NATURAL LAW COLLOQUIUM

LEGAL INTERPRETATION AND NATURAL LAW

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INTRODUCTION

More than twenty years ago, Justice Antonin Scalia wrote of "the great degree of confusion that prevails" in the field of statutory interpretation.[1] Today, Justice Scalia's textualism is ascendant. Over the past three decades, textualism has expanded its influence in both the courts and the scholarly literature.[2]

In the first part of my talk, I will show that despite the confidence with which it is propounded, textualism is deeply confused. Indeed, it is utterly unclear what method textualism claims that interpreters should use. Moreover, textualism, like its rival, intentionalism, is most commonly argued for on democratic grounds, but the arguments from democracy that textualists offer do not help to clarify its central claim.

In the second part of my talk, I will suggest a new way of thinking about legal interpretation from the ground up. Behind the familiar question of what method of interpretation is the right one lies a more fundamental question:

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1. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997).

2. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23–42 (2006). I use the term "textualism" to encompass textualism in both statutory and constitutional interpretation. *See infra* note 6.

what does legal interpretation, by its nature, seek? I will argue that widely shared premises dictate a straightforward answer—roughly speaking, legal interpretation seeks the contribution that statutory and constitutional provisions make to the content of the law.[3]

In the final part of my talk, I will show that, in light of this basic point, the field of legal interpretation looks very different. To illustrate the way in which the field is reconfigured, I will focus on the question of whether the kinds of arguments from democracy, fairness, and the like that theorists commonly offer are even the right kinds of arguments to defend methods of interpretation.

I will briefly canvass a few of the most influential theories of how the content of the law is determined[4] and show that they do not support the kinds of arguments that textualists, intentionalists, and other theorists typically make.

There is, however, another family of theories of how the content of the law is determined that has recently received a great deal of attention. This family comprises contemporary nonpositivist or natural law theories that hold that legal norms are a subset of moral norms. Among these theories, I will focus on my own theory—the Moral Impact Theory.[5] It turns out that the Moral Impact Theory makes sense of the kinds of arguments from democracy that theorists of legal interpretation make. So, there is an argument that theorists of legal interpretation implicitly presuppose something like the Moral Impact Theory. I will draw some conclusions about the implications of the Moral Impact Theory for legal interpretation.

I. TEXTUALISM AND ITS CONFUSIONS

Textualists give priority in statutory and constitutional interpretation to the relevant texts.[6] Textualism is typically formulated in opposition to

3. I focus here on the interpretation of statutory and constitutional provisions, but my argument that legal interpretation, by its nature, seeks provisions' contributions to the content of the law applies with appropriate modifications to the interpretation of other sorts of legal instruments, including private instruments such as contracts and wills. In the case of such provisions, the notion of a provision's contribution to the content of the law needs to be appropriately broadened to something like a provision's legal impact, as contracts and wills are not naturally understood as affecting the *content of the law*.

4. Throughout this lecture, I use the term "determine" in its constitutive, rather than its epistemic, sense. *See infra* Part III.A.

5. *See generally* Mark Greenberg, *The Moral Impact Theory, the Dependence View, and Natural Law*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 275 (George Duke & Robert P. George eds., 2017).

6. *Textualism* is often used specifically to refer to a position on statutory rather than constitutional interpretation. But there is a corresponding position with respect to constitutional interpretation and, as noted above, I use the term to encompass textualism in both statutory and constitutional interpretation. The latter is also called *public meaning originalism*. For convenience, I will often use statutes as an example, but my arguments apply both to statutory and constitutional interpretation. In principle, textualism is distinguishable from originalism because one could focus on the text without privileging its original meaning. In practice, however, textualists care about original meaning rather than what words mean (or would be taken to mean) at a later time, so constitutional textualism is in practice a form of

intentionalism or purposivism, as it rejects the search for legislative intentions or more general statutory purposes, at least to the extent that they are not found in the text. If the meaning of a text is taken to be clear, textualists reject the appeal to other sources to modify or depart from that meaning, even when the meaning of the text is in tension with apparent legislative purposes.[7]

In ascertaining the meaning of the text, textualists commonly endorse a favored cluster of textual methods, including the use of dictionaries, certain traditional interpretive canons, and attention to the use of the same words in other provisions. Contemporary textualists accept that extratextual context is relevant to ascertaining meaning.[8] But a prominent feature of contemporary textualism is a rejection of appeals to legislative history, which textualists regard as unreliable and manipulable.[9]

Probably the most common and important argument for textualism begins with the idea that, in a democracy, courts should be faithful agents of the legislature.[10] Notably, this argument is also probably the most important starting point for intentionalists—the most influential opponents of textualism. Intentionalists argue that the point of electing lawmakers in a democracy is to respect their decisions about what laws to make. So, intentionalists conclude, democracy requires that we interpret statutes in accordance with legislators' intentions.

Like intentionalists, textualists argue that democracy requires that the courts act as faithful agents of the legislature. But contemporary textualists are skeptical about the existence of coherent and discoverable legislative intentions, at least with respect to the kinds of difficult issues that create

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originalism that claims that the relevant original aspect of a constitutional provision is its original meaning. *See* SCALIA, *supra* note 1, at 37–38. One prominent camp that emphasizes "original public meaning" is "new originalism."

7. SCALIA, *supra* note 1, at 17–23; William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 686 (1990); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7, 17 (2001) [hereinafter Manning, *Textualism*]; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92–93, 110 (2006) [hereinafter Manning, *What Divides Textualists from Purposivists?*].

8. Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 78–85; *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60, 176–79 (1999).

9. SCALIA, *supra* note 1, at 29–37; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376–78 (2012); *see* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64–65 (1994) [hereinafter Easterbrook, *Text, History, and Structure*]; John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 123–24. *See generally* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990) [hereinafter Easterbrook, *Legislative History*].

10. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393–94, 2394 n.18 (2003); Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 100–01; *see also* Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 915 (2010); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 129 (2010) [hereinafter Whittington, *New American Constitution*]; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 399–400 (2013) [hereinafter Whittington, *Originalism*].

serious interpretive disputes.[11] To save words, I will not keep repeating the qualification "with respect to the difficult issues that create serious interpretive disputes" but will simply take it as understood throughout.

There are excellent reasons for this skepticism about legislative intentions, which are probably familiar.[12] Very briefly, though it is plausible that small, cooperative, and cohesive groups can have collective intentions, there are many compelling reasons for thinking that multimember—indeed, multicomponent—legislatures in contemporary nation-states typically lack collective intentions that would help to resolve the kinds of controversies that end up in the appellate courts. The individual members typically have not even read the relevant texts or thought about the difficult issues that become controversial. And to the extent that they *have* thought about the issues, different members often have inconsistent and competing intentions.

Textualists point out that in the circumstances of contemporary legislatures, in order to get legislation passed, it is often necessary to compromise. For example, given the way in which the U.S. Constitution structures the legislative process, minorities have the power to block legislation. Competing interests may have very different intentions when they agree on a form of words. Indeed, often the words are crafted in the way that they are precisely to navigate the obstacles in the legislative process.[13] They may well fail to reflect a coherent underlying purpose.[14] As John Manning, a leading textualist, puts it: "The reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded

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11. *See, e.g.*, Frank H. Easterbrook, *Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63–64 (1988) [hereinafter Easterbrook, *Role of Original Intent*]; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; Manning, *Absurdity Doctrine*, *supra* note 10, at 2408–19 (arguing that "complexities of the legislative process make it meaningless to speak of a legislative 'intent' at odds with the intent expressed by the clear social meaning of the enacted text"); Manning, *Textualism*, *supra* note 7, at 71–72l; *see also* Frank H. Easterbrook, *Foreword* to READING LAW: THE INTERPRETATION OF LEGAL TEXTS, *supra note* 9, at xxi, xxii; SCALIA & GARNER, *supra* note 9, at 392–93.

12. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 162–64 (1985); SCALIA & GARNER, *supra* note 9, at 391–96; Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 214–22, 229–31 (1980); Easterbrook, *Role of Original Intent*, *supra* note 11, at 62–66; Easterbrook, *Statutes' Domains*, *supra* note 11, at 547–48; Easterbrook, *Text, History, and Structure*, *supra* note 9, at 67–68; Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 968–76 (1990); Manning, *Absurdity Doctrine*, *supra* note 10, at 2408–19; Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 246–70 (1981); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–72 (1930); Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 645–56 (1995); Lawrence B. Solum, *Semantic Originalism* 14–15 (Univ. of Ill. Coll. of L. Ill. Pub. L. & Legal Theory Series, Research Paper No. 07-24, 2008).

13. For interesting empirical evidence, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013).

14. *See* Manning, *Absurdity Doctrine*, *supra* note 10, at 2390, 2394–95, 2409–24; Manning, *Textualism*, *supra* note 7, at 18–21, 70–78; Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 99–109.

compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment."[15]

Given this reality, if an interpreter attributes a general purpose to a statute and then interprets the statute so as to implement that purpose, the interpreter may well override carefully negotiated compromises. What is therefore required is that interpreters be finely attuned to the details of the text—that is all that the interpreter can presume was actually agreed on.[16]

Textualism's emphasis on the text has to be understood as an emphasis on the linguistic meaning of the text, rather than the text understood as mere marks on a page. I say "linguistic meaning" to make clear that I am not using meaning in some looser sense—for example, the sense in which one might say, when discovering somebody doing something they should not be doing, "what is the meaning of this?"[17]

There are two basic types of linguistic meaning: semantic content and pragmatically conveyed content (or pragmatic content, for short). Very roughly speaking, semantic content is what is conventionally encoded in the words. In other words, it is approximately literal meaning.[18] Pragmatic content is what a speaker or author, by uttering words on a particular occasion in a particular context, manages to convey beyond, or different from, the semantic content of the words.[19] Central to pragmatic content are the communicative intentions of the speaker. When the doctor says to the patient

15. Manning, *Absurdity Doctrine*, *supra* note 10, at 2417.

16. *See id*. at 2395 ("[J]udges can rarely, if ever, tell if a law's specific wording . . . was instead crafted to navigate the complex legislative process."); Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 74 ("[T]he final wording of a statute may reflect an otherwise unrecorded legislative compromise, one that may—or may not—capture a coherent set of purposes.").

17. For discussion of different senses of the term "meaning," see Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1296–97, 1296 n.18 (2014) [hereinafter Greenberg, *The Moral Impact Theory of Law*]. *See also* Response, Mark Greenberg, *What Makes a Method of Legal Interpretation Correct?: Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 107 n.5 (2017) [hereinafter Greenberg, *What Makes a Method*].

18. Understanding "literal meaning" as semantic content probably best captures the way textualists use the term. As the examples discussed below illustrate, textualists reject literal meaning in part because of the way in which speakers in context manage to convey information different from the semantic content of the words.

This lecture will use the term "semantic content" in the standard way. Unfortunately, but understandably, legal theorists use the term differently. For example, John Manning seems to use "semantic content" or "semantic meaning" for some form of pragmatically conveyed content. *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 76; *see also* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 548, 562 (2013). Readers in this area must be wary of this difference in usage given that "semantic content" in philosophical usage is standardly opposed to pragmatically conveyed content. One complication that can be set aside here is that there is a further distinction between standing or timeless word meaning and semantic content. According to a common view, for example, the speaker's semantic intentions determine such matters as the sense of ambiguous expressions and the referents of demonstratives, thereby yielding semantic content.

