

Principles of Legal Interpretation

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1. Introduction

In the large literature on legal interpretation, we find intelligent argument and sophisticated theoretical resources. But the field lacks system or structure – there is no general understanding of what constraints a theory of legal interpretation must meet or what it must accomplish in order to be successful. Theorists enter the debate from different starting points, offering a particular consideration or type of argument in favor of a preferred account. Some theorists argue from a particular conception of legislative supremacy, democracy, or legitimacy. Others maintain that the study of language yields the correct method of legal interpretation. Still others offer an assortment of different “modes” of interpretation. A common approach is to offer normative considerations, such as the appropriate role of appointed judges in a democracy, for favoring a particular method of interpretation. Another tack is to insist that given what *interpretation* is, legal interpretation can only be the ascertainment of the legislature’s intentions. Are such diverse approaches in competition? Could an account based on a conception of legislative supremacy, linguistic considerations, or the nature of interpretation accomplish the tasks facing an account of legal interpretation? We lack a framework for evaluating such questions.

The present paper seeks to address this problem of structure. The goal is to argue from difficult-to-dispute starting points to a set of fundamental principles that constrain any account of

legal interpretation. I do not advocate a particular theory or method of legal interpretation. Rather, I derive principles that any tenable theory of legal interpretation must adhere to.

Here is the plan for the rest of the paper. Section 2 argues that we should understand legal interpretation to be the process of using legal materials to ascertain the content of the law. Section 3, the centerpiece of my argument, considers the relation between the epistemology and the metaphysics of law — that is, between how to ascertain the content of the law and how the content of the law is determined. I argue that a theory of legal interpretation is (in a sense that I elucidate) *responsible to* a theory of how the content of the law is determined. Section 4 responds to three objections, thus sharpening my position on the relation between the epistemology and the metaphysics of law. Section 5 responds to the objection that legal interpretation should be concerned with second-best, rather than ideal, theory. Sections 6 through 8 introduce three further principles that theories of legal interpretation must satisfy. Section 9 argues that my central principle — concerning the relation between a theory of legal interpretation and a theory of law — is more difficult to satisfy than might initially appear because the most widely-held theory of law is inconsistent with any controversial theory of legal interpretation. Section 10 examines the implications of my principles for representative theories of legal interpretation.

2. Legal interpretation as discovering the law

The Starting Point: Legal interpretation is the process or activity of using legal materials to ascertain what the law is, or, more precisely, to ascertain legal obligations, powers, rights, privileges, and so on.

My starting point is that legal interpretation is the process or activity of using legal materials, such as statutes, constitutions, contracts, wills, and the like, to ascertain legal obligations, powers, rights, privileges, and so on. (In practice, of course, we look at some relatively small subset of legal materials in order to answer some particular question.)¹

That legal interpretation seeks to discover legal obligations (powers, rights, and so on) is partly intended to be a useful regimentation of ordinary usage. When lawyers and judges interpret statutes, regulations, contracts, wills, they are normally trying to determine what legal obligations there are. Conversely, when a judge makes a discretionary decision, such as determining a criminal sentence that is not specified by sentencing guidelines, or engages in fact-finding, we don't describe the judge's decision-making process as legal interpretation.

That's not to say that nothing else ever gets mixed in under the term 'legal interpretation.' Courts engage in a range of activities that are not always carefully distinguished from ascertaining what the law is. These activities include fashioning decision rules,² finding a way to decide a case that is not covered by applicable law, creating law, deciding whether enforcing the law goes beyond the court's institutional capabilities, and so on.³ I don't want to dispute that such activities, typically together with ascertaining what the law is, are sometimes included under the rubric of legal interpretation. But to the extent that it is clear that a court is doing

¹ It would be simpler to say that legal interpretation is the process of using legal materials to discover *what the law is*, but this formulation would be awkward in the case of contracts, wills, and other private law instruments. My focus will be on interpretation of statutes and constitutions, so I will often use the simple formulation and talk of discovering what the law is. The discussion is for the most part applicable to the interpretation of private law instruments as well.

² On the distinction between decision rules and the content of the law, see Berman XXX.

³ A few qualifications. First, it is worth noting that, at least on orthodox views of the relation between law and morality, there are separate legal and moral questions of how to decide a case that is not covered by applicable law. Second, as I mention in the text below, it may be that, when there is no applicable first-order legal standard, there is a legally correct way for a judge to proceed. Third, I do not include in the list in the text activities unlikely to be confused with ascertaining what the law is, such as fact-finding and deciding whether it is morally required to disregard applicable law.

something other than ascertaining the law, e.g., finding a way to decide a case that is not covered by applicable law, that rubric seems inappropriate.

One important clarification: when I say that a case is not covered by applicable law, I mean that there are at least two outcomes that the applicable first-order legal norms do not rule out. But many other outcomes may be excluded by those norms. Thus, that a case is not covered by applicable law is consistent with existing legal norms strongly constraining the legally permissible outcomes. Moreover, even if the applicable *first-order* legal standards do not resolve the case, it may be that there is a legally correct way for a judge to proceed. For example, there may be rules of closure – e.g., if there is no first-order legal standard that gives the plaintiff a right to win, decide the case in favor of the defendant. More interestingly, it may be that there are legal requirements on how a judge should go about creating law when necessary to resolve the case. For example, it might be that when a statutory scheme leaves a specific question unresolved, the judge is legally required to create law interstitially in the way that best implements the principles embodied in the statutory scheme or in the way that the legislature would have resolved it had it considered the issue. In other words, a legal system might have second-order legal norms governing how to resolve cases that are not resolved by first-order legal norms. Again, when I say that a case is not covered by applicable law, I mean only that first-order legal norms do not dictate a unique resolution.

With respect to the activities of lawyers, as opposed to judges, there are fewer candidates for other activities that might be classified as legal interpretation. Lawyers don't create law, fashion decision rules, and so on. One relevant activity that lawyers engage in is predicting what courts or other authorities will do. They often make such predictions, however, precisely by working out what the law is, and, in that case, it is no surprise that the term legal interpretation is

apt. In some cases, however, lawyers predict what the authorities will do based on their personal familiarity with the relevant officials, on political considerations, or the like. And here the term ‘legal interpretation’ again seems inappropriate.

Ascertaining the law is obviously governed by different principles than activities such as creating law or finding a way to decide a case that is not governed by existing law. It is an activity with a different aim; consequently, different means are suited to it. It is therefore important to distinguish ascertaining the law from other activities that courts and lawyers engage in. Given that ‘legal interpretation’ centrally picks out working out what the law is, it seems an apt regimentation to use the term exclusively for that activity.

Thus far, I’ve been suggesting that taking legal interpretation to be a search for the content of the law is a useful precisification of ordinary usage. But I want to make a stronger claim: that the theories I discuss and criticize – for example, theories commonly labeled “originalism,” “textualism,” “intentionalism,” “purposivism,” “non-originalism,” “pluralism,” and “living constitutionalism” – are in fact best understood as trying to ascertain the law. (I will continue to refer to such theories as theories of legal interpretation, but I don’t mean to beg any questions by this usage; it is just a shorthand for such theories.) To the extent that these theories were engaged in some other project, my criticisms would not be apt. Thus, my claim that legal interpretation seeks to ascertain the law is primarily a claim about what project the theories in question are engaged in, rather than a claim about the use of the term “legal interpretation”.

