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Author

Greenberg, Mark

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BEYOND TEXTUALISM

BY

MARK GREENBERG

PROFESSOR OF PHILOSOPHY

PROFESSOR OF LAW

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BEYOND TEXTUALISM

Natural Law Lecture, Fordham University School of Law

Mark Greenberg, UCLA

I. Introduction

More than 20 years ago, Justice Scalia wrote of “the great degree of confusion that prevails” in the field of statutory interpretation. Today, Scalia’s textualism is ascendant. Over the past three decades, textualism has expanded its influence both in both the courts and in the scholarly literature.

A quick terminological point: I’m using the term *textualism* to encompass textualism in both statutory interpretation and constitutional interpretation. The latter is also called *public meaning originalism*. For convenience, I’ll often use statutes as an example, but my arguments apply both to statutory and constitutional interpretation.

In the first part of my talk, I’ll 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. 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 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: 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.

Once we have clarified 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 kind of arguments from democracy, fairness, and the like that theorists offer are even the right kind of arguments to defend methods of interpretation.

I will briefly canvas a few of the most influential theories of how the content of the law is determined 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. These theories are particular type of contemporary non-positivist or natural law theory according to which legal norms are a subset of moral norms. I’ll focus on my own theory – the *moral impact theory*. 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 a sense in which theorists of legal interpretation implicitly presuppose something like the moral impact theory.

Finally, I will draw some conclusions about the implications of the moral impact theory for legal interpretation. For example, once legal interpretation is reconfigured in the way that I have suggested, how would one go about defending something in the neighborhood of textualism?

II. Textualism and Its Confusions

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. Notably, this argument is also probably the most important starting point for intentionalists – the most influential opponents of textualism. Intentionalists argue that the whole 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 the 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 serious interpretive disputes. (To save words, I won't keep repeating this qualification about "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, which are probably familiar. Very briefly, though it is plausible that small, cooperative, and cohesive groups can have collective intentions, there are many compelling reasons for thinking that modern multimember – indeed multi-component – legislatures typically lack collective intentions that would help to resolve the kinds of issues that create controversies that end up in the appellate courts. The individual members typically haven't even read the relevant texts or thought about kinds of difficult issues that become controversial. And to the extent that they have thought about the issues, they 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 Constitution structures the legislative process, minorities have the power to block legislation. The 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. They may well fail to reflect a coherent underlying purpose. 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 compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment" (Manning 2003, 2417). 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 will override the compromise. Intentionalist interpretation will thus make it impossible to effectuate

the compromises. What is required is therefore that interpreters be finely attuned to the details of the text – that is all that the interpreter can presume was actually agreed on.

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 shouldn't be doing, "what is the meaning of this?")

Within linguistic meaning, there are two basic types: *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. And 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. Central to pragmatic content are the communicative intentions of the speaker. When the doctor says to the patient 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 is immortal.

On the face of it, pragmatic content seems 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 understand it as seeking semantic content. But leading textualists explicitly reject literal meaning, which they associate with old-fashioned "plain meaning" textualism that was in vogue years ago. Our antennae should be up at this point. Despite textualists' emphasis on the meaning of the text, they reject both main types of meaning. If not semantic content or pragmatic content, what are textualists after?

Contemporary "new textualists" insist that textualism seeks a reasonable reading in context, not a literal one. As Justice Scalia puts it: "A text should not be construed strictly...; it should be construed reasonably, to contain all that it fairly means" (Scalia 1997, 23). In another common formulation, textualists say that they are seeking what a reasonable member of the audience would understand in the context.