19. *See* Kepa Korta & John Perry, *Pragmatics*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020), https://plato.stanford.edu/archives/spr2020/index.html [https://perma.cc/XAJ2-28QS].

in the emergency room, "Don't worry, you're not going to die," she likely intends to communicate that the patient is not going to die from this injury (or something in that neighborhood) and the patient will likely recognize that intention, though the literal meaning of the words is that the patient will not die.

On the face of it, pragmatic content seems to be a poor candidate for what textualists are after, given their skepticism about legislative intentions (though we will see that much of what they say points toward pragmatic content nevertheless).

Given textualism's emphasis on text and objective meaning, it would be natural to expect it to focus on semantic content.[20] But leading textualists explicitly reject literal meaning.[21] In Justice Scalia's words: "[T]he good textualist is not a literalist."[22] John Manning makes the point this way: "In contrast with their literalist predecessors in the 'plain meaning' school, modern textualists reject the idea that interpretation can occur 'within the four corners' of a statute."[23]

Our antennae should be up at this point. Despite textualists' emphasis on the meaning of the text, they reject semantic content, and their skepticism about legislative intentions makes an appeal to pragmatic content problematic. If not semantic content or pragmatic content, then what are textualists after?

Contemporary "new textualists" insist that textualism seeks a reasonable reading, not a literal one.[24] To quote Justice Scalia again: "A text should not be construed strictly . . . ; it should be construed reasonably, to contain all that it fairly means."[25]

A *reasonable* reading; at first blush, this suggestion seems hard to quarrel with. But the warm overtones of "reasonableness" obscure the fact that what is reasonable depends on what one seeks (as well as on what one knows or believes). Textualists do not clearly address what a reasonable reader is supposed to be seeking, in part because they have not recognized that there is a question here that needs to be addressed.

The textualist literature suggests at least three quite different things that the reasonable reader might be seeking: (1) what the legislature intended to communicate, (2) what legal norm the legislature intended to adopt, or (3) how the legislature intended the legal norm to be applied to the facts of the present dispute—that is, how the legislature intended a particular case or type

20. Semantic content does not depend on communicative intentions at all, though it does depend on lexical and semantic intentions, e.g., about which word to use. *See supra* note 18.

21. *See* SCALIA, *supra* note 1, at 23–24; Easterbrook, *Text, History, and Structure*, *supra* note 9, at 64, 67; Manning, *Absurdity Doctrine*, *supra* note 10, at 2457–58; Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 108–11; *see also* WHITTINGTON, *supra* note 8, at 176–77.

22. SCALIA, *supra* note 1, at 24.

23. Manning, *Absurdity Doctrine*, *supra* note 10, at 2456.

24. *See* sources cited *supra* note 21.

25. *See* SCALIA, *supra* note 1, at 23.

of case to be resolved.[26] These candidates all involve different intentions of the legislature: intentions about what to communicate (communicative intentions), intentions about what legal rule to create (legal intentions), and intentions about the application of the law to particular types of cases (application intentions).[27]

I will focus on the first candidate, which is probably most supported by textualist writings: the reasonable reader seeks *what the legislature intended to communicate*. As we will see, the remaining two candidates suffer from the same central problem as this candidate. Many textualist discussions rely on examples from ordinary communication, and some textualists are explicit that they take ordinary communication as a model. In ordinary communication, such as in interpreting a remark by one's spouse, the goal is normally to identify what the speaker or author intended to communicate. A reasonable interpretation in a conversational setting is therefore one that is reasonably calculated to recover the speaker's communicative intentions given the audience's beliefs about the speaker and the situation.

Let me give one illustration of the way in which textualists rely on examples from ordinary communication, especially conversation. In the well-known case of *Smith v. United States*,[28] Smith had offered to trade a gun for cocaine.[29] The U.S. Supreme Court divided over the question of whether he was properly sentenced under a statute that provides for increased penalties if the defendant "uses a firearm" in a drug-trafficking or violent crime.[30] In a much-quoted dissenting opinion, Justice Scalia pointed out that, "When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane."[31] The example illustrates

26. As noted below, textualists generally do not distinguish clearly between different kinds of legislative intentions. For evidence of textualists' focus on the first candidate, see the discussion of ordinary communication, *infra* notes 27–32 and accompanying text. For evidence suggesting one or the other of the second and third candidates, which can be especially hard to disentangle, see, for example, Easterbrook, *Statutes' Domains*, *supra* note 11; Easterbrook, *Text, History, and Structure*, *supra* note 9, at 62; Manning, *Absurdity Doctrine*, *supra* note 10, at 2457–58, 2457 n.258, 2470 n.308; Manning, *Textualism*, *supra* note 7, at 109, 113–14; Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 78, 80–82, 84–85, 85 nn.53–54; Whittington, *Originalism*, *supra* note 10, at 386. *See also* WHITTINGTON, *supra* note 8, at 186–87.

27. I have shown elsewhere that these three kinds of intentions are not only different but can also have inconsistent implications in real cases. *See* Mark Greenberg, *Legislation as Communication?: Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 241–44 (Andrei Marmor and Scott Soames eds., 2011) [hereinafter Greenberg, *Legislation as Communication?*]. For further elaboration of the distinctions between different kinds of legislative intentions, see Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 796–99 (2017). *See also* Mark Greenberg, *Legal Interpretation*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 19 (forthcoming 2020) [hereinafter Greenberg, *Legal Interpretation*].

28. 508 U.S. 223 (1993).

29. *Id.* at 226.

30. *See id.* at 228–31.

31. *See id.* at 242 (Scalia, J., dissenting); *see also* Manning, *Absurdity Doctrine*, *supra* note 10, at 2460.

that, in ordinary conversation, in many situations, a speaker who uttered the words in question would likely intend to ask whether you walk with a cane. The communication would therefore be successful if the audience correctly identified that intention.[32]

Textualists also endorse the use of linguistic canons of interpretation such as *expressio unius est exclusio alterius*—to express one is to exclude the others.[33] Properly understood, such linguistic canons are rules of thumb for inferring what a speaker likely intended to communicate, as opposed to the meaning of the words. To take another example from Justice Scalia: "If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other."[34] The conclusion that people twelve and over must pay is not part of what the words mean; rather, it is what one who wrote these words in ordinary communication would typically intend to communicate (and what the audience would likely recognize the author to have intended). In the terms of contemporary philosophy of language, it is an "implicature."

To summarize, a major theme in textualist writings, both explicit and implicit, is the model of ordinary communication. On that model, though textualists do not fully recognize this point, the relevant inquiry is what it would be reasonable to take the speaker to *intend to communicate*. In fact, textualists often equate what words mean with what a reasonable person would take the speaker to intend to communicate.[35] Similarly, textualists often say that the relevant inquiry is "objectified" legal intention, understood as what a reasonable person, given the context, would take the legislature to have intended.[36] (Like other writers on legal interpretation, textualists generally do not distinguish different kinds of legislative intentions—communicative intentions, legal intentions, application intentions, semantic intentions, and so on.)

The notion of what a reasonable person would take a speaker to have intended to communicate is coherent, but in the contemporary study of

32. *See infra* note 49 and accompanying text. For another example of reliance on the model of ordinary communication, see Manning, *Textualism*, *supra* note 7, at 111 n.434.

33. *See, e.g.*, SCALIA, *supra* note 1, at 25–26. Textualists also endorse the use of canons of interpretation and interpretive practices and conventions that are not ways of ascertaining linguistic meaning of any sort. *See, e.g.*, *id.* at 27–28; SCALIA & GARNER, *supra* note 9; Manning, *Absurdity Doctrine*, *supra* note 10, at 2466–67, 2469–70.

34. SCALIA, *supra* note 1, at 25.

35. *See, e.g.*, SCALIA & GARNER, *supra* note 9, at 16, 56.

36. Textualists and nontextualists often quote Justice Scalia on objectified intentions as if Scalia were endorsing the position, though it is unclear that he means to do so: "We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*." SCALIA, *supra* note 1, at 17; *see, e.g.*, Larry Alexander & Saikrishna Prakash, "*Is That English You're Speaking?": Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 968 (2004); Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–21 (1999); Richard H. Fallon, *The Meaning of Legal Meaning and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1275 (2015); Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 70, 79.

language, it is not an important contender as a conception of word or utterance meaning.[37] The crucial point, however, is that, in the case of legislation, by the textualists' own lights, *it is not reasonable to take the legislature to have intended to communicate anything*. A central textualist tenet, remember, is that there are no coherent and discoverable legislative intentions of the sort that would be needed to resolve controversial issues in statutory and constitutional interpretation. So, unless the reasonable reader is assumed to be confused about legislatures, if we ask what the reasonable reader would take the legislature to have intended to communicate, the answer is: *nothing*.[38]

Textualists have not recognized this problem, in part, because they misunderstand what the examples from ordinary communication illustrate. They think that there is a type of meaning—they call it "meaning in context" or "public meaning"—that varies from context to context, and that that type of meaning is what we try to discover in ordinary communication.

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37. One kind of contemporary view maintains that speakers' intentions can determine content only if they are recognizable by a reasonable hearer. *See, e.g.*, Jeffrey King, *Speaker Intentions in Context*, 48 NOÛS 219 (2014).

38. There is a more general and more technical way of explicating the problems faced by theorists who claim that they are after the linguistic meaning of legal texts, yet maintain that legislatures (ratifiers of constitutions and so on) lack coherent and discoverable intentions. An important lesson of much contemporary work on language is that the standing or timeless meanings of sentences fail to determine complete propositions. This underdetermination is the result of diverse phenomena, including, for example, lexical and structural ambiguity, deixis and more covert forms of context sensitivity, and compression. For a small sampling of a large literature, see generally ROBYN CARSTON, THOUGHTS AND UTTERANCES: THE PRAGMATICS OF EXPLICIT COMMUNICATION (2002); 1 SCOTT SOAMES, PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE (2009); Kent Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE 124 (1994); Kent Bach, *Semantic Slack: What Is Said and More*, *in* FOUNDATIONS OF SPEECH ACT THEORY 267 (Savas L. Tsohatzidis ed., 1994); Robyn Carston, *Implicature, Explicature, and Truth-Theoretic Semantics*, *in* MENTAL REPRESENTATIONS: THE INTERFACE BETWEEN LANGUAGE AND REALITY 155 (Ruth M. Kempson ed., 1988); Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1327; François Récanati, *The Pragmatics of What Is Said*, *in* PRAGMATICS: A READER 97 (Steven Davis ed., 1st ed. 1991); Stephen Neale, Textualism with Intent (Nov. 4, 2008) (unpublished manuscript), https://sites.google.com/site/nicosstavropoulos/NealeExcerpt.pdf [https://perma.cc/H9NY-5PPV].

There is a lively debate about the details of semantic and pragmatic enrichment—the name given to the processes of fleshing out the skeletal content determined by the standing or timeless meaning of words—but the crucial point for present purposes is that according to a wide range of mainstream views, speakers' intentions play an important role. Such enrichment yields semantic content and, on some accounts, *what is said*. To take a simple example, on standard views, semantic intentions play a central role in determining the reference of expressions like demonstratives ("this" and "that"). Similarly, when a speaker uses a phrase like "Pat's book," her intentions play a central role in determining that the content of what she says is, for example, *the book that Pat wrote*, *the book that Pat owns*, or *the book that Pat chose*. *See infra* notes 46–47 (discussing the role of intentions in determining the semantic content of context-sensitive expressions).