I believe that I am on strong ground in claiming that theories of legal interpretation seek to ascertain how statutory and constitutional provisions and other legal instruments affect the content of the law. Some theories are more or less explicit about this point. In others, the point is implicit. To see this, notice, first, that theorists of legal interpretation would be in broad

agreement that courts are in general bound to follow the law when there is law on the issue before them. (I say “in general” because it is plausible that it is sometimes permissible for courts to sometimes underenforce legal requirements.⁴ But this issue is not relevant here. When theorists of legal interpretation give their preferred accounts, they certainly are not offering accounts of when courts should underenforce the law.) Moreover, the theorists in question take their accounts to yield outputs that are, at least as a rule, decisive – that is, they are supposed to resolve legal cases. Consequently, the accounts cannot be well understood as seeking to ascertain some factor that merely bears on what the content of the law is, for example the linguistic meaning of the texts. Given the consensus that courts are generally bound to follow the law and the assumption that the accounts yield decisive resolutions, the accounts must either be accounts of how to ascertain the law or accounts of how to decide cases when there is no law.

There are at least three reasons for thinking that theorists are not best understood as addressing how courts should decide cases when there is no law. First, before a court can reach the question of how to decide a case when there is no law, the court must begin by trying to ascertain the law. Thus, a theory of how to decide a case when there is no law could only be relevant after a theory of how to ascertain what the law is. But theorists of legal interpretation take their theories to provide a starting point as well as a decisive answer to cases.

Second, the theories in question tend to be focused on the details of texts, legislative history, and the like. This focus makes sense if the goal is to figure out what the law is. But if the goal is to decide a case where there is no law, it is more difficult to explain the attention to

⁴ See Sager XXX. In at least many such cases, it is arguable that in deciding to underenforce the law, courts are following higher-level legal standards, e.g., ones concerning what courts should do when they are institutionally ill-suited to enforcing constitutional obligations. To the extent that this is correct, the statement that judges are bound to follow the law when there is law on the issue before them is true without qualification (though misleading because it might suggest that judges must always follow first-order legal standards).

the details of statutory texts and so on; and there are lots of other relevant considerations, such as the societal consequences that we would expect to receive more consideration. Moreover, the appeals to legislative supremacy, the nature of authority, the limited role of judges in a democracy, what interpreters are seeking when they try to understand linguistic utterances, and so on wouldn't really make sense if the goal were to figure out how to decide cases when there is no law.

Third, many theorists of legal interpretation strenuously insist that there is one uniquely correct way to interpret statutes and other legal texts. If the project were how to decide cases when there is no applicable law, one would expect the tone to be very different – one would expect a much more tentative, open-ended type of inquiry. In sum, despite some confusion in the literature, theories of legal interpretation are best understood as theories of how to ascertain what the law is.⁵

Larry Solum has advocated using the term “legal interpretation” for the activity of working out the linguistic meaning of the legal texts, as opposed to the content of the law.⁶ His

⁵ The points in the last two paragraphs are less strong to the extent that there are second-order norms about how to decide cases in the absence of law that require close attention to the details of legal materials and dictate unique outcomes. But it is implausible that the U.S. legal system has such norms as a general matter.

⁶ Solum proposes using "constitutional interpretation" for the activity of working out the linguistic meaning of the constitutional text and "constitutional construction" for the activity of working out the impact of the Constitution on the law. His main concern is to prevent conflation between linguistic meaning and what the law is. He and I share the view that it is extremely important to prevent this conflation. So our difference on this point is largely terminological. Solum appeals to the long-standing use of the interpretation/construction distinction, but on my reading of that history, it does not support his terminology. It is true that some writers gloss “interpretation” as discovering “meaning,” but such remarks must be understood in light of the extremely common conflation of discovering meaning with discovering a provision's contribution to the content of the law. Once this point is taken into account, the traditional distinction is better characterized by saying that interpretation involves working out a provision's contribution to the law, while construction is a more creative process of creating law that takes over when a provision's contribution to the law is indeterminate or uncertain on the issue before the court. See Whittington 1999.

In my view, using "legal interpretation" for finding linguistic meaning is more likely to promote the conflation than using “legal interpretation” exclusively for finding the content of the law. Moreover, we don't need a technical term for the process of working out the linguistic content of legal texts, any more than we need a special term for working out the linguistic content of any text. Rather, we need to be careful to use different terms for, on

usage actually brings out how natural it is to use the term in my way. On Solum's view, once legal interpretation is completed, we don't yet know what the law is. We have to begin a separate process of using the ordinary linguistic meanings of the texts along with other legally relevant considerations to work out what the law is.

By contrast, legal interpretation as it is ordinarily understood is supposed to yield a take on what the law is, not an intermediate step from which one can go on to work out what the law is. It would be peculiar for an appellate opinion to arrive at a legal interpretation of the relevant provisions and then to begin a discussion of how to get from that interpretation to a conclusion about what the law is. Two observations support this point about ordinary usage. Legal interpretation, on the ordinary understanding, draws on considerations that are not relevant to ordinary linguistic meaning. For example, the rule of lenity in criminal law seems to have its basis in considerations of fairness. Such canons are sometimes rationalized as heuristic devices for inferring what the legislature meant or communicated, but they don't look much like sincere attempts to infer the legislature's communicative intentions. Similarly, if legal interpretation were just a matter of working out the linguistic meaning of the texts, it would not require special skills beyond those of competent speakers of the language (and in some cases technical linguistic skills), though it might require knowledge of specialized vocabulary or knowledge of relevant

the one hand, the impact of an enactment on the content of the law and, on the other hand, linguistic contents, such as semantic content, speaker's meaning, communicative content, and implicatures.

Moreover, Solum's usage has other unfortunate side effects. It tends to suggest that there is only one linguistic meaning. As argued in section 7, it is important that theories of legal interpretation distinguish different types of linguistic meaning. Second, Solum's usage tends to slant the playing field in favor of views that, like his own, claim that the relation between linguistic meaning and the content of the law is relatively simple. Specifically, the two-stage picture goes well with a view like Solum's on which the linguistic meaning of the texts becomes the law either without modification or, if necessary, with some filling in or precisification. It obviously does not fit well with a view like that of Ronald Dworkin or my own on which there is no simple route from linguistic meaning to the content of the law and on which linguistic meaning has no privileged status. Dworkin, *Law's Empire*; Greenberg, "The Moral Impact Theory," *Yale Law Journal* (2014).

background considerations.⁷ In fact, however, legal interpretation draws on lawyerly reasoning skills that are learned in law school.⁸

It is worth emphasizing that the question of legal interpretation addressed here is *not* the question of how judges should decide cases. First, the question of legal interpretation is not specific to judges or to any other particular actor. Anyone, including a private citizen or a theorist, can seek to discover the law. Second, as pointed out above, in deciding cases, judges have tasks that go beyond figuring out what the law is, such as deciding how to decide cases where there is no binding legal standard, creating law, and deciding whether legal requirements should be underenforced.

3. The need for an account of legal interpretation to be linked to a theory of law

The Linkage Principle: Any account of legal interpretation is responsible to a theory of law, i.e., a theory of how the determinants of the content of the law make legal propositions true.

From our starting point that legal interpretation seeks to ascertain what the law is, our first fundamental principle follows: that an account of legal interpretation is responsible to a theory of law. I will first address what I mean by *a theory of law* and then turn to my claim that an account of legal interpretation must be responsible to such a theory.

Facts about the content of the law – for example, the fact that, under California law, contracts for the sale of land are not valid unless committed to writing – are not among the most

⁷ The reason for the qualification about technical linguistic skills is that, although ordinary speakers are proficient at inferring, for example, speaker meaning, there are more esoteric types of linguistic meaning such as semantic content. See section 7. But the skills necessary to identify such contents are not taught in law school.