In fact, textualists seem to think that this is the basic notion of what words mean – what a reasonable member of the audience would understand in context. Notice that what a reasonable member of the audience would understand will depend on the context. Because textualists think that word meaning is to be explicated in terms of what a reasonable member of the audience would understand, they think that word meaning changes from context to context. In fact, however, the notion of what a reasonable member of the audience would understand in the context is not what the words mean. And it is not even fundamental notion in the study of language and meaning. By the way, if you are tempted by the idea that the meaning of words is something like what the reasonable member of the audience would understand by the utterance

of those words in this context, notice that words have to have stable meanings across contexts in order for members of the audience to infer different information in specific contexts. To take a famous example, suppose a professor writes in a recommendation letter “John has excellent handwriting.” Sincerely yours, Professor Smith. The audience will likely understand that, in the context of recommendation letters, the professor is communicating that John is not a very good candidate. But the audience would not be able to understand this were it not for the fact that “has excellent handwriting” has a stable meaning that does not depend on the context.

“A reasonable reading” – at first blush, this idea seems, well, reasonable. But the warm overtones of “reasonableness” obscure the fact that what is reasonable depends on one’s goals – on what one is seeking. The 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.

Textualists’ discussions suggest at least four quite different things that the reasonable reader might be seeking. These can usefully be put in terms of questions. 1) The question could be what a reasonable person would take the legislature to have intended to communicate. 2) Or the question could be what legal norm a reasonable person would take the legislature to have intended to adopt. 3) Differently, again, the question could be what a reasonable person would conclude about how the legislature intended the legal norm to be applied to the particular situation – that is, how the legislature intended or expected this case would be resolved. 4) Finally, the question could be what a reasonable contemporaneous reader would take to be the effect of the enactment on the content of the law.

The first three of these candidates for what the reasonable reader seeks all involve different intentions of the legislature: intentions about what to communicate; intentions about what legal rule to create; and intentions about the outcome of particular cases. I have shown elsewhere that these three kinds of intentions are not only different, but also they can have inconsistent implications in real cases. I don’t have time to say much about this here, and it won’t matter for today. But I’m happy to talk about it in discussion.

The fourth candidate is different – the question is simply what the reader would take the provision’s impact on the law to be. This is a peculiar candidate. For present purposes, suffice it to say that whenever there was no consensus about the effect of a provision on the law, a reasonable person would presumably not be able to have a view – I’m assuming that the reasonable reader is not supposed to be a theorist with controversial views. So this fourth candidate is pretty much a nonstarter if the method of interpretation is going to have any chance of resolving controversial issues. So I’m going to set aside the fourth candidate, the one that does not appeal to any kind of legislative intentions.

For reasons that will become clear in a moment, I’m going to focus on the first candidate – what a reasonable person would take the legislature to have intended to communicate. As we’ll see, the remaining two candidates suffer from the same central problem, though they also have distinct problems of their own that I won’t have time to get into.

Many textualist discussions rely on examples from ordinary communication and some textualists are explicit that they are taking 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. And the role of context is that the audience uses it to infer the speaker's communicative intentions.

An aside about the term *context*. In philosophy of language, the term is used in a technical way that typically includes the speaker's intentions. But in legal literature, context is used in loose, colloquial way that does not include the speaker's intentions. To avoid confusion, I'm going to stick with the legal usage, so the speaker's intentions are not part of the context. Rather, context includes a wide range of facts about the situation, including, for example, the historical situation in which a statutory or constitutional provision was enacted, the problem to which the provision was a response, matters that are common knowledge in the society, the common use of words, the use of words in other statutes, and the surrounding language in the provision being interpreted.

Let me give one example of the way in which textualists rely on examples from ordinary conversation. In the well-known case of *Smith v. United States*, Smith had offered to trade a gun for cocaine. The Supreme Court divided over the question 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." 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".

Textualists also endorse the use of linguistic canons of interpretation with Latin names like "espressio unius est exclusio alterius" – to express one is to exclude the others. Properly understood, such linguistic canons are rules of thumb for inferring what a speaker likely intended to communicate, as opposed to the literal meaning of the words.

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.

The notion of what a reasonable person would take a speaker to have intended to communicate is coherent, but it does not have an important role in the contemporary study of language and meaning -- it certainly is not what words mean. 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*. The textualists' important starting point, 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, if we ask what the reasonable reader would take the legislature to have intended to communicate, the answer is: **nothing**.

