, at 1194–210.

55. Encarnacion, *supra* note 1, at 2041–46 (collecting citations).

56. *See id.* at 2071–72 (observing that these extratextual considerations create a tension for textualism in cabining discretion, for example).

of the text—and thus to understand what the legal content of an enactment is, one should follow suit. The problem here is that this is almost certainly false. Here too the examples of the absurdity doctrine and scrivener's error are instructive: Legal officials do look past the original public meaning of the text to decide cases.[57] Again, there are textualist parrying moves: the textualist may assert there might be exceptions, but legal officials *generally* privilege text. The rebuttal to the textualist then is to observe that in asking if particular cases are exceptional to the textualist rule, we have again essentially embraced pluralism. The textualist may claim that the so-called exceptional cases can be explained through contextual understanding of the text and its ordinary meaning. The rebuttal is to observe that if context is sufficiently capacious to handle the absurdity doctrine and scrivener's error, it opens the door to pluralist consideration. That is just a taste, but the point is that insofar as the slogan is a descriptive claim about our actual practices, it is very flimsy.

Finally, the slogan may be a descriptive claim about the nature of legal interpretation. By definition, consider that to interpret a text is to give meaning to that text.[58] Similarly, some textualists claim that to interpret a legal text simply is, at its core, to determine the original public meaning of its text.[59] There are several problems with this. As Mark Greenberg has convincingly shown, legal content and linguistic—or communicative—content differ.[60] As a consequence, it is not as simple as a matter of the definition of interpreting a legal text to determine the ordinary meaning of the text. That legal content is equivalent to the linguistic content is a substantial claim that requires much more than sloganeering. But even if you disagree with Greenberg's argument, or my deployment of it, there is a now-familiar problem: Even if legal content were determined by communicative content, most textualists agree that determining the communicative content of an enactment requires understanding the full

57. *Id.* at 2044–45.

58. *See Interpret*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/interpret [https://perma.cc/NZ8H-6BVY] (defining "interpret" as "to explain or tell the meaning of: present in understandable terms").

59. F. Andrew Hessick, *Saying What the Law Should Be*, 48 B.Y.U. L. REV. 777, 798 (2022) (recognizing that "for textualists, the most likely semantic understanding of the text" is what "the law is"); *see also* Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 265 (2021) (explaining that for textualists, interpreting a law is to determine its communicative content, which is in turn its original plain meaning).

Related to this is the bicameralism-and-presentment argument. That contends that, in the United States, only the text of statutes "survive[s]" the legislative process and thus determining the law must privilege only that text. Encarnacion, *supra* note 1, at 2035 n.45 (quoting NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019)). But as Encarnacion observes, this argument has lost favor with textualists, because it does not apply to agency action and it may improperly foreclose the use of any extratextual sources. *Id.* at 2035–36.

60. Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 39–41 (Leslie Green & Brian Leiter eds., 2011); Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 107 (2017).

context of the enactment.[61] And doing that requires consideration of lots of other sources that provide such context, like evidence of intentions and purposes, precedent, history and tradition, and other background legal norms. Again, the textualist finds themselves at the pluralist party, but they are unfashionably late.

Reviewing the bidding then, the textualist slogans fail in their *lucidity*. That is not to say they are false, but even surface examination of the claim raises more questions than answers. As a result, it does not serve to provide the textualist with an argumentative lever; rather, it infects their every assertion with doubt.

What of the textualist slogans' *representation* then? In assessing the textualist slogans—charitably translated—some common themes emerged. Either the textualist position was extremist—and potentially absurd—or the textualist position had to be substantially softened. Philosophers have a name for this: the Motte and Bailey Doctrine.[62] The idea is that a proponent will make a bold, ambitious claim, but when it is challenged, the proponent retreats to defending a more modest, defensible position.[63]

Now, for my bold, ambitious claim[64]: the textualist slogans precisely represent modern textualism—which itself resembles a Motte and Bailey maneuver. As we have discussed, modern textualism claims to substantially privilege the meaning of the text over the other relevant sources. But when pressed, they make exceptions; for example, with absurdities and scrivener's errors. And to theorize the exceptions, they invite contextualization, with all the other information that it requires. Modern textualism has abandoned the bailey for the motte—just as the slogans foretold.

CONCLUSION

In his brilliant Article, Encarnacion shows how the simple phrase "the text is [the] law"[65] can do much damage to our collective understanding of law, because the literal interpretation of that phrase can provide license for all sorts of nonsense and chicanery. I have contended here that even under non-literal interpretations, these phrases do not carry their requisite load: they overpromise and underdeliver—just like modern textualism.

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

62. This label is of fairly recent vintage. Nicholas Shackel coined the term in his 2005 paper *The Vacuity of Postmodernist Methodology*. Nicholas Shackel, *The Vacuity of Postmodernist Methodology*, 36 METAPHILOSOPHY 295, 298–99 (2005). He named it after the Motte and Bailey type castle, wherein the motte is heavily fortified and surrounded by a larger courtyard. *Id.* at 298. In the analogy, the bailey is the proponent's ambitious claim, while the motte is the defensible claim to which the proponent retreats. *Id.*

63. *Id.*

64. There is a nontrivial chance I will abandon it for some motte.

65. *See* Encarnacion, *supra* note 1, at 2041–46.