⁸ A third reason is that, as I discuss below, I largely set aside considerations of bounded rationality that may have an important bearing on how judges should decide cases. See section 5.

basic facts of the universe. Rather, such *legal content facts* – *legal facts*, for short – obtain in virtue of other, more basic facts. A core project in philosophy of law is that of giving what I will call a *theory of law* – an account of how the content of the law is determined at the most fundamental level. For example, on H.L.A. Hart’s positivist theory, the content of the law is determined at the fundamental level by convergent practices of judges and other officials – what Hart calls the rule of recognition.⁹ By contrast, on Ronald Dworkin’s “law as integrity,” theory, the content of the law is determined, roughly speaking, by the set of principles that best fit and justify the legal practices. Yet another view would be that the content of the law is determined by, say, the linguistic meaning of the authoritative legal texts.¹⁰

To say that a theory of law specifies how the content of the law is determined *at the fundamental level* is to say that there is no further determinant that makes it the case that the content of the law is determined in that way. For example, if Hartian positivism is true,¹¹ it is not that there are, say, moral reasons in virtue of which the convergent practice of judges is what matters. Rather, the most basic explanation of why statutes, judicial decisions, and the like have the impact that they do on the content of the law is that judges have a practice of treating those items as having that impact.¹² Similarly, if the content of the law is determined at the

⁹ For brevity, I will usually write “the fundamental level” rather than “the most fundamental level.”

¹⁰ In Greenberg (forthcoming), I argue that this “Standard Picture” is most plausibly understood as an account of how the content of the law is determined at the surface level, not the fundamental level.

¹¹ It is not necessary to add the qualification that Hartian positivism is true *at the fundamental level* because it is built into Hartian positivism that it is a theory of how the content of the law is determined at the fundamental level.

¹² There is a deep question concerning what kind of philosophical explanation, if any, there can be of why the content of the law is determined, at the fundamental level, in the way that it is. Such an explanation would have to appeal to factors that are not themselves determinants of the content of the law. For example, assuming that Hartian positivism is true, suppose that a putative explanation appeals to a certain factor – factor X – to explain why the practice of judges is the fundamental determinant of the content of the law. Factor X could not be a determinant of the content of the law, for, if it were, it would be more fundamental than the practice of judges. I hope to address the question raised in this paragraph elsewhere, but for present purposes I set it aside. I will assume throughout that the kinds of explanations that I am discussing of how the content of the law is determined are ones that appeal to determinants of the content of the law. There can be no explanation of this sort of why the content of the law is determined, at the fundamental level, in the way that it is.

fundamental level by, say, the plain meaning of the authoritative texts, then it is not that the plain meaning of those texts matters because of the practice of judges, reasons of democracy, or anything else.

The distinction between the fundamental level and less basic levels should be familiar from discussions of inclusive legal positivism. Inclusive and exclusive legal positivists agree that, at the fundamental level, moral facts play no role. But inclusive positivists, unlike exclusive legal positivists, maintain that moral facts may play a role in determining the content of the law at a less basic level, for the rule of recognition may give that role to moral facts.¹³

As inclusive legal positivism illustrates, that the content of the law is determined in a particular way at the fundamental level is consistent with its being determined in a different way at the surface level of ordinary practice.¹⁴ We can use Hartian positivism to illustrate the point more generally. If Hartian positivism is correct, then the way in which the law is determined at the surface level will depend on the actual practice of judges in the particular legal system. If the practice of judges is, say, to treat the semantic content of an authoritative legal text as its contribution to the content of the law, then, at the surface level, the content of the law will be determined by the semantic content of the authoritative legal texts.¹⁵ We could make parallel points with respect to other theories of how the content of the law is determined at the fundamental level.¹⁶

¹³ See Hart 1994: 250-54.

¹⁴ There could be intermediate levels between the fundamental level and the surface level, but I will set aside this complication, as it should not affect my argument.

¹⁵ Semantic content is, roughly speaking, the information conventionally encoded in the linguistic expressions. In non-technical terms, the semantic content of a sentence is approximately its literal meaning. See section 7 below.

¹⁶ To say that the content of the law is determined in a particular way, whether at the surface level or the fundamental level, is not to make a claim about the actual practice of judges or other practitioners, such as a claim about how they in fact go about ascertaining what the content of the law is. Rather, it is to say what it is in virtue of which the legal facts obtain. A claim about how the content of the law is determined therefore has a closer bearing

Having clarified the notion of a theory of law, I turn to my argument that a theory of legal interpretation has to be appropriately linked to a theory of law.¹⁷ In general, an account of how to figure out the properties of particular Xs must be appropriately based on what Xs are. An astronomer can use a radio telescope to tell us about cosmic bodies because the bodies that she is studying give off radiation that can be picked up by the radio telescope. The astronomer's method for inferring facts about the cosmic bodies from the data provided by the instruments is closely linked to a theory of the bodies themselves, what they are made of and how they behave. The fact that using a particular instrument – a barometer, say – for learning about stars would have some virtue, e.g. that it would be inexpensive or would save the astronomer's eyes – could not be a good reason for using the instrument unless what it measures is appropriately related to the stars. To use a sports analogy, if one wants to learn how to keep track of the score in an unfamiliar sport, one needs to understand what the determinants of the score are, e.g., how the actions of the players make it the case that a point is scored.

The general point should be uncontroversial. A method for learning about something has to be appropriately geared to the target of study. We can use vision to learn about physical objects because they reflect light. We can't use vision to learn about numbers (except indirectly by looking at symbols) because they do not. In philosophical terms, the epistemology of a domain has to be appropriately linked to the metaphysics of that domain. (By the "epistemology" of a domain, I will mean how we learn about the facts of that domain. By the

on how it would be legally *correct* to go about figuring out what the law is than on how judges or other practitioners actually do it.

¹⁷ For arguments in a similar vein, see Scott Shapiro 2010: 25-30; Greenberg 2011. My arguments focus on the claim that a theory of legal interpretation must be linked to a theory of how the content of the law is determined at the fundamental level, but similar points apply even more strongly to the connection between a theory of legal interpretation and an account of how the content of the law is determined at the surface level.

“metaphysics” of a (non-basic) domain, I mean how the facts of the domain are determined or constituted by more basic facts.)

Indeed, on a flat-footed line of thought, one might think that there is little or no space between a theory of how to detect the facts of some target domain and a theory of how the facts about domain – the X facts – are (metaphysically) determined. Suppose that the X facts are determined by more basic A facts, B facts, and C facts. To put it schematically, let’s say that the X facts are a particular function Θ of those facts -- $\Theta (A,B,C)$. On the flat-footed line of thought, then, the best theory of how to detect the X facts is simply that we must detect the A, B, and C facts and calculate $\Theta (A, B, C)$.¹⁸ To take a simple, concrete example, consider M1, a standard measure of the money supply. Suppose we want to know what M1 is in the United States at a particular time. Money supply facts are not basic facts about the universe. So we need to know the more basic facts that determine M1. M1 is the sum of currency on hand plus demand deposits (roughly, checking accounts). Thus, in order to figure out what M1 is, we need to figure out the total quantities of currency on hand and demand deposits and then add them together. (Similar points could be made about how to figure out the total quantities of currency on hand and demand deposits.)

Matters are not quite this simple, however.¹⁹

¹⁸ There is a special case in which we have an X-factor detector that makes it unnecessary for us for us to consciously identify the A, B, and C facts and calculate Θ – or even to be aware of how the X facts are determined. I discuss this kind of case – in which we have a reliable way of detecting the target facts without knowing anything about the metaphysics – below XXX.

¹⁹ I defer discussion of two complications. First, some metaphysical differences do not make a difference to epistemology. Second, in some domains, we have methods of ascertaining the facts that we have reason to believe are reliable, even if we know little about the underlying metaphysics. In section 4, I argue that neither of these complications is relevant to legal interpretation.