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” – which varies from context to context, and that that is what we try to discover in ordinary communication. In fact, however, aside from certain context-sensitive words that are generally avoided in legal instruments such as statutes and constitutions, the meaning of words does not change from context to context. As we have already seen, instead, what changes is what speakers intend to communicate, and the audience uses the context to infer what the speaker tries to communicate. To give a very simple example, the word “bank” does not mean riverbank when we are fishing and financial bank when we are on Wall Street. Rather, the word always has the same meanings, and the audience uses the context to try to infer what the speaker intended. Just imagine you are fishing – no problem using bank to mean financial bank! Similarly, contrary to what textualists suggest about the Smith, “use” does not have a special narrow meaning of *use as a weapon* or use for its intended purpose in certain contexts. But speakers may employ the phrase “use as a gun” intending to communicate something narrower or broader.

Notice that the same problem applies if what the reasonable person is supposed to be seeking is one of the other two kinds of legislative intentions that, as I mentioned earlier, textualists sometimes seem to have in mind – what legal rule the legislature intended or what outcome the legislature intended in this type of case. Either way, a reasonable person, knowing that this text was issued by a legislature, 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 legislator to have intended, it is certainly possible to construct related contents by stipulating false assumptions about the speaker or the situation. For example, we might ask what a reasonable person would take 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. Plainly, there are many such counterfactual-based notions depending on exactly how we specify the various counterfactual assumptions.

But 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?

In particular, why should the question be what it would be reasonable to take the speaker to have intended if the text had been uttered in ordinary conversation? The assumption that legal interpretation should be modeled on the interpretation of ordinary communication is problematic. Lawmaking has very different goals, presuppositions and circumstances from ordinary communication. For example, the shared purpose of efficiently exchanging information plays a crucial role in the conversational case. 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 audience across all legislation.

At this point, it should be clear that textualism is on the rocks. Textualism rejects the idea that the search is for the most objective form of meaning – semantic content. And it can't take the search to be for pragmatically conveyed content given its skepticism about legislative intentions. 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 at all; and 2) badly underspecified, so a lot more needs to be said to determine a unique content.

Perhaps we should take a step back and ask how we became engaged in an exercise of constructing contents by stipulating false assumptions about the speaker and the context.

Let's go back to the democratic idea from which textualism begins – that in a democracy, judges must act as faithful agents of the legislature. A faithful agent must 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. 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?

I think we can vaguely 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 can't simply regard the words as meaningless marks on the page.

This handwaving is far from a compelling argument that implementing words involves interpreting them in accordance with their meaning. There are many alternatives. For example, one possibility is that implementing words requires adhering to the best justification for enacting a text with those words.

But, anyway, the textualist counterfactual notion of what a reasonable reader would understand under certain fictional assumptions is, contrary to textualist rhetoric, not the meaning of the words. It's not even an important notion in the study of language and meaning.

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 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 handwaving about democracy doesn't 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 thinking about 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.

III. What Legal Interpretation Seeks

Lawyers and judges are familiar with various competing theories or methods of legal interpretation like textualism, originalism, intentionalism, and purposivism. 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?

Many activities are defined or constituted in part by their aims. The practice of medicine is an example. Someone who examines people, prescribes medications, and performs surgeries is not practicing medicine unless these activities are undertaken for the appropriate purposes – something like healing illness and promoting health. 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 certain input, such as legal texts and practices. And legal interpretation yields an output – “an interpretation.” The familiar debate concerns which method of getting from the input to the output is correct. Textualism? Intentionalism? Originalism? Living constitutionalism?

But the more basic issue concerns what the output is supposed to be – what legal interpretation seeks. Here are four main candidates: the *linguistic meaning* of the text of the relevant provision? The enacting body's intentions? The provision's *contribution to the content of the law*? The *best resolution of disputes*?

This issue is more fundamental than more familiar questions about the method of interpretation because *which method is correct depends on what legal interpretation seeks*. In general, how good a method is depends on what the method is *for*. 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 seeks linguistic meaning, but highly relevant if it seeks the best resolution of disputes.