In my view, though legislatures avoid many words and expressions that require enrichment and often add explicit specifications where necessary, it is impossible in practice to avoid the need for enrichment entirely. Consequently, even if textualists were willing to opt for semantic content (or, differently, for what is said), it would be a problematic option for them because in many cases the relevant texts do not yield complete contents without appeal to at least some legislative intentions. And textualists' rejection of legislative intentions makes pragmatically conveyed content even more problematic.

Like many writers on legal interpretation, textualists take for granted that the meaning of words is determined by context[39]: "Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing. Texts appeal to communities of listeners, and we use them purposively. The purposes, and so the meaning, will change with context, and over time."[40] The idea that word meanings depend on context and therefore, change from context to context, is pervasive in textualist literature.[41] Indeed, textualists sometimes go so far as to suggest that words have meaning only in context.[42] And they further assume that the notion of the "ordinary meaning of words in context," or of the "public meaning" of words, is unproblematic and requires little explication.[43]

In fact, however, the standard view in the philosophy of language and linguistics is that there is much less context sensitivity than textualists seem to assume.[44] As illustrated below, many of the phenomena that textualists

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39. Again, I emphasize that I use the term "determine" exclusively in its constitutive sense. *See infra* Part III.A. As the discussion in the next few paragraphs makes clear, it is crucial to distinguish the claim that (intention-independent) context constitutively determines the content of a text from the claim that it is used to ascertain that content.

40. Easterbrook, *Text, History, and Structure*, *supra* note 9, at 61.

41. *See, e.g.*, Barnett, *supra* note 36, at 632–33, 644; Randy Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 419 (2013); Easterbrook, *Legislative History*, *supra* note 9, at 443; Manning, *Absurdity Doctrine*, *supra* note 10, at 2457–65; Manning, *Textualism*, *supra* note 7, at 108–11; Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 75, 78–85; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004); *see also* SCALIA & GARNER, *supra* note 9, at 56. Barnett suggests that constitutional interpretation, like contract interpretation, should use an "objective approach" that "looks to the publicly-accessible meaning that a reasonable person would attach to these words in context." Barnett, *supra* note 36, at 632–33. Many textualist examples involve cases in which the reader uses context to infer which sense of a word or phrase the speaker intended to employ. *See, e.g.*, Manning, *Absurdity Doctrine*, *supra* note 10, at 2458 n.262. Manning illustrates what he takes to be the way in which words vary in meaning in different contexts with Samuel von Puffendorf's example of a medieval statute imposing criminal penalties on anyone who "drew blood in the streets." *Id.* at 2461. Manning writes:

> A modern textualist, however, would place different glosses on the phrase 'drew blood' in different contexts. In some contexts, that phrase refers to a violent piercing of the skin . . . . In different contexts, however, it might refer to a medical procedure . . . . Accordingly, under a modern understanding of textual interpretation, dismissing the charges against Puffendorf's surgeon would comport with the ordinary meaning of the statute in context.

Id. at 2461–62.

42. Manning, *What Divides Textualists from Purposivists?*, *supra* note 7, at 77.

43. *See, e.g.*, Whittington, *supra* note 41, at 609–10. Barnett, for instance, quotes Robert Bork approvingly: "[W]hen lawmakers use words, the law that results is what those words ordinarily mean." Barnett, *supra* note 36, at 620 (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990)). The passage confuses what words mean with what hearers would ordinarily take a speaker who utters the words in a particular context to mean.

44. There are radical pragmatists, who take context sensitivity to be ubiquitous. For example, Charles Travis, probably the most prominent theorist in this camp, denies that sentences, as opposed to utterances in context, have determinate truth conditions. *See, e.g.*, Charles Travis, *Meaning's Role in Truth*, 105 MIND 451 (1996) [hereinafter Travis, *Meaning's Role*]; Charles Travis, *On What Is Strictly Speaking True*, 15 CAN. J. PHIL. 187 (1985)

understand to be the intention-independent context determining the meanings of texts are, instead, best understood as speakers' intentions determining the contents expressed by utterances of the texts.

In the contemporary literature, theorists have claimed context sensitivity for diverse categories of terms, including gradable adjectives, modals, quantifiers, and terms like "relevant" and "enough." Far from its being widely accepted that *all* words are context sensitive, even such claims of context sensitivity for quite specific categories of terms are highly controversial.[45]

Moreover, textualists and others writing in the legal literature take context not to include the speaker's intentions (nor indeed any mental states of the speaker). That is why textualists can happily talk of "meaning in context," despite their skepticism about legislative intentions.

It is therefore crucial to understand that in discussions of context sensitivity, philosophers of language and linguists standardly understand context to *include* the speaker's intentions.[46] Thus, a claim that a term is

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[hereinafter Travis, *Strictly Speaking*]. Such positions face well-known objections, and, contrary to what textualists seem to assume, they are far from the orthodoxy.

Travis does not offer a worked-out account of the mechanism by which the semantic values of context-sensitive expressions are determined. It is worth noting that because radical pragmatist positions do not do much to specify the details of how context determines content, if textualists were to adopt such a position, it would make it difficult for them to adjudicate between competing interpretations. Telling us that content is determined by multiple subtle contextual factors is not much of a prescription for ascertaining content in a disputed case. It is important to understand that radical pragmatists—and indeed theorists of pragmatics more generally—are not in the business of offering a method for ascertaining the meanings or contents of utterances. Rather, humans are remarkably good at making pragmatic inferences swiftly and automatically, and pragmatic theory tries to explain how we do it. Theories of legal interpretation are in a very different posture, as they are precisely trying to specify a method for resolving controversial cases—cases where people do not agree on the relevant inferences.

In addition, it is not clear to what extent Travis denies that speakers' intentions are part of the relevant context. *See, e.g.*, Travis, *Meaning's Role*, *supra*; Travis, *Strictly Speaking*, *supra*. As discussed in the text below, in discussions of context sensitivity, speakers' intentions are generally understood to be an important part of the context. For a rare example of a view that tries to spell out how the semantic value of context-sensitive expressions is determined without relying on speakers' intentions, see Christopher Gauker, *Zero Tolerance for Pragmatics*, 165 SYNTHESE 359 (2008). Gauker argues that speakers' intentions play no role in determining the referents of demonstratives ("this" and "that"). *See id.* at 363. Rather, the referent is the object that best satisfies several criteria, including salience, prior reference in the discourse, relevance, and pointing. *Id.* at 364.

45. *See generally* David Braun, *Indexicals*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 19; Jeff Speaks, *Theories of Meaning*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 19.

46. To take one fairly typical example, Daniel Rothschild and Gabriel Segal argue that certain predicates, such as "red," are context sensitive. On the question of what context is, they say: "We have no theory of contexts, but the key thing is that they must include the referential intentions of speakers. If someone insists on asking us what a context is, then we will say that it is an ordered pair of an utterance and the rest of the universe." Daniel Rothschild & Gabriel Segal, *Indexical Predicates*, 24 MIND & LANGUAGE 467, 471 n.10 (2009). Others do not take speakers' intentions to be a *component* of context but nevertheless take those intentions to play a central role in determining the contents of utterances involving context-sensitive expressions. *See, e.g.*, Kent Bach, *Context ex Machina*, *in* SEMANTICS VERSUS

context sensitive is not a claim that the content expressed by an utterance of the term is determined independently of the speaker's intentions.[47]

In short, context sensitivity, in the way that it is generally understood in linguistics and the philosophy of language, is little help to textualists. "Meaning in context" does not provide textualists with an alternative type of meaning or content that is independent of speakers' intentions.

In general, rather than the meanings of words changing with changes in the (intention-independent) context, speakers' intentions change—which words (or senses of words) they intend to use, what they intend to refer to, and what they intend to communicate. And the audience uses the context to infer the speaker's intentions. To give a very simple example, an utterance of "bank" does not mean *riverbank* when the speaker is fishing and *financial bank* when the speaker is on Wall Street. Rather, the speaker's intentions determine which of the homonymous words—or which sense, if you take "bank" to be a single ambiguous word—she is using, and the audience then uses the context to try to infer what the speaker intended. An illustration: if you are fishing on the side of a river, you will encounter no difficulty using "bank" to mean *financial bank*. Your audience may or may not have difficulty inferring what you mean, but that is a separate question.

Textualists' discussion of *Smith* illustrates this misunderstanding. John Manning writes: "*Focusing on what 'using a firearm' means in the context of committing a crime*, Justice Scalia simply read the text to require penalty enhancement only for brandishing a gun in connection with drug trafficking."[48] But the words "using a firearm" do not take on a special, narrow meaning of *use as a weapon* or *use for its intended purpose* "in the context of committing a crime."[49] Rather, as the "using a cane" example

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PRAGMATICS 15 (Zoltán Gendler Szabó ed., 1st ed. 2005); Kent Bach, Why Speaker Intentions Aren't Part of Context (2009) (unpublished compilation), http://userwww.sfsu.edu/kbach/Bach.Intentions&Context.pdf [https://perma.cc/5R6D-FWNT].

47. The contemporary debate about the mechanism by which the semantic content of context-sensitive expressions is determined tends to be about whether speakers' intentions do *all* the work or merely some of it. *Compare* Jeffrey C. King, *Speaker Intentions and Objective Metasemantics*, *in* THE ARCHITECTURE OF CONTEXT AND CONTEXT-SENSITIVITY 55, 56 (Tadeusz Ciecierski & Pawel Grabarczyk eds., 2020) (arguing that speakers' recognizable intentions are the mechanism that determines the content of context-sensitive words other than indexicals), *with* Michael Glanzberg, *Indirectness and Intentions in Metasemantics*, *in* THE ARCHITECTURE OF CONTEXT AND CONTEXT-SENSITIVITY, *supra*, at 29, 45 (arguing that in the case of context-sensitive gradable adjectives, intentions play only a limited role in determining semantic value). It is common for theorists who argue for the context sensitivity of a particular type of term to leave open the question of the exact mechanism by which semantic content is determined in context. For an explicit statement of such agnosticism, see Zoltán Gendler Szabó, *Adjectives in Context*, *in* PERSPECTIVES ON SEMANTICS, PRAGMATICS, AND DISCOURSE 119, 143 n.32 (Istvan Kenesei & Robert M. Harnish eds., 2001).

48. Manning, *Absurdity Doctrine*, *supra* note 10, at 2461 (emphasis added).

49. *See* 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, *in* PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE, *supra* note 38, at 403, 413–15 [hereinafter SOAMES, *Interpreting Legal Texts*]; Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1327; Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 237–39 (2011) [hereinafter Soames, *Toward a Theory*]. *See generally* Neale, *supra* note 38.

illustrates, a speaker may employ a phrase like "use as a gun" intending to communicate something narrower than the standing meaning of the words or, differently, intending to use a relatively narrow sense of a polysemous term. And the audience uses context to infer what the speaker intended.

The upshot is that, if we take ordinary communication to be our model, appealing to a reasonable reading gets us nowhere. As emphasized above, if the legislature lacks coherent and discoverable intentions, a reasonable person would not take the legislature to have intended to communicate anything. And notice that the same problem applies if what the reasonable person is supposed to be seeking is the content of one of the other two kinds of legislative intentions that textualists sometimes seem to have in mind—the legislature's intention to create a particular legal rule, or the legislature's intention that a particular outcome be reached when the relevant legal rule is applied to a certain class of cases. Either way, a reasonable person, understanding that legislatures lack coherent and discoverable intentions, would not take the legislature to have intended anything.