First, an account of how to ascertain the facts must be sensitive to evidentiary considerations. Suppose, for example, that, on the correct theory of law, a statute's contribution to the content of the law is the content of the legislature's communicative intention in enacting the statute. We know from the study of language that the standard way of inferring communicative intentions relies on context. In that case, the best theory of legal interpretation may direct us to use context in interpreting statutes. But context plays no role in making the content of the law what it is; for the legislature's communicative intentions are not what they are in virtue of the context. Context is just a means of inferring communicative intentions.

A theory of legal interpretation might also include evidentiary restrictions of a different sort. It might be that there are legal or moral reasons – as opposed to reasons of accuracy – not to permit consulting certain kinds of evidence. For example, it might be that, for democratic reasons, private diaries of legislators are not appropriate kinds of evidence, *even if consulting them would yield more accurate conclusions about the content of the law.*²⁰

Next, at least on one way of thinking about epistemology, epistemology depends not only on the facts to be detected, but also on the abilities and limitations of the creatures in question. An account of how to find out about cosmology for creatures with sensory apparatus sensitive to neutrinos, magnetic fields, and x-rays would be very different from an account designed for human beings. Human beings have to, for example, build neutrino telescopes, and make inferences from the readings on the instruments. Similarly, an epistemology for humans should

²⁰ On one line of thought, this kind of point should really be implemented at the level of metaphysics rather than epistemology. According to this way of thinking, if democratic reasons preclude the consultation of certain sources, then the content of the law does not depend on whatever is in the sources. I think that it is a possibility, however, that the content of the law might depend on certain facts, yet there are legal or moral reasons why it is not appropriate for a court to consider certain kinds of evidence of those facts, even though they are reliable sources of those facts. Nothing will turn on this point, however.

take into account their bounded rationality. For example, if we are interested in how soldiers in combat should figure out where the enemy is located, we must take into account the effects of fear, lack of sleep, time pressure, and the like.

Turning to legal interpretation, certain kinds of evidentiary restrictions illustrate the point. Suppose that the content of the law depends on the communicative intentions of legislators. Given widespread human biases and tendencies, it might be that looking at certain kinds of evidence of those communicative intentions would tend to produce worse outcomes – that is, ones that are less accurate about the content of the law – than excluding those kinds of evidence.

These points about taking into account the abilities and limitations of specific kinds of creatures do not change the basic point that an account of how to figure out the X facts – where X facts are high-level facts of some sort – must depend on how the X facts are constituted by more basic facts. Whatever the abilities and limitations of the creatures in question, the best method of figuring out the X facts depends on how the X facts are constituted. To return to the example on which the X facts are a specific function of A, B, and C facts, we may need an additional layer of theory to take into account how the specific abilities and limitations of the relevant creatures affect the best way for them to figure out the A, B, and C facts (and to calculate the relevant function). But the ultimate goal is to figure out the A, B, and C facts (and calculate the function); thus, the metaphysics of the X facts plays a crucial role in determining which method of discovering the X facts is best. Whatever the specific capacities of the relevant creatures, the fact that the X facts are constituted by (a specific function of) the A, B, and C facts is an essential part of what makes a theory of how to figure out the X facts true.

In the case of legal interpretation, our concern will be with legal interpretation for human beings, not for other possible creatures. We can therefore set aside questions about how creatures with other kinds of perceptual or cognitive faculties might go about ascertaining the law. There are special issues about how, say, children, people without legal education, or people with cognitive impairments should best go about ascertaining the law. For example, in many circumstances, people without legal education should simply consult a legal expert, rather than trying to ascertain the law directly. Similarly, in certain situations, personal involvement is likely to impair one's ability to ascertain the law, so people who have a direct stake in a matter might be advised to consult a disinterested legal expert. I set aside such issues, instead simply assuming that our concern is with intelligent, cognitively normal adult humans who have been trained as lawyers (and are not personally interested in the issue at stake).

Even with this qualification, bounded rationality raises important issues for a theory of legal interpretation.²¹ Judges, to take an especially important group, operate with limited time and limited information and they are subject to human cognitive biases and other limitations much discussed in recent literature. It would be important for a theory of legal interpretation aimed specifically at judges to take such considerations into account. We might also want to have special accounts for other participants in the legal system, for example, for legislators, executive officials, and police officers.

Let's distinguish between, on the one hand, an ideal theory of legal interpretation, which specifies how an intelligent, legally trained human being works out what the law is – without taking into account bounded rationality and, on the other hand, a second-best theory of legal

²¹ See Greenberg 2014 1335-1336.

interpretation that takes into account bounded rationality. For reasons that I discuss in section 5, I will for the most part focus on ideal theory. From this point on, I will set aside considerations of bounded rationality, especially circumstances that are specific to particular types of actors, such as judges or police officers, and will use ‘a theory of legal interpretation’ to refer to ideal theory in the sense just identified.

With these clarifications out of the way, we can now ask: what exactly is the nature of the relevant link between the epistemology of law and the metaphysics of law – between a theory of legal interpretation and the way in which the content of the law is determined? First, a theory of interpretation *presupposes* a theory of law. If a theory of legal interpretation is true, it is true primarily because of 1) the way in which the content of the law is determined at the fundamental level and 2) any factors or circumstances that the fundamental level makes relevant.²² If it is true that we should interpret statutes in accordance with, say, their communicative content, it is true either because a statute’s communicative content is the fundamental determinant of its contribution to the content of the law or, more likely, because the fundamental determinant of the content of the law, perhaps the convergent practice of judges, makes it the case that a statute’s communicative content is its contribution. (Actually, there is another possibility – that a statute’s communicative content is the best evidence of its contribution to the content of the law. But if that is true, it is again because of the fundamental determinants of the content of the law and any factors that those determinants make relevant.) In a nutshell, a theory of legal interpretation is ultimately made true by the way in which the content of the law is determined at the fundamental level along with factors that are made relevant by the fundamental determinants. Therefore, a

²² The reason for the qualification "primarily" is that peripheral factors, such as considerations of what evidence may appropriately be considered, may also play a role.

theory of legal interpretation presupposes a theory of law in the sense that the truth of a theory of legal interpretation requires that an appropriate theory of law be true.

A consequence is that a theory of legal interpretation is *responsible to* a theory of law. What does this responsibility involve as a concrete matter? A minimal implication is that a theory of legal interpretation must be consistent with a coherent and plausible theory of law. For example, some accounts of legal interpretation claim that interpreters should draw on an assortment of modalities or factors.²³ It is a serious question what plausible theory of law could make true such an unstructured multifactorial interpretive process.²⁴ If there is no plausible theory of law that could make a theory of legal interpretation true, then the theory of legal interpretation must be rejected.

Another implication of the responsibility of a theory of legal interpretation to a theory of law is that the commitments of the theory must be consistent with the theory of law that is presupposed. There are various kinds of inconsistency. Many theorists of legal interpretation, if pressed on the question of their underlying theory of law, would appeal to Hartian positivism, as it is the most widely held theory of law. As I argue in section 9, however, Hartian positivism is in fact inconsistent with any *controversial* theory of legal interpretation. Now, in some cases, a theorist's appeal to Hartian positivism is doing no work, and the theorist could simply abandon that appeal. In other cases, however, theorists explicitly or implicitly rely on the assumption that Hartian positivism is true in defending a controversial theory of legal interpretation.

Similarly, in developing and defending theories of legal interpretation, theorists regularly make arguments that seem to presuppose conflicting theories of law. Many theorists seem to

²³ See Bobbitt 1991; Breyer 2005.