There is a straightforward and powerful argument that legal interpretation seeks legal provisions' contribution to the content of the law. This argument begins from three propositions that are very widely shared by theorists of legal interpretation: 1) legal interpretation often yields interpretations that are decisive – that is, the outputs of legal interpretation *resolve* legal disputes; 2) in resolving disputes, judges must follow the law except in extremely unusual circumstances; 3) the content of the law is often determinate enough to resolve disputes.

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.

This point immediately rules out candidates such as the linguistic meaning of the legal texts or the intentions of the enacting bodies. Whatever else legal interpretation has to find along the way, it can't stop short of figuring out the content of the law.

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 it seeks the best resolution of disputes. Resolving disputes involves a good deal 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 1) some cases will not be fully resolved by applicable law, and 2) 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 depart from 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; 3) deciding whether to depart from the law in cases of exceptional injustice. 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.

But our paradigm 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, and whether to depart from the law in cases of exceptional injustice.

In sum, since legal interpretation must resolve disputes, it must at least yield the content of the law. Since standard theories of legal interpretation are not multi part theories that include all of the other kinds of activities that would be needed to resolve disputes, those theories are best understood as seeking the content of the law.

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 by 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 third main part of my talk. In this last part, will see that we need to look at jurisprudential theories like that of HLA Hart and Ronald Dworkin. And it will turn out that the theory that gives us what we need is my own theory of law! But I'm getting ahead of myself.

IV. Theories of Law and Their Implications for Legal Interpretation

Let's 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 in writing. 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, like legislatures and courts, have said and done and decided and, on some views, moral or other normative facts.

(A quick aside about the words "determine" and "determination". The word "determine" 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 law is. I am using the term determine exclusively in the metaphysical sense.)

I use the label a *theory of law* for an account of how the more basic, determining facts make the legal facts what they are. Different theories of law make different claims about what the determining facts are and how they combine to determine or give rise to the legal facts. Examples of well-known theories of law are HLA Hart's legal positivist theory, exclusive positivist theories like that of Joseph Raz, and Ronald Dworkin's influential law as integrity theory.

Let's turn back to the kinds of arguments that textualists and other theorists of legal interpretation offer to support their preferred methods of legal interpretation. As I mentioned earlier, normative arguments are probably the most common. The typical argument is that a method is supported by a certain value, democracy, for because the method treats sources of law as contributing to the law in the way that that value requires.

One quick point that I don't have time to elaborate on today. The other major kinds of arguments offered in support of methods of interpretation are linguistic arguments – that is, arguments about how language and meaning work – and conceptual arguments – for example, arguments about the concept of interpretation. Once we understand that legal interpretation seeks the content of the law, both linguistic and conceptual arguments are going to be in trouble. As I say, I don't have time to develop this point here, but, very crudely, the basic point is that once we see that we are trying to figure out the content of the law, points about the meaning of linguistic utterances or about what counts as interpretation are just not going to be terribly relevant. There's a lot more to be said here, but not today.

So, back to normative arguments like arguments from democracy. Are such arguments apt – that is, are they an appropriate way of defending a theory 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 the way that is supported by fairness (say) 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's 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 it accurately identifies a provision's contribution to the content of the law.

Let's begin with HLA Hart's positivist theory, which is probably the most widely held theory of law, at least in law schools. Many theorists of legal interpretation profess to accept Hartian positivism.

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. I'm going to have to be very broad brush here, leaving out a lot of the details. 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.

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, either 1) there is a consensus among judges that those normative factors are relevant or 2) a valid source of law, itself grounded in the rule of recognition, such as a statute or the Constitution, makes those normative factors relevant to determining the content of the law.

First, there is certainly nothing like a consensus among judges 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 make out the idea that a valid source of law makes democracy or other values 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. Moreover, the conception of democracy enshrined in the Constitution is on the face of it quite flawed for familiar reasons. So, it would be a stretch to argue that the Constitution requires whatever the true understanding of democracy entails.