Although the textualist cannot appeal to notions that depend on what a reasonable person would have taken the legislature to have intended, it is certainly possible to construct related contents by stipulating false assumptions about the speaker or the situation. Plainly, there are many such counterfactual-based notions depending on exactly how we specify the various counterfactual assumptions.[50] For example, we might ask what a reasonable person would have taken the speaker's communicative intention to be if the text had been uttered by one coherent speaker in ordinary conversation with the goal of communicating a message.

It is important to note that, as stated, the answer to this question will likely be indeterminate—that is, without more specification, there will be no fact of the matter as to what a reasonable person would have taken the speaker's intention to be. In an ordinary conversation, the listener typically has a good deal of information that allows him or her to infer the speaker's communicative intentions: information about the setting; the course of the conversation to this point; the speaker's beliefs, interests, and goals; and what is common knowledge between the speaker and listener. Textualists have offered no reason to think that such information is dispensable. What characteristics should the reasonable member of the audience be taken to have? Most importantly, what does this reasonable person believe about the history and goals of the fictional conversation and about the speaker's beliefs and interests?[51] In order to specify a determinate content, such questions have to be answered. Moreover, answering these questions in a particular way, rather than indefinitely many others, needs to be justified.

50. Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 87, 91–93 (Grant Huscroft & Bradley W. Miller eds., 2011).

51. For an interesting discussion of problems with appeals to idealized listeners in discussions of how the semantic content of context-sensitive expressions is determined, see Ethan Nowak & Eliot Michelson, *Who's Your Ideal Listener?*, AUSTRALASIAN J. PHIL. (forthcoming 2020), https://philarchive.org/rec/NOWWYI [https://perma.cc/K23E-HXSS].

An alternative approach for textualists would be to appeal to contemporary accounts of pragmatic contents, for example, of what is asserted, that have an objective cast, relying in part on norms or conventions of communication rather than on the speaker's communicative intentions.[52] Given the norms in force in a particular context, the speaker may be, for example, committed to a content even if the speaker does not intend to communicate that content. (One way to explicate the notion of commitment is that a speaker is committed to a content if the speaker would have to have intended that content in order to be in compliance with the relevant norms.) The difficulty is that, in the actual context, the relevant norms or conventions are those of legislative drafting and legal interpretation, which just returns us to the question of which principles govern drafting and interpretation.[53] Alternatively, the relevant norms or conventions could be taken to be those of some counterfactual context, such as that of ordinary conversation, which would bring us back to counterfactual contents.

Once the notion of a reasonable reading is explicated in terms of counterfactual assumptions about the speaker or the context, its relevance and appeal fade. Why should the interpreter be focused on what would be reasonable for a reader who had certain false assumptions about the authorship of the text or the context in which it was uttered?

Return, for example, to the model of ordinary conversation, which is so prominent in textualist discussions. Why should one ask what it would be reasonable to take the speaker to have intended if the text had been uttered in ordinary conversation given various fictional specifications about the setting of the conversation, the speaker, and so on? The assumption that legal interpretation should be modeled on the interpretation of ordinary conversation is problematic. Lawmaking has very different goals,

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52. According to the classic account of Paul Grice, the audience infers the speaker's intentions by assuming that the speaker is trying to comply with the norms governing ordinary conversation. *See* Paul Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 49–51 (Peter Cole & Jerry L. Morgan eds., 1975). Therefore, another way of constructing an objective content is by asking what the speaker would have to have intended in order to comply with those norms. *See* Greenberg, *Legislation as Communication?*, *supra* note 27, at 230–31, 248–49. Scott Soames offers hints in this direction, though it is unclear how he takes the relevant contents to be determined and, in particular, to what extent they depend on the speaker's communicative intentions. *See* SOAMES, *Interpreting Legal Texts*, *supra* note 49; Scott Soames, *Deferentialism: A Post-originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013); *see also* Soames, *Toward a Theory*, *supra* note 49, at 239–43.

53. There is a further question of whether the relevant principles are those that are in fact generally conformed to or those that are appropriate for legislative drafting and legal interpretation, regardless of whether they are conformed to. If the former, they will not take us far—for example, they will not help to resolve any issue that is controversial. As for the latter possibility, I address it briefly in Part III.E. For elaboration, see Greenberg, *Legislation as Communication?*, *supra* note 27, at 250–56; Mark Greenberg, *The Communication Theory of Legal Interpretation and Objective Notions of Communicative Content* 6–10 (UCLA Sch. of L. Research Paper No. 10-35, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726524 [https://perma.cc/95Z9-HE7N]; *see also* Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS. 423, 435–40 (2008).

presuppositions, and circumstances from ordinary conversation.[54] For example, the shared purpose of efficiently exchanging information plays a crucial role in the conversational case.[55] That's why the central feature of ordinary conversation is that the goal is to figure out what the speaker intended to communicate. Given the cross-purposes and lack of cooperation, both within the legislature and between the legislature and various parts of the audience, it is difficult to see what would be an analogous purpose shared by the legislature and the audience across all legislation.[56]

At this point, it should be clear that textualism is in trouble. Textualism rejects the idea that the search is for the most objective form of meaning—semantic content. And, given its skepticism about legislative intentions, textualism cannot take the search to be for pragmatically conveyed content. What textualism calls "public meaning" has to be reconstructed in terms of false assumptions about the context and the speaker. Such a counterfactual content is: (1) contrary to textualist rhetoric, not the meaning of the words, and (2) badly underspecified, so much more needs to be said to determine a unique content.

Let's take a step back and ask how we became engaged in an exercise of constructing contents by stipulating fictional assumptions about the speaker and the context. We began from contemporary textualism's starting point — that in a democracy, judges must act as faithful agents of the legislature who are obliged to carry out the principal's intentions. This argument does not offer any help with the question of how "a reasonable reading of the text" should be understood when there is no legislative intention. If the result of legislative bargaining is merely an agreement on a form of words, then there is, by hypothesis, no intention to be implemented by the faithful agent.

In a nutshell, the words *are* the bargain. So, implementing the bargain requires implementing the words. But what does it mean to implement words? We can see why one might think that implementing a verbal compromise points in the direction of interpreting the text in accordance with the meaning of the words. After all, you cannot simply regard the words as meaningless marks on the page.

This thought is far from a compelling argument that implementing words involves taking the meaning of the words to be the end point of legal interpretation. In the next part, I will argue that the question is what contribution the enactment of a provision with particular words makes to the content of the law. And competing theories of law take different positions on that question. But, anyway, what a reasonable reader would understand under certain fictional assumptions is, contrary to textualist rhetoric, not the meaning of the words.

We have seen that "a reasonable reading of the text in context" is underspecified. Textualists thus face a challenge to specify a coherent and unique content—one based, say, on precise counterfactual stipulations about

54. Greenberg, *Legislation as Communication?*, *supra* note 27, at 241–56.
55. PAUL GRICE, STUDIES IN THE WAY OF WORDS 28 (1989).
56. *See* Marmor, *supra* note 53, at 429, 435–40; Greenberg, *supra* note 53, at 6.

the speaker or the context. But the more fundamental challenge is to explain why legal interpretation should be focused on the content thus constructed, rather than on one of the many other candidates. An appeal to faithful agent theory with some hand-waving about democracy does not take us very far. Perhaps more fully developed arguments from democracy, rule of law, and fairness could meet the challenge.

I want now to make a fresh start by asking whether such normative arguments are even the appropriate place to turn when defending methods of legal interpretation. I hope that these brief remarks about textualism's troubles have given you a sense of why that fresh start is needed.

I now turn to the second main part of my talk.

II. WHAT LEGAL INTERPRETATION SEEKS

Lawyers and judges are familiar with various competing theories or methods of legal interpretation—textualism, intentionalism, purposivism, pragmatism, originalism, living constitutionalism, and the like. The questions of which theory is correct, and of the different theories' pros and cons, are important. But there is a more fundamental question that is less often addressed: What *is* legal interpretation? More specifically, what does legal interpretation, by its nature, seek? What is its constitutive aim?[57]

Many activities are defined or constituted in part by their aims. The practice of medicine is an example. One who examines people, prescribes drugs, and performs surgeries is not practicing medicine unless these activities are undertaken for the appropriate purposes—something in the neighborhood of healing illness and promoting health. Imagine, for example, someone who is engaged in such activities as part of a scheme to harm the "patients." Of course, individual physicians may have many other purposes, such as earning money or impressing people, but such ends are not what the practice of medicine, by its nature, seeks.

Legal interpretation starts from particular input, such as legal texts and practices. And legal interpretation yields an output—an interpretation. It seems clear that an account according to which legal interpretation is simply any process that takes the legal texts and yields an output is inadequate. If the output is generated randomly or in order to entertain, the process is not legal interpretation. I suggest that what is missing, as in the case of someone

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57. I want to forestall a possible confusion. Above, I considered three different things that textualist discussions might suggest the reasonable reader is seeking. That discussion does not concern how textualists understand the constitutive aim of legal interpretation but rather how they understand the textualist method and, in particular, its appeal to a reasonable reading. *See supra* notes 26–27 and accompanying text. When writers talk about what legal interpretation seeks, they are often best understood as addressing the less fundamental question of which substantive method of legal interpretation is correct. *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 8–9 (2005); SCALIA, *supra* note 1, at 16; Alexander & Prakash, *supra* note 36, at 991; Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013); Fallon, *supra* note 36, at 1279, 1297; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348, 351–57 (2005); Soames, *Deferentialism*, *supra* note 52, at 597; Whittington, *New American Constitution*, *supra* note 10, at 120, 121 n.3.

who gives out drugs and performs surgeries in order to harm people, is the constitutive aim of the activity.

Notice that the familiar debate concerns which method of getting from the input to the output is correct: Textualism? Intentionalism? Pragmatism? Originalism? But to be a method is, necessarily, to be *for* the achievement of some end. What would make a method of legal interpretation correct except that it is a good way of fulfilling the aim of legal interpretation?

The more basic issue thus concerns not which method of getting from input to output is correct but what the output is supposed to be—what legal interpretation, by its nature, seeks.[58] Here are three main candidates[59]: (1) the linguistic meaning of the text of the relevant provision,[60] (2) the

58. For brevity, I will generally omit the qualification "by its nature."

59. For simplicity, I do not include legislative intentions as a candidate here, but the argument that rules out linguistic meaning as the constitutive aim of legal interpretation applies to legislative intentions as well. *See infra* note 66 and accompanying text.

60. Frequently, all sides to a legal interpretive debate ostensibly agree that the debate concerns the "meaning" of a particular legal text. *See* Berman & Toh, *supra* note 18, at 547 n.11; Kent Greenawalt, *Constitutional and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 275–77 (Jules Coleman & Scott J. Shapiro eds., 2004); Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1297 n.19; *see also, e.g.*, BARAK, *supra* note 57, at 3; Alexander & Prakash, *supra* note 36, at 991; Reed Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L.J. 206, 217 (1975); Fallon, *supra* note 36, at 1237, 1297–1307; Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 743–45 (1982); Jeffrey Goldsworthy, *Constitutional Interpretation: Originalism*, 4 PHIL. COMPASS 682, 683 (2009); Gary Lawson, *On Reading Recipes…and Constitutions*, 85 GEO. L.J. 1823, 1824 (1997); Whittington, *New American Constitution*, *supra* note 10, at 121. But this apparent agreement does not in fact tell us much. The term "meaning" (and its cognates) is often used loosely and, in any event, has several senses, of which linguistic meaning is only one. Moreover, there is widespread confusion about what linguistic meaning is, and it is common to conflate a provision's contribution to the content of the law with its linguistic meaning or, differently, to assume that a provision's contribution is constituted by its linguistic meaning. Even sophisticated theorists who carefully distinguish between different kinds of linguistic meaning fail to distinguish between a provision's linguistic meaning and its contribution. For example, Richard Fallon assumes without argument that the different items that competing theories of legal interpretation seek are all kinds of linguistic meaning. *See* Fallon, *supra* note 36, at 1241–42. Similarly, Samuel C. Rickless takes for granted that legal interpretation seeks some kind of linguistic meaning and argues that the relevant kind of linguistic meaning varies. *See* Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 SAN DIEGO L. REV. 519, 521 (2005); *see also* SOAMES, *Interpreting Legal Texts*, *supra* note 49, at 403 (taking for granted that legal interpretation seeks the total linguistic content of a statute).

provision's contribution to the content of the law,[61] and (3) the best resolution of disputes.[62]

This issue is more fundamental than the more familiar question of which method of interpretation is correct because *which method is correct depends on what legal interpretation seeks*. As I suggested above, methods are for achieving ends. In general, how good a method is depends on what the method is *for*. Whether a method of searching is a good one depends on whether one is searching for black holes, tigers, or viruses. A method of physical training that is good for preparing for marathons might be very poor for preparing for sumo wrestling.