²⁴ See Berman and Toh 2013.

assume that the contribution of a constitutional or statutory provision is constituted by its linguistic meaning and that this fact is not dependent on normative factors. In refining their theories – for example in seeking to avoid awkward implications – the same theorists appeal to normative factors, for example to reasons of democracy, legitimacy, or rule of law. As I discuss below, for example, Scott Soames argues on linguistic grounds that the content of the law is determined by what the legislature asserts. Moral values play no role. He also argues, however, that linguistic meaning should not control when it yields a result that is inconsistent with “the chief publicly stated purpose that proponents of the law advanced to justify it.”²⁵ Presumably, this position could be defended on grounds of democracy. But what coherent and plausible theory of law could support such a combination of positions about legal interpretation? If moral values are not part of what makes it the case that linguistic meaning constitutes a statute’s contribution, then how can moral values be relevant to override the role of linguistic meaning?

Another kind of inconsistency involves appeal to apparently ad hoc considerations. The central tenets of a theory of interpretation may seem to presuppose a particular theory of law. But the theory of interpretation also includes wrinkles that are not warranted in light of that theory of law. For example, Scalia and Garner (2012) seem to presuppose that a statute’s contribution is the linguistic meaning of the text. They then go on to endorse various kinds of interpretative canons that are not well designed to discover linguistic meaning, but more plausibly serve judicial policies or other goals.²⁶

An especially common kind of ad hoc argument involves appeal to a consideration sounding in democratic values, legitimacy, or rule of law, without considering other arguments

²⁵ Soames 2013.

²⁶ See, e.g., Scalia and Garner 2012: 31.

based on the same values or considering other values. Contemporary textualists, for example, often gesture toward an argument from democracy. But if an argument from democracy is relevant, it is difficult to see how it could be warranted to stop short of asking what democratic values support all things considered. If one democratic reason militates in favor of public meaning, but other democratic reasons outweigh that reason, it would be hard to argue that respecting public meaning is justified on democratic grounds. Similarly, if reasons of fairness and rule of law in favor of public meaning are outweighed by democratic values, it would be hard to claim on fairness grounds that respecting public meaning is justified on balance. Consequently, once one takes normative factors to be relevant, it is difficult to avoid the view that the determinants of the content of the law depend on all relevant normative factors.²⁷ Therefore, there is at least a *prima facie* difficulty for a position that appeals to one normative argument, without considering others.

In light of these points, it would be a good practice for theorists of legal interpretation to say explicitly which theory – or at least which general type of theory – of law they presuppose. Doing so would impose a salutary discipline on theories of legal interpretation, combating the problematic tendencies described above. For example, theorists who indicated a commitment to a theory of law would presumably be less likely to offer arguments that seem to presuppose inconsistent theories of law or to offer *ad hoc* arguments, ones not grounded in the relevant theory of law. Critics would be in a better position to evaluate a theory of interpretation that was linked to a theory of law, for they would not be left guessing about the ultimate grounds on which the theory of interpretation rests.

²⁷ The remarks in the text are just the barest sketch of how an argument would go. For development of the argument, see Greenberg 2014: 1334-1337.

It might be thought that my argument entails that there is no way to argue for a theory of interpretation other than by appealing to – and, ultimately, defending – a theory of law. I do not think that such a strong conclusion is warranted, however. A theorist might begin with firm convictions about the way in which some interpretive questions must come out.²⁸ For example, one might take it as a fixed point that the fourteenth amendment of the U.S. Constitution must have the consequence that segregated public schools are unconstitutional. A theorist might also appeal to intuitively attractive theoretical principles or considerations. Some possible examples: a good theory of legal interpretation should avoid absurd results; should give importance to the linguistic meaning of authoritative legal texts; should have the consequence that the content of the law is accessible; should respect democratic values. Starting with a set of convictions about interpretive outcomes and some prima facie attractive principles, a theorist could use a method analogous to reflective equilibrium to develop and support a theory of legal interpretation. So there are resources for developing and defending a theory of legal interpretation without appealing to a full-blown theory of law.²⁹

On the other hand, there are significant limits to how much progress can be made with such a method. To begin with, it would be difficult to find many theoretical principles that are sufficiently uncontroversial to serve as starting points. And there are many competing theories of interpretation that can account for all or most widely shared convictions about interpretive outcomes while respecting uncontroversially attractive theoretical considerations.

²⁸ I am grateful to Seana Shiffrin for discussion of this point.

²⁹ It is worth noting that the responsibility of a theory of legal interpretation to a theory of law is not avoided by the use of a “bottom-up” or reflective-equilibrium-type method to defend the theory. If the theory of legal interpretation is true, it must be in virtue of the fundamental determinants of the content of the law, and so the theory must, regardless of how it is defended, be consistent with a plausible theory of law.

Ultimately, there will be conflicts between competing theories of legal interpretation that can only be resolved by resolving debates between the underlying theories of law. Some theories of legal interpretation may be eliminated because they cannot be reconciled with plausible theories of law. Others may be eliminated by a reflective-equilibrium-type method. It seems inevitable, however, that there will remain competing candidates that presuppose different theories of law. (There will also be competing candidates that presuppose the same theory of law; such debates must be resolved by working out the consequences of the relevant theory of law.) If that is right, debates over legal interpretation can only be resolved, in the end, by addressing the fundamental issue of how the content of the law is determined. This consequence is unsurprising because whether a theory of legal interpretation is true depends on how the content of the law is determined.

It might be thought that this implication is problematic. The way in which the content of the law is determined at the most fundamental level is a controversial issue in the philosophy of law. Therefore, my argument has the consequence that debates over legal interpretation ultimately depend on a controversial issue in philosophy of law.

This implication is no objection, however. First, there are far fewer theories of law than there are theories of legal interpretation, so the debate would be greatly narrowed if it were honed down to the issue of how the content of the law is determined. More importantly, it is a good thing if debates about legal interpretation are focused on what is ultimately at issue. Because a theory of legal interpretation is made true primarily by the way in which the content of the law is determined at the fundamental level, it is healthy to recognize the dependence of debates about legal interpretation on debates about how the content of the law is determined. In addition, as I have emphasized, many currently influential theories are not appropriately linked

to any plausible theory of law, relying on ad hoc arguments and the like. Consequently, a great deal of progress could be made in theorizing about legal interpretation without resolving the question of how the content of the law is determined. Moreover, there may be a two-way street between the development of theories of legal interpretation and of theories of law, since theories of legal interpretation may stimulate new theories of law.

4. Three objections

In this section, I address three objections and in the process elaborate my account of the relation between legal interpretation and how the content of the law is determined.

First, I have written as if a theory of legal interpretation presupposes a unique account of how the content of the law is determined. An objector might point out that some differences in metaphysics do not have implications for epistemology. In particular, it is possible for there to be different accounts of how the content of the law is determined that have the same implications for legal interpretation. (At one extreme, two accounts could have the same implications for interpretation with respect to all possible legal systems; at the opposite end of the spectrum, they could have the same implications only in the particular circumstances of a specific legal system at a given time.) We can say that two such accounts are interpretively equivalent (with respect to the relevant legal systems). Disputes between interpretively equivalent accounts of how the content of the law is determined are not relevant to legal interpretation.

Although interpretively equivalent accounts are possible, prominent accounts of how the content of the law is determined in fact have extremely different implications for legal interpretation. Hartian positivism is probably the most widely held contemporary account of

how the content of the law is determined. I argue in section 9 that it has the consequence that *no* controversial theory of legal interpretation can be correct. For example, because textualism, purposivism, living originalism, and Dworkinian interpretivism are all controversial in the US legal system, if Hartian positivism is true, none of these accounts of interpretation is correct. By contrast, if Dworkin's "law as integrity" theory is true, then – at least if Dworkin is right about the consequences of his theory³⁰ – the correct method of legal interpretation seeks the set of principles that best fit and justify the practices of the legal system, including the Constitution, statutes, judicial decisions.