On the other hand, it is differently problematic to argue that the Constitution requires us to use the method of interpretation supported by a particular flawed method of democracy. When you are talking about what democracy really entails, you can simply appeal to the truth – that is, make the best arguments you can. But when you are trying to establish what a particular flawed conception of democracy entails for legal interpretation, one can't simply make arguments about what democracy requires. So, 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 doesn't ever explicitly address.

And there is obviously something very 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. This unattractiveness may explain why we don't see theorists going this route.

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, because the consensus of judges is the fundamental determinant of the content of the law, if Hart's theory is true, no controversial method of interpretation can be correct. (As a result, on any difficult question there simply won't be a legal answer.) For present purposes, however, the point is just that Hart's theory does not support the appeal to democratic and other normative arguments in defending theories of legal interpretation.

Exclusive positivist theories of law, by contrast with 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, it is clear that normative arguments have no bearing on whether a theory of interpretation is true.

Dworkin's law as integrity theory makes normative arguments relevant. But the type of normative argument that it makes relevant is very different from the normative arguments typically offered in favor of theories of legal interpretation. 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. 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.

One theory of law – really, a family of theories – offers a natural explanation of the relevance of the typical normative arguments. Today I'll 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 to communicate? Or, differently, is it what a reasonable person in 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's a whole literature about them. I don't 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.

Just as individuals do things, such as making promises and giving consent, that affect their genuine obligations, so legal institutions take actions, such as enacting statutes and regulations

and deciding cases, that have a more general impact on our 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 lots of connotations that could be confusing. On some views, when you have a legal obligation, there’s 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 factors. This is a non-positivist 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 something 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 affects the law is determined by the way in which it would be fair or democratic for it to do so.

On the moral impact theory, the way to argue for a method of interpretation is to argue that the way in which the method of interpretation takes sources to contribute to the content of the law is supported, on balance, by the relevant values.

Indeed, with certain complications that I want to set aside today, the moral impact theory implies a method of interpretation that we can call the *normative relevance theory* of interpretation or just *normative relevance* for short. According to normative relevance, a legal provision should be interpreted in the way that is supported, on balance, by all relevant values. Whether, for example, the literal meaning of a statutory provision, the communicative intentions of the legislature, or some kind of constructed counterfactual content matters – and how much and in what way it matters – depends on democracy, fairness, rule of law, and any other relevant values.

Normative relevance is not often explicitly articulated, let alone advocated. Textualist and intentionalists and many other theorists often appeal to arguments from democracy, fairness, and rule of law in a relatively ad hoc way to support preferred accounts of statutory and constitutional interpretation. It could be argued that these appeals to normative arguments to support particular theories of interpretation presuppose the position that legal instruments should be interpreted in the way that is most supported by all relevant values. I don’t have time to fully develop such an argument today, but you will remember that I argued earlier against the obvious alternative – that the reason normative arguments are relevant is that the Constitution requires that we follow whatever method of interpretation is supported by, for example, democratic values.

So, there’s a good case that typical normative arguments offered for methods of interpretation presuppose something like normative relevance. And I have argued that the normative relevance

position on interpretation would be justified if the moral impact theory of law were true, but not if its main competitors were true.

Just to pause to rub in this point: arguments from democracy, fairness, and the like are not even relevant to what method of interpretation to use unless we adopt a certain controversial non-positivist picture of law.

I should pause to emphasize that I haven't given anything like an argument for the moral impact theory here today. I've argued for it extensively elsewhere. Today, my goal with respect to the moral impact theory is to show how it explains the pervasive use of normative arguments for methods of legal interpretation and to sketch some of the implications of the moral impact theory for legal interpretation.

The moral impact theory and normative relevance give us a better understanding of many aspects of legal interpretation. For example, once we understand that we are not searching for the linguistic meaning of texts, a core dilemma for textualists is dissolved. A central textualist dogma is that they are searching for the meaning of the words of legal instruments. But, as we have seen, the kind of counterfactual content central to textualist methodology has nothing to do with meaning.