Returning to legal interpretation, the appropriate method for finding, say, the linguistic meaning of a text is likely very different from the appropriate method for finding the best resolution of a dispute. Similarly, the fact that a method is fair or democratic might well be irrelevant if legal interpretation

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61. Mitchell Berman has suggested to me the alternative phrasing, "the legal norms to which the provision contributes." His formulation is probably better for present purposes than "the provision's contribution to the content of the law" because legal interpretation seeks not just a provision's contribution to legal norms but the legal norms themselves. It is better than simply "the content of the law" or "the legal norms" because it captures the way in which legal interpretation focuses on particular provisions. For expository ease, however, I often talk loosely of legal interpretation's seeking "a provision's contribution to the law" or simply "the content of the law." There is a perceptible trend in the literature toward the position that legal interpretation seeks the content of the law. *See generally* Greenberg, *Legislation as Communication?*, *supra* note 27; Greenberg, *The Moral Impact Theory of Law*, *supra* note 17; Greenberg, *What Makes a Method*, *supra* note 17; Mark Greenberg, Principles of Legal Interpretation (Aug. 2016) (unpublished manuscript), https://philosophy.ucla.edu/wp-content/uploads/2016/08/Principles-of-Legal-Interpretation-2016.pdf [https://perma.cc/8AUB-6HGJ]. The influential textualist and originalist movements have increasingly relied on arguments that textualism and originalism accurately identify the content of the law. *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1340–44 (2018); *see also* Whittington, *supra* note 41, at 608–09. As Randy Barnett puts it, "the original meaning of the text provides the law that legal decision makers are bound by." Barnett, *supra* note 41, at 417; *see, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4, 144 (1990); SCALIA, *supra* note 1, at 22; SCALIA & GARNER, *supra* note 9, at 383, 397–98; Charles L. Barzun, *The Positive U-turn*, 69 STAN L. REV. 1323 (2017); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. L. REV. 1455, 1460 (2019); Berman & Toh, *supra* note 18; Easterbrook, *Text, History, and Structure*, *supra* note 9, at 82.

62. The view that legal interpretation seeks the best resolution of disputes is not often explicitly defended. In fact, there has been a recent tendency to insist on distinguishing between adjudication—understood as encompassing everything that courts must do to resolve disputes—and interpretation. *See, e.g.*, Lawson, *supra* note 60, at 2155–62; Rickless, *supra* note 60, at 521. But traditional writings on legal interpretation, as well as many contemporary writings, take an eclectic approach to defending and evaluating methods of interpretation, appealing to whichever aspects or consequences of a method are valuable or desirable. *See, e.g.*, Molot, *supra* note 2, at 64–65; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 201 (1986). *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008). This kind of approach seems better suited to identifying the best method of resolving disputes than to identifying the most reliable method of ascertaining a legal text's linguistic meaning or a provision's contribution to the law. On the other hand, the use of such an approach may simply reflect the fact that most writers have not carefully considered the question of what legal interpretation seeks.

seeks linguistic meaning but highly relevant if it seeks the best resolution of disputes. In evaluating methods of interpretation, however, writers tend to appeal to whatever considerations strike them as valuable without addressing what legal interpretation is *for*.[63]

There is a straightforward and powerful argument that legal interpretation seeks legal provisions' contributions to the content of the law.[64] This argument begins from several propositions that are very widely shared by theorists of legal interpretation: (1) their theories of legal interpretation often yield interpretations that are decisive—that is, they tell judges how to *resolve* legal disputes; (2) in resolving disputes, judges must follow the law except in extremely unusual circumstances, for example of grave injustice or imminent threat to life; and (3) the content of the law is often sufficiently determinate to resolve disputes. For precision, it should be clarified that theorists take the cases in which their theories of legal interpretation yield decisive interpretations to be among the cases in which there is sufficient law to resolve the disputes. That is, it is not that theories of legal interpretation yield decisive interpretations only in cases in which there is no law.[65] On the contrary, they commonly yield decisive interpretations in cases in which there is law.

Given these propositions, the output of legal interpretation must *at least* include the content of the law. If it did not, then, given that there is often law and the courts must as a rule follow the law, legal interpretation would not in general be able to resolve disputes.

It might be objected that theories of legal interpretation could resolve legal disputes without identifying the content of the law—they could resolve them *incorrectly* without regard to what the law is. But this objection misunderstands what theorists agree on. They take their theories to yield *correct* resolutions in cases where there is decisive law. Since they agree that courts must follow the law (except in extraordinary circumstances), their theories must purport to identify the relevant legal standards.

This point immediately rules out such candidates for the constitutive aim of legal interpretation as the linguistic meaning of the legal texts or the intentions of the enacting bodies. It may well be that in order to identify the content of the law, it is necessary to identify other items, such as the linguistic meaning of the texts or the intentions of the legislators. But whatever legal

63. For example, Philip Frickey suggests that the way to evaluate purposivism is by asking "whether the interpretations that this theory produces are more worthwhile for a legal system than would be literalist or intentionalist ones." Philip P. Frickey, *Structuring Purposive Statutory Interpretation: An American Perspective*, 80 AUSTRALIAN L.J. 849, 851–52 (2006). Similarly, after making their often quoted claim that "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation," Hart and Sacks suggest that "the most that could be hoped for" in a theory is that, in addition to being founded in experience and good practice, "it will be well calculated to serve the ultimate purposes of law." HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge & Philip P. Frickey eds., 1994).

64. I elaborate this argument somewhat differently in Greenberg, *Legal Interpretation*, *supra* note 27.

65. "No law" is shorthand for not enough law on the issues in dispute to resolve the case.

interpretation has to find along the way, it cannot stop short of ascertaining the content of the law.[66]

The remaining alternative to the claim that legal interpretation seeks the content of the law would be that it seeks the content of the law plus something more. In particular, the obvious possibility would be that legal interpretation seeks the best resolution of disputes. Resolving disputes involves more than figuring out what the law is. Given that courts must follow the law, when there is law, resolving disputes must begin by trying to ascertain what the law is. But it involves more because some cases will not be fully resolved by applicable law, and in cases of exceptional injustice or the potential for extraordinary harm, even when there is applicable law that resolves the issue, there is a further question of whether to refuse to follow the law.

Consequently, if legal interpretation sought the best resolution of disputes, it would have to comprise several activities in addition to ascertaining what the law is. For example, it would have to include: (1) making discretionary decisions not governed by dispositive legal standards, such as fixing criminal sentences under statutes that specify a range of permissible sentences; (2) fashioning new legal standards; and (3) deciding, in exceptional circumstances, whether to refuse to follow the law. These are very different kinds of activities from ascertaining what the law is and would therefore require very different methods. So, if legal interpretation sought the best resolution of disputes, theories of legal interpretation would have to have multiple components—including one for making discretionary decisions, one for deciding whether to refuse to follow the law, and so on.

But our paradigmatic theories of legal interpretation do not seem to have multiple components; they offer unified prescriptions. And these theories do not even begin to address many of the kinds of questions that have to be resolved in a theory of how to resolve disputes. For example, intentionalism, purposivism, and textualism have nothing to say about how to fix defendants' sentences within a statutory range, how to fashion new legal standards, or whether to depart from the law in cases of exceptional injustice or imminent danger.[67]

In sum, since legal interpretation has to resolve disputes that are governed by legal standards that courts must follow, it must at least yield the content of the law. Since standard theories of legal interpretation are not multipart theories that include methods for making the other kinds of decisions that

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66. *See* Greenberg, *What Makes a Method*, *supra* note 17, at 110. It might be objected that finding, say, the linguistic meaning of the relevant legal texts does resolve disputes because the linguistic meaning constitutes a provision's contribution to the law. This objection concedes that legal interpretation seeks a provision's contribution to the law and assumes that that contribution is constituted by linguistic meaning. The objection, therefore, should be understood as taking the position that legal interpretation, by its nature, seeks provisions' contribution to the content of the law and further holding, based on a controversial substantive claim about how the content of the law is determined, that the correct method of legal interpretation is to ascertain linguistic meaning. At any rate, a position concerning legal interpretation's constitutive aim should not depend on a controversial substantive claim about how the content of the law is determined.

67. *See id.* at 110 n.16.

would be part of a full dispute resolution method, those theories are best understood as seeking the content of the law.[68]

From this point on, I will take it as established that legal interpretation is best understood as seeking the content of the law. What follows from this conclusion is that we should evaluate methods of legal interpretation according to how well they ascertain the content of the law. A method cannot be a good one unless it reliably yields the content of the law.

I now turn to the final substantive part of my talk.

III. THEORIES OF LAW AND THEIR IMPLICATIONS FOR LEGAL INTERPRETATION

In this part, I examine the implications of the conclusion that legal interpretation seeks the content of the law. Given this conclusion, the crucial question is how to figure out the impact of the enactment of a provision on the content of the law. We therefore need to understand how the enactment of a provision affects the content of the law. This is the province of what I call a theory of law.

A. Legal Interpretation and How the Content of the Law Is Determined

Let us use the term "legal facts" for facts about the content of the law—for example, the fact that, in California, contracts for the sale of land are not valid unless they are in writing.[69] Legal facts are not among the most basic facts of the universe. They are determined by more basic facts, such as facts about what various people and institutions, including legislatures and courts, have said, done, and decided and, on some views, moral or other normative facts.

An important terminological point: the word "determine" ("determination," "determining," and so on) is ambiguous between a metaphysical sense—to determine the content of the law is to *make* the content of the law what it is—and an epistemic sense—to determine the content of the law is to ascertain or figure out what the content of the law is. To avoid confusion, I use the term exclusively in the metaphysical sense.

In these terms, a theory of legal interpretation is a theory of how to *ascertain* the content of the law, not a theory of how the content of the law is determined. I use the label a "theory of law" for an account of how the more basic, determining facts determine the legal facts, i.e., make those facts what they are. Different theories of law take different views about what the determining facts are and how they combine to determine the legal facts. Examples of well-known theories of law include H. L. A. Hart's legal

68. *See generally* Berman & Toh, *supra* note 18; Greenberg, *The Moral Impact Theory of Law*, *supra* note 17; Greenberg, *supra* note 61.