Differently again, Scott Shapiro argues that his Planning Theory has complex consequences for theories of legal interpretation, for example that there are different criteria for the correctness of a method of interpretation depending on why the officials of the legal system accept, or purport to accept, the rules of the system. In an "authority" system – of which the US legal system is probably an example – which method of interpretation is correct depends on the planners' attitudes about the trustworthiness of the interpreters.³¹ On my own Moral Impact Theory, roughly speaking, legal interpretation requires ascertaining the moral consequences of the ratification of constitutions, enactment of statutes, and other actions of legal institutions.³² Finally, on the widespread implicit picture of law according to which the content of the law is constituted by the linguistic meaning of the authoritative legal texts, legal interpretation requires

³⁰ As Dworkin himself points out, one could accept his "law as integrity" account of how the content of the law is determined at the fundamental level, but reject his account of its higher level consequences. For example, he describes a "conventionalist" account on which legal interpretation would involve no moral reasoning. See *Law's Empire* XXX.

³¹ See Shapiro 2011, chapters 12-13.

³² See Greenberg 2004/2006; 2011; 2014 at 1325-1341. By including the Moral Impact Theory among "prominent theories of how the content of the law is determined," I don't mean to suggest that the Moral Impact Theory is prominent to others. But it is prominent to me.

ascertaining the linguistic meaning of those texts.³³ In sum, these five accounts of how the content of the law is determined are likely to have importantly different implications for legal interpretation in the US and similar legal systems. Because we are not in a situation where actual competing accounts of how the content of the law is determined are plausibly interpretively equivalent, we can set aside the qualification that differences in how the content of the law is determined are relevant only to the extent that they have different implications for epistemology.³⁴

Second, it might be pointed out that, in some domains (that are plausibly not domains of basic facts, i.e., facts that do not obtain in virtue of the obtaining of other facts), we are able to ascertain the relevant facts without knowing much of anything about the metaphysics. Humans have reliable knowledge of our own mental states, such as beliefs, desires, and emotions, though most humans have never thought about the metaphysics of mind (and the metaphysics of mind is controversial among philosophers). Ordinary people know a lot about their own mental states without ever pausing to worry about metaphysics. To take a different kind of example, mathematicians are adept at amassing mathematical knowledge, despite the fact that the metaphysics of mathematics is highly controversial. Mathematicians have no need to concern themselves with the metaphysics of math in order to discover mathematical truth. It might therefore be wondered why we cannot, in a parallel way, proceed with figuring out the content of the law without worrying about how the content of the law is determined.

³³ In Greenberg (forthcoming), I argue that this "Standard Picture" is most plausibly understood as an account of how the content of the law is determined at the surface level, not the fundamental level.

³⁴ Therefore, when I say, for example, that a theory of legal interpretation presupposes an account of how the content of the law is determined, strictly speaking, I should be understood as saying that a theory of legal interpretation presupposes a set of interpretively equivalent accounts of how the content of the law is determined.

The cases of our own minds and of mathematics are special because, in these domains, we have methods of acquiring knowledge that we have reason to believe are reliable. And, crucially, our reasons for believing that these methods are reliable do not depend on an understanding of the metaphysics of the domains. In the mental case, we presumably have innate mechanisms that are sensitive to our own mental states. Those innate mechanisms, to the extent that they are reliable, track the relevant facts, but they operate unconsciously. Because these mechanisms do the work for us, one does not need to be consciously aware of what lower-level facts make it the case that one has a belief or a fear. (Recent developments in psychology as well as older Freudian ideas suggest that people's knowledge of their own minds is less good than people typically assume, but we can set this point aside for the sake of argument.) In the mathematical case, the method of acquiring knowledge – mathematical proof – is virtually uncontroversial among mathematicians until one reaches the most recondite questions. In addition to the consensus of mathematicians, the extraordinary success of math-based science and technology gives us reason to be confident in the reliability of mathematical methods.

The legal case is utterly different. Far from there being an uncontroversial method of legal interpretation that we have reason to believe is reliable, there is widespread debate over the correct method of legal interpretation. Competing theories of legal interpretation take inconsistent positions about the role of the communicative intentions of legislatures, public meaning, moral values, contemporary understandings, historical practices, and much more. If mathematicians had comparable debates about how to discover mathematical truth, then points parallel to the ones that I have made about legal interpretation would apply. Indeed, it is worth noting that, even when we have reliable methods like those in the mental and mathematical cases, those methods are correct, to the extent that they are correct, *because of* the underlying

metaphysics. The mechanisms that give us first-person knowledge of our own minds are reliable only because, and to the extent that, they track the determinants of our mental states. If it turned out, surprisingly, that in a particular subfield of mathematics, the determinants of mathematical facts could not be reliably tracked by standard methods of mathematical proof, mathematicians would need new methods for acquiring knowledge in that subfield.³⁵

The third and final objection is that my argument seems to assume that, with respect to every issue, there either is, or is not, applicable law. This assumption, the objection continues, conflicts with the phenomenology of judging (and perhaps of lawyering as well). Judges do not feel that they face two cleanly distinct types of situations: one in which there is there is an applicable legal standard that must be followed and another in which there is no such standard and judges are free to do as they please. I will make several points in response.

First, remember that when I say that a case is not resolved by applicable law, I mean that there are at least two legally permissible outcomes. But that is not to say that the outcome is not strongly constrained by law. So one reason why a judge would feel not suddenly feel free is that even when the case is not resolved by applicable legal standards, the law may exclude many possible outcomes. And one reason why a judge might experience a continuum of freedom from applicable law is that there is in fact a continuum from cases in which the first-order legal

³⁵ What about ethics? It is controversial how much consensus there is regarding methodology in ethics. If we restrict ourselves to Anglo-American moral philosophy, ignoring, for example, people who claim to acquire ethical knowledge by divine revelation or by consulting their reactions of disgust, there is arguably somewhat less controversy over the methods of acquiring ethical knowledge than in the legal case. To the extent that there is an accepted method that is known to be reliable, ethics can be treated like the mathematical case. But ethics certainly lacks anything like what mathematics has – a method that is agreed by all to be fully reliable. Partly as a result, there is a great deal of disagreement over first-order ethical propositions. In order to make progress in ethics, we therefore need to settle disputes about methodology. I would make arguments about the epistemology of ethics that are parallel to those that I make about law. The method of ethics is responsible to metaethics. To take one example, if Cornell moral realism is a true account of metaethics, then the reflective equilibrium method would plausibly not be a reliable method of learning about ethics.

standards permit only one outcome to cases in which the first-order legal standards place little constraint on the outcome.

Second, as mentioned in section 2, even when a case is not resolved by applicable law in the sense that there is no first-order legal standard that dictates a unique outcome, there may often be second-order legal standards that control how the case should be resolved. (Moreover, some such second-order standards would have the consequence that reasoning about which legal standard to create would involve considerations intimately related to figuring out what the statutory scheme requires. An example would be a requirement that, when a statutory scheme leaves a specific question unresolved, the judge is legally required to create law interstitially in a way that best fits the rest of the statutory scheme.)

Third, the sense that judges are constrained even after the law has run out might be fostered by a very simple picture of the metaphysics of law. Suppose that a theorist assumes that if the plain language of the most obviously pertinent constitutional provisions, statutes, judicial decisions, and the like does not clearly resolve an issue, then the law does not resolve that issue. The theorist then observes that judges (and lawyers), even after they recognize that the plain language of the relevant materials does not clearly resolve an issue, continue to engage in legal interpretation, closely scrutinizing the relevant texts (as well as other, less facially relevant texts) and making arguments about how they are best interpreted. Such a theorist might well conclude that, even after the law has run out, judges (and lawyers) do not feel unconstrained.