To take another example, there are many factors to which judges appeal in legal interpretation, but there is virtually no discussion of why those factors are relevant. In the "use a gun" case, for example, the court's majority and defendant dissenting opinions appeal to the ordinary meaning of the word "use"; dictionary definitions of the word; what people ordinarily mean by words or phrases in particular contexts; how Congress intended the language to be construed; how the statutory phrase is most reasonably read; whether Congress would have wished its language to cover the situation; whether Congress intended the type of transaction in question to receive increased punishment; how the word "used" is employed in other legal instruments such as the federal sentencing guidelines; past judicial decisions; the history of the statute's modifications over time; and the rule of lenity. The moral impact theory explains that in interpreting a statute, a fact is relevant because it has a bearing 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 the past cases.

But we don't simply gain understanding of current practices; the arguments that I have sketched today have many revisionist implications as well. I'll give a few examples.

First, normative relevance makes clear that it is not enough that some normative factor – some particular argument from democracy, say, – supports the method; a method must be favored by all relevant values *on balance*.

Second, normative relevance doesn't just explain why lots of different factors are relevant in legal interpretation. It yields a principled way of resolving conflicts between them, something that is sorely needed. According to the moral impact theory, the correct resolution of such

conflicts depends on what the relevant moral values, on balance, support. So, if dictionary definitions point in one way, but the way a reasonable person would understand an utterance of the words in ordinary communication points another way, we are not simply at a standstill. We least understand what question to ask.

Next, typical arguments for methods of interpretation assume that democracy or other values get invoked to support a method, but then we can apply the method without any further appeal to democracy or fairness. But if a statute's contribution is determined in the way that the moral impact theory specifies, the inquiry may be far more pervasively normative.

This point leads me to an important distinction between two versions of normative relevance. According to *variable* normative relevance, the correct method of statutory interpretation may vary from one type of legal source to another or even, at the extreme, from provision to provision.

According to the *general* version, the relevant values, on balance, support one method of statutory interpretation across the board. One might draw an analogy to the relation between rule utilitarianism and act utilitarianism. According to the general version of normative relevance, following a general rule better promotes the relevant values than making provision-by-provision calculations. So, for example, one might argue that the relevant values support textualism – or, since textualism is, as we have seen, underspecified – some more fully spelled out position in the neighborhood of textualism.

It should be evident that there are in fact many possible positions on the spectrum from pure variable normative relevance to pure general normative relevance. For example, it might be the case that one method of legal interpretation is correct for criminal statutes, another for abstract constitutional provisions, another for administrative regulations, and so on.

A potential advantage of general normative relevance is that it does not require legal interpreters to engage in as much normative argument as variable normative relevance. Indeed, this advantage may yield powerful reasons supporting general normative relevance over variable normative relevance. For example, if legal interpreters try, in each instance, to consider all relevant values, they may do a worse job of determining what is required by those values than if they follow general principles.

Two points about variable normative relevance. First, variable normative relevance implies that legal interpretation involves a great deal of normative argument. Of course, its competitors themselves do not provide mechanical methods of interpretation; interpreting statutes in accordance with intentionalism, purposivism, or textualism requires a great deal of judgment. But variable normative relevance requires more explicit consideration of values.

Second, it is important to recognize that even pure variable normative relevance does not require normative reasoning in every case. 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 values. Even in difficult cases, it is only

necessary to eliminate competing accounts to the extent that they favor a different outcome in the case at hand.

Next, I want to illustrate the implications of my talk for how to think about textualism. We can now frame the democracy question better. The question is not how to be a faithful agent. Given that the legislature lacks a coherent mind, faithful agency theory is the wrong approach to understanding what democracy requires. We will need more nuanced democratic thought. Given that we cannot expect there to be collective intentions on the kinds of difficult issues that arise in legal interpretation, but we need lawmakers in these circumstances to be able to make law, we need to understand what democracy implies about how our lawmakers can make law without having shared intentions.