69. *See* CAL. CIV. CODE § 1624 (West 2020).

positivist theory,[70] exclusive positivist theories like that of Joseph Raz,[71] and Ronald Dworkin's influential law-as-integrity theory.[72]

Even before we look in detail at theories of law, we can see implications of the conclusion that legal interpretation seeks the content of the law for debates over methods of legal interpretation. Consider, for example, the common style of argument that begins from the proposition that nothing counts as interpretation unless it has some crucial feature, for example, that it seeks to identify the speaker's or author's intentions.[73] Given that legal interpretation seeks the content of the law, the speaker's intentions are relevant only if, and to the extent that, they are relevant to the content of the law. It is beside the point whether interpretation properly so-called must seek to identify the speaker's intentions; if legal interpretation is not a form of interpretation by this criterion—just as starfish are not fish and computer viruses are not viruses—then so be it. By whatever name, the goal is to ascertain the content of the law.

Again, a common type of argument in the recent literature on legal interpretation is driven by claims about how language and communication work.[74] For example, in general, when we interpret linguistic texts, we seek the total linguistic content of the texts, not their semantic content.[75] Legal interpretation is, the argument assumes, a form of linguistic interpretation. Therefore, the argument concludes, when we interpret legal texts, the goal is to identify the total linguistic content of the texts. Again, given that legal interpretation seeks the content of the law, this kind of argument misses the mark. Facts about how language and communication work are relevant only to the extent that they are relevant to how the content of the law is determined.

The general point is that any kind of argument for a method of interpretation will be apt only to the extent that it bears on how to ascertain what the law is. So, any argument for a method of legal interpretation will have to proceed via claims about how the content of the law is determined. Linguistic considerations are likely to be highly relevant to legal interpretation, but their role will be subsidiary—they will be relevant because the content of the law depends on particular aspects of language or meaning.

As I mentioned earlier, normative arguments are probably the most common arguments that textualists and other theorists of legal interpretation offer to support their preferred methods of legal interpretation. The typical argument is that a method is supported by a certain value, such as democracy,

70. H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994).

71. JOSEPH RAZ, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 210 (1994); JOSEPH RAZ, *Legal Positivism and the Sources of Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37 (2d ed. 2009); *see also* SCOTT J. SHAPIRO, LEGALITY 271–81 (2009); Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 LEGAL THEORY 533, 535–36 (1998).

72. RONALD DWORKIN, LAW'S EMPIRE (1986).

73. *See* Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1133 (2008); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 643–47, 650 (2005).

74. *See* Greenberg, *Legislation as Communication?*, *supra* note 27, at 224–26.

75. *See* SOAMES, *Interpreting Legal Texts*, *supra* note 49, at 403.

because the method treats sources of law as having the implications that that value requires. I am going to focus here on such arguments. In particular, are such arguments apt? That is, are they an appropriate way of defending a method of legal interpretation, given our conclusion that legal interpretation seeks a provision's contribution to the content of the law?

The fact that a method of legal interpretation treats a provision as contributing to the law in a way that is supported by fairness, for example, is an argument in favor of the correctness of that method only if fairness is relevant to the method's ability to identify a provision's contribution to the content of the law. But whether fairness is relevant in this way depends on how the content of the law is determined. Thus, whether typical normative arguments are apt depends on how the content of the law is determined. For example, if normative factors play no role in determining the content of the law, then it is hard to see how the fact that a method of interpretation treats a source as contributing to the law in a way that is fair bears on whether the method accurately identifies a provision's contribution to the content of the law.

B. Influential Theories of Law

We can elaborate the point by considering the implications of a few influential theories of law. Let us begin with H. L. A. Hart's positivist theory, which is probably the most widely held theory of law, at least in law schools.[76]

On Hart's account, the content of the law is determined, at the most fundamental level, by the convergent practices of judges and other officials.[77] In Hart's well-known terminology, judges' convergent practices and attitudes constitute a rule of recognition that specifies how the content of the law is determined.[78]

On Hart's theory, therefore, normative factors like democracy can play a role in determining how the content of the law is determined if, and only if,

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76. Many theorists of legal interpretation profess to accept Hartian positivism. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2364–65 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 825–26 (2015); Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2261 (2014); *see also* RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 90–91 (2018); Alexander, *supra* note 50; Baude & Sachs, *supra* note 61; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Goldsworthy, *supra* note 60.

77. *See* Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 265, 271–76 (Scott Hershovitz ed., 2006). To say that the content of the law is determined in a particular way at the most fundamental level is to say that the content of the law is determined in that way and that it is not the case that it is determined in that way because of some further determinant. Jurisprudential theories like those of Hart and Dworkin offer accounts of how the content of the law is determined at the fundamental level. *See* Greenberg, *supra* note 5, at 279–81.

78. HART, *supra* note 70, at 100–10. I paint with a broad brush here. For more detail, see Greenberg, *supra* note 77, at 271–73. I will usually write simply of judges, setting aside other officials.

either: (1) there is a consensus among judges that those normative factors are relevant; or (2) a valid source of law such as a statute or the Constitution—itself grounded in the rule of recognition—makes those normative factors relevant to determining the content of the law. For concreteness, I will focus on democracy, but the same points apply to other values.

First, there is certainly nothing like a consensus among judges in the United States or the United Kingdom that statutory and constitutional provisions and judicial decisions make whatever contribution to the law is most supported by democracy. (Nor is there a consensus among judges that the correct method of interpretation is the one most supported by democracy.)

Second, the most promising way to vindicate the idea that a valid source of law makes democracy relevant to determining the law would be to argue that the Constitution requires that statutory provisions and judicial decisions make whatever contribution to the law is most supported by democracy. The idea would be, in effect, that the Constitution requires that we use the method of interpretation most supported by democracy.

It would be a challenging enterprise, however, to support this claim. To begin with, in order to argue that the Constitution imposes such a requirement, one would have to rely on a controversial method of legal interpretation, so there is a severe circularity problem lurking.[79] Moreover, the conception of democracy enshrined in the Constitution is, at least on the face of it, quite flawed for familiar reasons. It would be a stretch to argue that, despite appearances, the Constitution requires whatever the true understanding of democracy entails.[80]

The bottom line is that if Hart's theory is true, the fact that a method of legal interpretation is supported by democratic values has no bearing on whether it accurately ascertains the content of the law. Indeed, as I and others have pointed out, if Hart's theory is true, then, in the circumstances of the U.S. legal system, no controversial method of interpretation can be correct.[81] (As a result, on any difficult question there simply will not be law.) For

79. This type of problem applies generally to any attempt to argue that a valid source of law, grounded in the rule of recognition, requires whatever method of interpretation is most supported by democracy—for example, it would apply to an argument that 18th century customs so require.

80. On the other hand, it would be differently problematic to try to show that a certain method of interpretation is required by the Constitution because it is entailed by the Constitution's particular *flawed* conception of democracy. When the issue is what democracy genuinely entails, one can simply appeal to the truth—that is, one can make the best possible arguments about how to understand democracy. But when one is trying to establish what a particular flawed conception of democracy entails, one cannot simply appeal to the best possible arguments about democracy. Given how spare the language of the Constitution is, it would be quite a trick to spell out what its flawed conception of democracy specifically entails for legal interpretation, a topic it never explicitly addresses. Moreover, there is something highly unattractive about arguing that we are required to use a method of legal interpretation that is not supported by democracy but instead is supported by a flawed understanding of democracy. Perhaps because of these two kinds of problems, we do not see theorists taking this route.

81. *See* Greenberg, *What Makes a Method*, *supra* note 17, at 114–17.

present purposes, however, the point is just that Hart's theory does not support an appeal to democratic and other normative arguments in defending theories of legal interpretation.

Exclusive positivist theories of law, in contrast to *inclusive* accounts like Hart's, maintain that normative factors can play no role in determining the content of the law *at any level*. On such accounts, normative arguments have no bearing on whether a theory of interpretation is true. What democracy says about how statutory or constitutional provisions should affect our obligations is irrelevant to what the law is. Therefore, that a method of interpretation treats provisions as contributing to the law in the way that democracy favors tells us nothing about whether the method is a good way of ascertaining provisions' contributions to the law.

Dworkin's law as integrity theory makes normative arguments relevant. On Dworkin's theory, the way to show that a method of interpretation accurately identifies how sources contribute to the law is to show that the method yields the principles that best justify the legal practices. (The practices include, among other things, constitutional and statutory provisions and judicial decisions.)[82] An argument that a method yields the best justification of legal practices is, however, very different from the kind of normative argument typically offered in favor of theories of legal interpretation. Dworkin himself has extensively illustrated the method of interpretation that he takes to follow from his theory of law.[83] In brief, he begins by identifying principles that fit the relevant practices well enough to be plausible candidates.[84] He then asks which of these candidate principles does the best job of morally justifying the practices.[85]

C. The Moral Impact Theory

One theory of law—really, a family of theories—offers a natural explanation of the relevance of the typical normative arguments. Today I will focus on my own theory, the Moral Impact Theory, which is a member of this family.

I can best explain the theory quickly by analogy. When one makes a promise or gives consent, that act changes one's obligations and rights. How exactly does my making a promise, say, change my obligations? For example, is the literal meaning of the words decisive? Or is it what I intended

82. *See generally* DWORKIN, *supra* note 72.

83. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); DWORKIN, *supra* note 72.

84. *See, e.g.*, DWORKIN, *supra* note 72, at 240–41.

85. *See, e.g.*, *id.* at 242–50, 284–85, 387–88; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 34–42 (1997); *see also* Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1303. As the description in the text makes clear, Dworkin's method of interpretation corresponds closely to his theory of law. He does not consider the possibility that the best way of ascertaining the law might come apart from how the content of the law is determined.

There is more to say about the implications of Dworkin's theory for how to argue for methods of legal interpretation, but this topic is beyond the scope of the present lecture. On the question of how Dworkin's law as integrity theory relates to the Moral Impact Theory, *see* Greenberg, *supra* note 5, at 296–300.

to communicate? Or, differently, is it what a reasonable person, given the context, would have taken me to be intending to communicate? What if the promisee knows that that is not what I was intending to communicate? These are difficult questions, and there is a whole literature about them. I do not intend to address them here. The point is just that, in answering the question of what the impact of a promise is on our obligations, we have to address a complicated set of moral questions involving concerns like fairness, avoiding harm, and so on.

While individuals take actions, such as making promises and giving consent, that affect their genuine obligations, legal institutions take actions, such as enacting statutes and regulations and deciding cases, that have a more general impact on our obligations, rights, powers, and so on. (For simplicity, I will generally focus on obligations.) According to the Moral Impact Theory, roughly speaking, the genuine obligations that come about in these ways are our legal obligations. (When I say "genuine" obligations, I am talking about whatever we are really required to do. I could use the word "moral" instead, but some people use it in a narrow way, and it has connotations that could be confusing. On some views, when you have a legal obligation, there is always a further question whether you have a genuine obligation to act in accordance with that legal obligation. But on the Moral Impact Theory, legal obligations are genuine obligations.)

To put it another way, legal obligations are those obligations that are the consequence, or *impact*, of the actions of legal institutions. (Hence: the *Moral Impact Theory*.) Thus, for example, a statute's contribution to the content of the law is the impact of its enactment on our obligations, in light of fairness, democracy, rule of law, and any other relevant values. The Moral Impact Theory is a nonpositivist theory of law because it holds that the content of the law depends on normative or moral factors. It is different from traditional natural law theories, however, because it does not hold that a norm is law because it is just or good. The role of moral factors, such as fairness and democracy, is more procedural—the way in which a statute or judicial decision affects the law is determined by the way in which it would be fair or democratic for it to do so.