Nothing in this line of thought presents any objection to my argument. A very plausible understanding of the situation is that judges, whatever they might say when engaged in theoretical reflection, do not work with the simple picture of the metaphysics of law that the theorist assumes. When they find that the plain language of the relevant texts does not clearly

resolve an issue, they do not conclude that there is no law on that issue. They continue to engage in legal interpretation because they are trying to ascertain what the law is. Of course, it is a separate issue whether judges are correct to think that there is law for them to ascertain. And that issue turns on the metaphysical question of how the content of the law is determined. (Obviously, it would be question begging to assume the very simple picture of the metaphysics of law, which, if known to be accurate, would largely eliminate the interest of legal interpretation — understood in the way I have elucidated — by restricting it to cases in which it is obvious what the content of the law is.)

Finally, and most importantly, it is sometimes uncertain whether there is a first-order legal standard that resolves a particular issue. Uncertainty about whether there is law on a given issue provides no reason to doubt that there either is or is not law on the issue. But it helps to explain why judges do not feel a sharp divide between cases that are governed by law and cases that are not. It is rarely clear that there is no first-order legal standard on a given issue; uncertainty is much more common. Consequently, judges will typically not be confident that there is no applicable legal standard. Moreover, it is plausible that, when faced with such uncertainty, judges think that a judgment that there is in fact no legal standard must not be made lightly; rather, they take themselves, as a rule, to be bound to make all possible efforts to ascertain whether one legal position is better supported by relevant arguments. .

Now what judges *should* do when they are uncertain whether there is a controlling legal standard is an important question for a theory of legal interpretation. The point that I want to emphasize here is that the answer to this question depends importantly on the way in which the content of the law is determined. (Indeed, when a judge *should* be uncertain whether there is a controlling legal standard itself depends on how the content of the law is determined.) Where

the line between law and no law falls depends on how the content of the law is determined. Similarly, how often there is no law governing an issue depends on how the content of the law is determined. For example, on the very simple picture of the metaphysics of law just mentioned, there is no law whenever the plain language of the relevant texts does not clearly resolve the issue, so there will very often be no law. On a very different picture of the metaphysics of law on which, to put it crudely, there is law whenever the relevant arguments on one side are better than those on the other, the line will fall in a very different place and there will be law much more often. (I don't mean to offer this picture as a serious account of the metaphysics of law; rather, I am just gesturing at a type of picture that contrasts with the simple one.) Thus, cases in which there is uncertainty about whether there is a governing legal standard present no objection to my thesis about the responsibility of theories of legal interpretation to theories of how the content of the law is determined.

In sum, the phenomenology of judging provides no compelling reason to doubt that, on each case, there is or is not a governing legal standard.³⁶

³⁶ An objector might nevertheless press the possibility of indeterminacy about whether there is a governing legal standard. Notice that this would be higher order indeterminacy, rather than indeterminacy about what the law is on some issue. That is, the objector suggests that it could be indeterminate *whether* there is or is not a legal standard. I'm inclined to make the simple response that higher-order indeterminacy of this sort is, for the purposes of legal interpretation, tantamount to first-order indeterminacy. On this line of thought, if it is indeterminate whether there is or is not an applicable legal standard that resolves the relevant issue, then the law leaves the issue unresolved. A more nuanced answer is that whether or not such indeterminacy is possible, what it would look like, and in what circumstances it would obtain all depend on how the content of the law is determined. Thus, to the extent that a theory of legal interpretation might treat higher-order indeterminacy differently from first-order indeterminacy, such higher-order indeterminacy constitutes no exception to the responsibility of a theory of legal interpretation to a theory of law.

[The following section, section 5, may not appear in this form in the final version of this paper. Please feel free to skip it.]

5. Another Objection: Legal Interpretation as Ideal or Second-Best Theory?

I have so far taken a theory of legal interpretation to be an ideal theory. That is, a theory of legal interpretation specifies how to work out what the law is without taking into account limitations of particular investigators or types of investigators.

It might be objected that a theory of legal interpretation should not be concerned with ideal theory, but with second-best theory. Because of the limitations or biases of particular institutional actors, those actors would do a better job of complying with ideal theory in the long run if they did not attempt to follow the ideal theory of legal interpretation directly, but simply adhered to specific rules. This general type of idea – that agents operating under particular constraints may in the long run better achieve an overall goal by following second-best rules – is a familiar one from discussions of rule utilitarianism. In designing a legal system, it could be sensible to require particular institutional agents not to follow the ideal theory of legal interpretation, but to follow second-best rules. Adrian Vermeule has powerfully argued for such a conclusion.³⁷ According to the imagined objection, since judges and other agents will in the long run do a better job of complying with the ideal theory by following second-best theory than by trying to follow ideal theory directly, it is a mistake to think that legal interpretation should be concerned with ideal theory at all.³⁸

³⁷ Vermeule (2006).

³⁸ Vermeule also suggests that, as a result, a theory of legal interpretation need not be concerned in practice with how the content of the law is determined. See note 39.

There are several answers. First, the subject of legal interpretation understood as ideal theory is of independent theoretical interest, whatever the practical importance of second-best theory.

Second, a second-best theory has to be relative to a particular type of institution, with its particular limitations. But legal interpretation is not only a matter of practical rules for specific institutions. A theorist or scholar can engage in legal interpretation – and therefore care about the correct approach to legal interpretation – without any specific institution in mind.

Third, it may well be that second-best rules have to be imposed as a matter of overall system design. In Anglo-American legal systems as they are presently constituted, there is a strong argument that it is not legally permissible for a judge to unilaterally decide to follow a second-best rule. Following a second-best rule makes a difference only when it leads a judge to decide a case differently from the way in which the judge would have decided the case if the judge had attempted to decide the case according to the applicable legal rules directly. Plausibly, a judge who believes that one party has a legal right to prevail on substantive legal grounds may not simply decide to resolve the case against that party on the basis of a second-best rule on the ground that adherence to that rule is likely to lead to more legally correct outcomes in the long run. (And, if that is right, it may be impermissible for a judge to circumvent this problem by deciding not to do her best to determine which party has a legal right to prevail.) Similar arguments apply to other institutional actors. Thus, although second-best theory is important for system designers or reformers, it may not be of practical relevance to ordinary judges, prosecutors, and administrative agencies as things now stand.

Fourth, the very attraction of second-best theory presupposes a consequentialist assumption that the relevant values, whatever they are, always support following a rule that

maximizes the number of cases in which the relevant values are adhered to – even when the agent is confident that following the rule in the present case goes against the relevant values. But such an assumption is controversial. One familiar problem is that some values may be agent relative. For example, it is plausible that I may not betray a friend even if doing so would lead to fewer betrayals of friends in the long run. The question of whether the underlying consequentialist assumption is correct with respect to the values relevant in the legal case is a difficult philosophical issue in its own right, and beyond the scope of this article. The problematic nature of the assumption, however, provides another reason for the importance of legal interpretation as understood here.

Finally, and most importantly, ideal theory has metaphysical and epistemic priority over second-best theory. The metaphysical priority is obvious. The correctness of the ideal theory does not depend on second-best theory, but the correctness of a second-best theory depends on which ideal theory is true. Suppose it is true that a certain group of judges would come closer to complying with the ideal theory by trying to follow a particular set of rules rather than by trying to follow the ideal theory directly. Obviously, that truth holds partly in virtue of what the ideal theory specifies. Thus, the importance of second-best theory provides no objection to my argument that a theory of legal interpretation is responsible to a theory of law.