Now at least we can ask the right question: How does the fact that democratically elected representatives enacted this bill with these words in this situation affect what we ought to do?

It's sometimes said that there is no point in having elected lawmakers if they don't get to make whatever law they intend. But this is a bad overstatement. All that is necessary for it to make sense to have elected 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 nonsensical to think that there is no point in trying to raise children if you can't make them come out exactly the way you intend!

I'll conclude with an example of how the moral impact theory may help to defend one aspect of an older form of textualism that is now out of fashion. The example illustrates how being explicit about normative relevance changes how we should think about legal interpretation.

According to old-fashioned textualism, if the plain meaning – roughly, literal meaning – is not ambiguous, the plain meaning controls, unless it would produce absurd results.¹ If we are relying on the model of ordinary communication, this is simply wrong. If I say something and the literal meaning is not ambiguous, you still want to know what I intended to communicate, not the literal meaning. If you receive a letter of recommendation from a professor that says only that the student has excellent handwriting, again, there is no ambiguity to the literal meaning – the words mean that the student has excellent handwriting – but you wouldn't stop there. You still have to work out what the professor intends to communicate – that the student is not a good candidate for the job.

But the moral impact theory offers a way of making sense of the now largely discarded notion that, when literal meaning is not ambiguous, it controls. First, you have to understand that legal theorists use the term “ambiguity” much more broadly than true ambiguity to encompass any situation in which something is unclear. Now something in the neighborhood of literal meaning

¹ It should be said that textualists do not apply this principle consistently, in part because they are unclear about what ambiguity is. They will often say that there is ambiguity when there is doubt about what the legal effect of language is, even though the language is not at all ambiguous. For example, the language “use a gun” is not in any way ambiguous.

actually has a lot going for it, from the point of view of interpreting legislation. Especially when specifying rules that affect our duties, lawmakers should not be able to rely on what is merely implied. In ordinary communication, one can say (to use an example from Justice Scalia) that children 12 and under enter free and *implicate* that 13-year-olds have to pay, but this kind of implicature would be problematic in the tax code or the criminal code for reasons that I probably don't need to spell out. The legislature should have to specify explicitly what our duties are. And unlike the situation with ordinary communication, the norms have to be available to people many years later with very varied backgrounds and with very little information about the original context.

But literal meaning is problematic for a very different reason. Literal meaning can actually be quite hard to figure out. For example, if I say that I have three objects, is the literal meaning that I have exactly three objects or at least three objects? [Compare: 1) I say I have three children, but it turns out I have four children; with 2) I say I have three beers, but it turns out I have more.]

So, an approach that says that when literal meaning is clear, other things being equal, literal meaning controls unless it leads to absurd results makes some sense from the point of view of democracy and fairness. Now, I hasten to add that other things are not always equal. There are other considerations at stake that may militate against literal meaning. I'm just simplifying for purposes of illustration. The point for the moment is that textualists have been led to their views by confusions about how language works, but it may be possible to defend some of their ideas on the moral impact theory.

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. I've 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.

The passage from Justice Scalia actually continues in the following way: “so utterly uninformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is.” 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.

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Next, I offered a new start. 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. 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.

It follows 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 most influential theories of how the content of the law is determined. None of them support the 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 contents of the law, those normative arguments wouldn't 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, presuppose a non-positivist 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 here's a quick way to see that the idea is not as foreign to them as it might seem. Textualists often summarize their view by saying that "the text is the law." And they defend textualism, as we have seen, on democratic grounds. So, 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. So 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.

Finally, I offered some thoughts about how statutory interpretation looks from the point of view of the moral impact theory. The moral impact theory implies that it is not enough to argue, as theorists often do, that a particular democratic or fairness consideration supports a preferred theory of interpretation. What is needed is an argument that the way in which a theory takes

sources to contribute to the content of the law is supported, on balance, by all relevant values. I sketched, for example, how one might go about defending one rather out-of-fashion idea on grounds of fairness and democracy directly.