D. Implications of the Moral Impact Theory

If the Moral Impact Theory is true, in order to ascertain a provision's contribution to the content of the law, one must ascertain the impact of the enactment of that provision on our genuine obligations, rights, and so on. Thus, at least at first blush, the appropriate way to argue for a method of interpretation is to argue that that method is a good way of working out the impact of enactments on our obligations. For example, one might argue for a particular intentionalist method by showing that there are reasons of democracy why the intentions with which the method is concerned are determinative of our obligations and rights. It is notable that such an argument looks a great deal like the typical normative arguments that theorists offer for their preferred methods of interpretation.

I should emphasize that I have not given an argument for the Moral Impact Theory here (though I have argued for it extensively elsewhere). Instead, I have made a case that the Moral Impact Theory provides a promising way—more promising than those provided by the most widely held theories of law—of vindicating the relevance of familiar normative arguments offered on behalf of methods of interpretation. In the rest of this section, I explore in greater detail the implications of the Moral Impact Theory for legal interpretation. For those who have no sympathy for that theory, the discussion may still be illuminating as a case study of the relation between legal interpretation and theories of law. For example, I will argue that there is space between an account of legal interpretation and a theory of law because legal interpreters may do better at accurately identifying the law by following relatively simple methods rather than by trying to apply the true theory of law directly.

The Moral Impact Theory improves our understanding of many aspects of legal interpretation.[86] To take one example, there are many factors to which judges appeal in legal interpretation with little discussion of why those factors are relevant. In *Smith*—the "use a gun" case—for example, the Court's majority and dissenting opinions appeal to: the ordinary meaning of the word "use,"[87] dictionary definitions of the word,[88] what people ordinarily mean by words or phrases in particular contexts,[89] how Congress intended the language to be construed,[90] how the statutory phrase is most reasonably read,[91] whether Congress would have wished its language to cover the situation,[92] whether Congress intended the type of transaction in question to receive increased punishment,[93] how the word "used" is employed in other legal instruments such as the federal sentencing guidelines,[94] past judicial decisions,[95] the history of the statute's modifications over time,[96] and the rule of lenity.[97] The Moral Impact Theory explains that in interpreting a statute, a fact is relevant because it bears on the statute's impact on our moral obligations. For example, dictionary definitions and ordinary usage are plausibly evidence of how the statutory phrase would be understood by ordinary people; and considerations of both democracy and fairness arguably make that relevant. Similarly, fairness helps to explain the basis of the rule of lenity and the relevance of decisions in past cases.

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86. I elaborate on the implications of the Moral Impact Theory for legal interpretation, including some of the points mentioned here, in Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1325–37.

87. *See* Smith v. United States, 508 U.S. 223, 230 (1993).

88. *Id.* at 228–29, 240.

89. *Id.* at 230.

90. *Id.* at 235.

91. *Id.* at 236.

92. *Id.* at 235.

93. *Id.* at 232–33, 235.

94. *Id.* at 243.

95. *Id.* at 239.

96. *Id.* at 236.

97. *Id.* at 239–40.

In light of the Moral Impact Theory, how do we argue for a method of legal interpretation? One might think that if the Moral Impact Theory is true, all that can be said about legal interpretation is that it must identify how legal instruments affect our genuine obligations. To defend a method of interpretation, we simply must show that it accurately identifies how provisions affect our obligations. Indeed, it might be thought that the Moral Impact Theory leaves no room for more concrete procedures, such as interpreting a statutory provision in accordance with its plain meaning when that meaning is clear.[98]

There are two reasons why this line of thought is overly simple. First, the Moral Impact Theory is consistent with the possibility of principles that specify, in relatively concrete terms, how legal enactments affect our obligations. Second, the theory of legal interpretation may come apart from the theory of law because legal interpreters may more accurately identify the content of the law by not trying to apply the theory of law directly in each case but by following simpler methods that are, in effect, heuristics or rules of thumb. I will take each point in turn.

First, the Moral Impact Theory does not claim that there are no general truths about the moral impact of legal enactments, i.e., that the impact of each enactment on our obligations is an entirely individualized or case-specific matter. It is an open question to what extent there are general principles concerning the moral impact of legal enactments. There are powerful reasons, such as the importance of predictability and accessibility for fairness and democracy, that push in favor of such principles. And there is a wide spectrum of possible degrees of generality, from fully general principles about the way in which all legal institutional action affects obligations, to principles about the impact of particular types of legal provisions—criminal statutes or abstract constitutional provisions, say—in particular legal systems. At the very general end of the spectrum, it might be, for example, that the moral impact of legal enactments never depends on what is merely implicated rather than explicitly stated. Or toward the more specific end of the spectrum, it might be that, in the case of criminal statutes, some specific kind of counterfactual content of the enacted text captures a provision's impact, absent overriding factors.

Second, thus far we have assumed that the theory of interpretation straightforwardly corresponds to the theory of law. That is, we have assumed that if the true theory of law says that the content of the law is determined by factor *X*, then the way to determine the content of the law is to seek to identify *X*. On this view, there is no space between a theory of law and a theory of legal interpretation. The Moral Impact Theory of law says that legal obligations are the genuine obligations that are the consequence of certain institutional actions. Accordingly, the theory of legal interpretation says that we should interpret legal institutional actions by figuring out what their consequences are for our genuine obligations.

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98. *See* Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1334–36.

Because the theory of legal interpretation and the theory of law respond to different questions, however, it is possible for them to come apart. Even if we know the true theory of law, it cannot be assumed that the best way for human beings to figure out the content of the law is to attempt to apply that theory.

One kind of point is familiar from discussions of bounded rationality. Given time constraints, limited cognitive capacity, and predictable biases of human beings, agents may do better in the long run at answering a particular question by following a method that is relatively easy to apply, but not fully accurate, than by trying to answer the ultimate question directly.[99]

In the case of legal interpretation, it may well be that judges would more accurately ascertain the law if they followed relatively simple methods—heuristics—rather than trying directly to ascertain the impact of each provision on our moral obligations.[100] Just for the sake of illustration, we can imagine that in the case of criminal provisions, it turns out as an empirical matter that judges who follow the method of, say, sticking to literal meaning when it is clear, actually do better at identifying the impact of the provisions on our obligations than judges who try in every case to work out that impact. (This might be the case because the method is relatively easy to follow correctly and because literal meaning, when clear, roughly approximates the moral impact of the provisions.)

There are really two distinct points here. First, there may be values other than accuracy that provide constraints on the inquiry. For example, it is important to preserve scarce resources, including time. To take a less mundane example, there may be moral reasons (such as reasons of democracy) why mistakes by certain decision makers are worse than mistakes by other decision makers or why it is worse for interpreters to err in one direction rather than others. Second, even if the only relevant value were accuracy, given the cognitive limitations and biases of human interpreters, they might do better at ascertaining the law by following a simpler method than by trying to ascertain the law directly.

Some might resist the suggestion that there could be such a gap between what judges ought to do and what the law is. By way of analogy, it might be

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99. *See id.* at 1335–36.

100. Fred Schauer and Adrian Vermeule have both suggested that plain meaning can be regarded as, in effect, a heuristic—that judges might reach more accurate results in the long run by following plain meaning than by trying to identify the truth directly. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 183–229 (2006); Fred Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 729–32 (1992). But neither offers an account of what plain meaning is a heuristic for, i.e., what it is in virtue of which an answer is correct. As discussed in the text below, without such an account, one cannot evaluate whether adhering to plain meaning would produce more accurate results than some other method. Vermeule argues that, in practice, all plausible ideal theories of legal interpretation would yield the same heuristics. *See* VERMEULE, *supra*, at 183–229. But given the diversity of theories of legal interpretation and how little we know about the results that different institutional actors would likely produce if they attempted to follow different approaches, any such claim is both tendentious and premature.

helpful to consider a different example of the way in which what courts ought to do may come apart from simply trying to apply the law. It is a familiar, though still debated, point that the content of constitutional law may go beyond what courts ought to enforce.[101] Because of institutional limitations of courts, they are poorly suited to enforce some kinds of constitutional norms—for example, norms the enforcement of which requires choosing between very different means of implementation, prioritizing competing interests, and creating complex mechanisms. But just because courts ought not to order a legislature, say, to take a particular action, it does not follow that that action is not constitutionally mandated. Legislatures and executives may have constitutional obligations that are not judicially enforceable, and constitutional norms may manifest their existence through a variety of legal consequences other than direct judicial enforcement.[102] This example is an analogy, not an instance of more accurately finding the law by following a heuristic. But it helps to illustrate the possibility of divergence between accounts of what judges ought to do and accounts of substantive legal norms.

It might be objected that, whatever one thinks about the possibility of constitutional norms that courts ought not to enforce, if the best method of interpretation is correctly applied, then what that method yields must be the law. To see that this cannot be right, notice that different legal interpreters may be in different positions and subject to different kinds of constraints, with different abilities and biases. To take an extreme example, consider police officers on the beat who must interpret the law in real time to make decisions about, say, whether to make stops or arrests. Police officers would likely do better at reliably identifying the law in such situations if they followed simple rules of thumb than if they attempted directly to work out the contents of legal standards from the relevant statutes and cases. It certainly does not follow that the output of such simple rules of thumb, correctly applied, constitutes the content of the law. It is in the nature of rules of thumb that they may give the wrong answer even when correctly applied, but following them across the board yields good results because it is much easier to apply them correctly than to answer the underlying questions directly.[103]

I have discussed two factors that complicate the implications of the Moral Impact Theory for legal interpretation. In light of this discussion, we can see that there are three ways of arguing for a method of interpretation. First, one

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101. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

102. *See id.*; Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U. L. REV. 579 (2010).

103. Now it might be further objected that the term "legal interpretation," properly understood, should be restricted to a kind of ideal legal interpretation for people who lack biases and have unlimited time and cognitive capacity. I do not want to debate the proper use of the term here. My point is just to draw attention to the possibility of divergence between accounts of how to ascertain the content of the law and theories of what determines the content of the law. Whether such accounts of how to ascertain the law should be labeled "legal interpretation" is not my primary concern.

can argue that the method captures the way in which, in light of democracy, fairness, and the like, provisions affect our obligations.

Second, one can argue that, though the method imperfectly reflects the way in which provisions affect our obligations, by following the method, interpreters—or interpreters of a certain kind, judges, say—will in the long run more accurately ascertain the way in which provisions affect our obligations than they would if they tried to do so directly.[104]

Third, one can argue that other values provide reasons for following a method despite the fact that it would not produce the greatest accuracy. As noted above, there may be reasons of democracy why mistakes by certain decision makers are worse than mistakes by other decision makers. Perhaps, for example, the cost in accuracy of the mistakes that courts would be expected to make by deferring to administrative agencies under specified conditions would be outweighed by the value of not having *courts* make certain kinds of decisions or by their avoiding a smaller number of mistakes of a more problematic kind. By way of analogy, it is widely believed that the cost in accuracy of the beyond-a-reasonable-doubt standard of proof in criminal trials is justified by the much greater injustice of mistaken convictions than mistaken acquittals.

The first type of argument is normative. As noted above, the familiar arguments from democracy offered by textualists and intentionalists, among others, fit in well here. The Moral Impact Theory can refine our understanding of such normative arguments, however. For example, it is common for theorists to offer some normative factor—some particular conception of democracy, say—in favor of a preferred method of interpretation. The Moral Impact Theory makes clear that it is not enough that some normative factor supports treating provisions as contributing to the law in a particular way; a method of interpretation must be favored by all relevant values *on balance*.

A different point concerns which normative factors are relevant and which are not. The Moral Impact Theory clarifies that the relevant normative factors are those that have a bearing on our obligations, rights, powers, and the like. Consider, for example, the common theme in the literature on legal interpretation that, in a democracy, the role of unelected judges ought to be greatly constrained. Because this idea bears not on how provisions affect our obligations, but on the proper role of judges in a democracy, it is not relevant to the first type of argument.

The second type of argument is empirical. Given the normative facts about how enactments affect our obligations, it is an empirical question whether interpreters would do a better job of identifying the impact of enactments on our obligations by following one method rather than another.

Finally, the third type of argument has both normative and empirical components. The normative component is obvious, for this type of argument

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104. Thus, unlike Dworkin's view, my account is compatible with the use of imperfect heuristics in legal interpretation and therefore is not vulnerable to the objection that it always requires herculean moral reasoning.

appeals to moral reasons, such as reasons of democracy and fairness that favor a given method over more accurate methods. There is also an empirical component because one cannot evaluate whether the loss in accuracy that results from following a given method is outweighed by other values without knowing what results the method is likely to produce.

It is important to see that both the second and third types of arguments depend on the fruits of the first type of argument and therefore can be regarded as taking place at a different stage of the inquiry. The reason for this dependence is straightforward. First, without gauging what answers would be produced if judges tried to identify the content of the law directly, and without an understanding of which answers are correct, one cannot begin to evaluate whether judges would do a better job of identifying the law by following a simpler method, a heuristic. Second, evaluating whether the moral reasons for a proposed method outweigh its costs in accuracy requires estimating the loss in accuracy consequent upon following the method—thus bringing us back to the second type of argument, which, as noted, depends on the first type of argument.

This discussion raises the question of to what extent methods of legal interpretation must involve normative judgments. Thus far, we have been discussing normative arguments for methods of interpretation, not whether the application of those methods involves moral or other normative judgments. Typical arguments for textualism and intentionalism seem to assume that democracy or other values are invoked to support a method but that we can then apply the method without any further appeal to those values. But the Moral Impact Theory raises the question whether legal interpretation must be more pervasively normative.

For several reasons, legal interpretation need not involve normative judgment in each case. First, we saw that there may be principles that specify concretely the way in which different kinds of enactments affect our obligations.[105] It is an open question to what extent these principles themselves involve normative notions. It might be, for example, that when the literal meaning of a criminal statute is clear, that literal meaning captures the provision's moral impact. (Of course, there would have to be further principles applicable to the case where literal meaning is not clear.) Establishing the truth of such a principle would require moral argument but applying it would not.

Second, even leaving aside the possibility of principles of the sort just described, in many cases legal interpretation will not require moral reasoning because all of the plausible moral arguments point in the same direction. As I have argued elsewhere:

> In the run of cases, all of the plausible accounts of democracy, fairness, and so on favor the same outcome. Therefore, in order to resolve such cases, it is not necessary to turn to the underlying moral considerations. That is why most cases are easy cases. Even in difficult cases it is only necessary to

105. *See supra* Part III.C.

> eliminate candidate accounts to the extent that they favor a different outcome in the case at hand.[106]

Third, the above discussion of the benefits of following simple rules of thumb is relevant here. Normative judgments are often difficult. And those judgments may be particularly likely to be skewed by predictable human biases. For these reasons, it is possible that, by following methods that require relatively little normative judgment, we do better in the long run at reaching the answers to the ultimate normative questions. Such methods require inquiry into questions that are proxies for the relevant normative inquiries, just as a specific age limit can be a rough proxy for a normative judgment about whether a person has sufficient maturity for some right or privilege.

E. Reevaluating Textualist Themes

I will conclude by returning briefly to textualist ideas to illustrate the implications of this discussion. Once we understand that legal interpretation, by its nature, does not seek the linguistic meaning of texts—not semantic content, nor what is said, nor speaker meaning or some other pragmatic content—a central dilemma for textualists is dissolved. On the one hand, a leading textualist idea is that the goal of legal interpretation is to identify the meaning of the texts. On the other hand, as we have seen, the kind of counterfactual content central to textualist methodology is not the meaning of the texts.

The Moral Impact Theory implies that the insistence on discovering linguistic meaning should be dropped. Legal interpretation seeks provisions' contributions to the content of the law, and there is no reason to assume that a provision's impact on our obligations is equivalent to its linguistic meaning. With this clarification, textualists can pursue their insights about the role of compromise in the legislative process and the democratic implications of compromise without the distorting influence of trying to maintain that their favored methods are ways of identifying the meanings of texts. (It might be wondered whether "textualism" is a good name for a theory that does not seek to identify the meanings of the texts, but I will set aside this labeling issue.)

Because what is agreed upon by the legislature may be simply a form of words rather than an underlying purpose, textualists conclude that courts, as faithful agents of the legislature, must respect the words rather than search for purposes behind them. It is easy to see how this insight could lead to reinforcement of the idea that legal interpretation should focus on the texts.

As we saw, however, the faithful agent model is unhelpful. To be a faithful agent is to be faithful to the principal's intentions. If the legislature lacks coherent and discoverable intentions, an appeal to the model of a faithful agent does not take us very far. We can say that the court should be faithful

106. Greenberg, *The Moral Impact Theory of Law*, *supra* note 17, at 1335.

to the legal norms that the legislature enacted, but that just restates the question of the provisions' contributions to the content of the law.

The Moral Impact Theory enables us to ask the right question: in light of democracy, fairness, and other relevant values, how does the fact that elected representatives enacted this bill—with these words, in this situation—affect our obligations, rights, powers, and so on? So, the textualists' appeal to democracy was on the right track. But we need more nuanced democratic thought than simply the idea that, since what was agreed on was the words, we must faithfully interpret the words using traditional textual methods. Assuming that the textualists are right that we cannot expect there to be collective intentions on the kinds of difficult issues that arise in legal interpretation, we nevertheless need lawmakers in these circumstances to be able to create and modify legal norms. We therefore need to understand what democracy implies about how our lawmakers can do so without having shared intentions.[107]

In reevaluating textualist ideas, the question becomes whether democracy and fairness, properly understood, make it the case that the impact of statutory and constitutional provisions is constituted by the kind of counterfactual content that textualists favor. And, if so, precisely which counterfactual content is favored on balance by the relevant values? Whether that counterfactual content is the meaning of the text is beside the point.

In constructing the relevant content, we have seen that textualists often take ordinary conversation as the model. I have given some general reasons why this model is not the appropriate one for lawmaking. To return to Justice Scalia's example, it is convenient and efficient to utter "children twelve and under enter free," thereby implicating that thirteen-year-olds have to pay. But this kind of implicature might well be problematic in the tax code or the criminal code. Fairness and democracy provide strong reasons why liberty should not be restricted without explicit specification. The legislature should not be able to evade responsibility by using implicature[108] and, in contrast to the case of ordinary conversation, the norms have to be available many years later to people with varied backgrounds and very little information about the original context. (Perhaps for these reasons, our expectations are plausibly different in the case of norm creation from what they are in the case of ordinary conversation. In contexts where norms are being created, we do not

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107. It is sometimes said that there is no point in having elected lawmakers if they do not get to make whatever laws they intend. *See* JOSEPH RAZ, *Intention in Interpretation*, *in* BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 265, 274–75 (2009). But this is a serious overstatement. All that is necessary for there to be a point in having lawmakers is that those lawmakers understand how to influence the direction of legislation. Compare child-rearing: any parent can tell you that it would be silly to think that there is no point in trying to raise children if you cannot make them come out exactly the way you intend. *See* Mitchell Berman, *For Legal Principles*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 241, 257–58 (Heidi Hurd ed., 2018); Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 73–75 (2009); Greenberg, *Legislation As Communication?*, *supra* note 27, at 255.

108. On the use of implicature to evade responsibility, see Greenberg, *Legislation as Communication?*, *supra* note 27, at 240–41, 245.

straightforwardly take the norms to include whatever would be implicated in ordinary conversation.)

To take ordinary conversation as the model is, in effect, to take the relevant content to be what a speaker who uttered the words of the legal text in a specified situation would have to have intended in order to be in compliance with the norms of ordinary conversation. Instead, the textualist could ask what a speaker would have to have intended to have complied with the norms appropriate to *lawmaking*. Working out which norms are the appropriate ones would be a very different project from the standard textualist project of mixing examples from ordinary conversation and claims about the meaning of words with traditional textual methods.[109]

CONCLUSION

At the start I quoted Justice Scalia from the late 1990s talking about "the great degree of confusion that prevails" in the field of statutory interpretation.[110] I have shown today that, if the state of the most influential theory in the field is any indication, Justice Scalia's pronouncement is at least as true today.

Contemporary textualism is confused to the core. It says that we should be seeking meaning, but in fact, the methodology that it proposes does not seek anything recognizable as meaning. The view is based on fundamental confusions about language and communication. It proposes that we seek a severely underspecified counterfactual construction. The justifications offered for the view provide no help. Perhaps ironically, Scalia himself played an outsized role in propagating these confusions. He is as responsible as anyone for the sorry state of legal interpretation today.[111]

The passage from Justice Scalia actually continues in the following way: "So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is."[112] I have argued that this claim is true in a way that runs much deeper than anything Justice Scalia had in mind. I showed that there is a simple and powerful argument that legal interpretation, by its nature, seeks a statutory or constitutional provision's contribution to the content of the law. This simple conclusion offers a new start—a way of rethinking legal interpretation.

The conclusion implies that which method of interpretation is correct depends on the way in which statutes and other materials contribute to the content of the law. In light of this point, I turned to the best-known theories of how the content of the law is determined. None of them support the

109. *See* Greenberg, *Legislation as Communication*?, *supra* note 27, at 250–56; Greenberg, *supra* note 53, at 8–14. For a related discussion, see Andrei Marmor, *Can the Law Imply More than It Says?: On Some Pragmatic Aspects of Strategic Speech*, *in* THE PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, 83, 96–104 (Andrei Marmor & Scott Soames eds., 2011); Marmor, *supra* note 53, at 439.

110. SCALIA, *supra* note 1, at 16.

111. *See generally* Berman, *supra* note 27.

112. SCALIA, *supra* note 1, at 16.

relevance of the most common kind of argument offered in favor of theories of legal interpretation.

The Moral Impact Theory, however, nicely fits the way in which theorists of legal interpretation employ normative arguments to defend their theories. Given that legal interpretation seeks the content of the law, those normative arguments would not be relevant unless the content of the law depends on normative arguments in something like the way that the Moral Impact Theory claims. So, perhaps surprisingly, the arguments from democracy and other normative arguments typically offered in favor of textualism, intentionalism, originalism, and the like may presuppose a nonpositivist or natural law theory along the lines of the Moral Impact Theory of law.

Most textualists and intentionalists would, I think, absolutely reject any suggestion that they presuppose the Moral Impact Theory or something in that neighborhood. They would mostly say that they are legal positivists.

But the idea is not as foreign to them as it might seem. Textualists often summarize their view by saying: "the text is the law."[113] And they defend textualism, as we have seen, on democratic grounds. Putting these two ideas together, they are arguing that the content of the law is determined in the way that it is—in particular, on their view, by the text—for democratic reasons. Thus, they implicitly accept that the way in which the content of the law is determined depends on normative grounds in roughly the way that the Moral Impact Theory maintains.

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113. *See, e.g.*, Easterbrook, *Legislative History*, *supra* note 9, at 445.