Ideal theory also has epistemic priority. In order to work out which second-best rules particular actors or institutions would do best to follow, we need to know what ideal interpretation would look like. Whether it is true that a particular institution, with particular limitations, would (in the long run) be most successful at complying with ideal theory by following particular second-best rules is a difficult empirical question. Investigating the question requires comparing how well an agent with particular limitations would succeed in complying

with ideal theory by trying to follow ideal theory directly as compared with how it would do by following candidate second-best theories. No such comparison can be made without the ideal theory. Thus, we need to know the ideal theory in order to ascertain which second-best theory is correct.³⁹ Indeed, because this paper does not take a position on how the content of the law is determined — and therefore does not take a position on which ideal theory of legal interpretation is correct — we cannot here engage in second-best theorizing.

In sum, regardless of whether it might be wise to impose certain second-best rules on particular institutional actors, ideal theory remains of independent theoretical and practical importance. And, to reiterate, however important second-best theory may be, it provides no objection to the claim that a theory of legal interpretation is responsible to a theory of law.

6. The content of the law versus the linguistic meaning of the legal texts

The Linguistic Meaning versus Legal Content Principle: A theory of legal interpretation must distinguish between the content of the law and the linguistic meaning of the legal texts.

³⁹ Vermeule argues that, in some cases, even without resolving underlying debates about how the law is determined, we can be confident that judges would do better to follow a second-best procedure. He gives the example that intentionalists and textualists should both accept that, given the limitations and tendencies of judges, judges would come closer to correct interpretations of the law restricting their attention to clear and specific statutory language and not considering other evidence of legislative intention.

It is obvious that differences in ideal theory can in principle make a difference to which second-best rules would produce the best results. Vermeule's claim is that, in practice, all *plausible* ideal theories of legal interpretation would yield the same second-best rules. 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.

And, at any rate, it is the job of theorists to work out which ideal theories of legal interpretation *are* plausible. Typically the way in which a field as a whole comes to views about which theories are plausible is through particular theorists trying to figure out which theory is true, and developing and defending their preferred accounts. Without theorists developing and defending particular ideal accounts, we would not be in a position to evaluate the relative plausibility of different candidates.

Moreover, a theory of legal interpretation that holds that an interpreter's ultimate goal is to ascertain the meaning of legal texts must offer an argument connecting the meaning of legal texts to the content of the law.

Theorists of legal interpretation often do not distinguish carefully between the ordinary linguistic content or meaning of the legal texts and the content of the law. (The point of the qualification “ordinary” is that the linguistic content of a legal text is an instance of linguistic content generally, not something specially legal.) When theorists talk about, for example, the meaning of a constitutional provision, it is often unclear whether they are talking about a linguistic content or a legal content.⁴⁰ Contributing to the problem, the terminology in this area is slippery. For example, talk of what a constitutional provision “says,” “states,” or “asserts,” or of its “content,” is ambiguous between, on the one hand, aspects of the linguistic meaning of the statutory text and, on the other, the impact of a statute on legal obligations, powers, and the like. In addition, the term *meaning* itself has many different uses.

To avoid ambiguity, I will use *linguistic content* (or sometimes *meaning* and its cognates) to refer to the information that language enables us systematically to convey to others. Linguistic content is to be distinguished from meaning in the loose non-linguistic sense that is roughly equivalent to *significance* or *upshot*. For example, we might ask the meaning of a recent political event or an embarrassing situation. More importantly, for present purposes, linguistic content is to be distinguished from the content of the law – what the law requires and permits.

As we will see in section 7, linguistic content is not one monolithic thing: the contemporary study of language has distinguished multiple types of ordinary linguistic content

⁴⁰ See, e.g., Goldsworthy (2009); Greenawalt (2002).

(semantic content, speaker's meaning, what is said, what is conversationally implicated, and so on). I will use *linguistic content* or *meaning* to refer generally to any of these (and more precise terms for the specific types of linguistic content).

Our starting point is that legal interpretation seeks the content of the law. The content of the law consists of obligations, rights, powers, and the like. By contrast, linguistic meaning is information represented by symbols. These two things are not even of the same general category. And, as a general matter, the content of norms need not be determined by information represented by symbols. After all, there are systems of norms in which texts or other symbols have no constitutive role.

Morality is one example. We use symbols to talk and think about morality, and it might be true that creatures without symbols could not be subject to moral norms. But many moral norms do not obtain *in virtue of* the existence or production of certain texts or symbolic representations. The content of the moral norms is not determined by the information represented by symbols. (At least, this is true on standard views about morality.) The point is not limited to domains of robust normativity such as morality.⁴¹ Whatever is the truth about the actual norms of etiquette (or fashion), we can easily imagine norms of etiquette that obtain in virtue of customs rather than in virtue of the symbolic representation of information.

It may turn out that, according to the best theory, what legal obligations people have is *determined* exclusively by what certain legal texts mean. Perhaps this is even true as a matter of

⁴¹ Citation for the distinction between robust and formal normativity.

necessity – there is no possible legal system in which the law is differently determined. But it is far from obvious that it is true.⁴²

One way to see this is just to notice that there are coherent, and indeed popular, theories of law on which the law diverges from what the authoritative legal texts mean. To take one example, on a popular kind of intentionalist theory of statutes and constitutions, the content of the law depends at least in part on the *legal intentions* of the legislature or framers. (A legislature’s legal intention in enacting a provision is the change in the law that it the legislature intends to effect, or, to put it another way, the legal norm it intends to enact. On no colorable theory of linguistic meaning is an agent’s legal intention in pronouncing a text constitutive of the linguistic meaning of the text.⁴³) To take a very different example, on Dworkin’s “law as integrity” theory, the content of the law is, as noted above, the set of principles that best fit and justify the past decisions of legal institutions (and the requirements that follow from those principles). On either theory, the content of the law is not determined by the linguistic meaning of the authoritative legal texts.

⁴² To put matters in a slightly more technical way, the concept of what the law requires is a different concept from the concept of the meaning of the authoritative legal texts. (Notice, for example, that they have different component concepts, and that someone could have one concept without having the other.) Two distinct concepts may of course refer to the same substance or object; they may even do so necessarily. But it requires investigation or argument to show that they do. The concept of Obama’s favorite drink is a distinct concept from the concept of hydrogen hydroxide or H₂O. But we could discover that these concepts happen to have the same referent. Even if two concepts *necessarily* have the same referent, it may be far from obvious that they do. The concept of an equilateral triangle is distinct from the concept of an n-sided polygon that can be inscribed in a circle regardless of the length of its sides, though it can be proved that these concepts necessarily are co-referential.

In these examples, the putatively co-referential concepts are intuitively concepts of objects in the same general category. As pointed out in the text, however, obligations and information represented by symbols are not even of the same general category. Consequently, it is not clear that the concept of the content of the law and the concept of the meaning of the authoritative legal texts *could* have the same referent. At best, perhaps, the content of the law might obtain *in virtue of* the meanings of the authoritative texts.

⁴³ On legal intentions see section 8 below. On the distinction between legal and linguistic intentions, especially communicative intentions, see Greenberg 2011 and forthcoming.

A different point is that it is plausible that there are customary legal norms for which there are no relevant authoritative legal texts. If this is right, it is enough to undermine the simple view that the content of the law is solely constituted by the meaning of authoritative legal texts. Furthermore, if an entirely custom-based legal system is possible, then it is not necessary that the content of the law is determined even in part by the meaning of authoritative legal texts.

Given the distinction between what the law requires and the ordinary meaning of the authoritative legal texts, any assumption that what the law requires is – or is determined by – the meaning of the authoritative legal texts requires argument. In light of our starting point that legal interpretation seeks to discover the law, a theory of legal interpretation must not assume without argument that the goal is to discover the ordinary meaning of the authoritative legal texts.

7. The distinction between different types of linguistic content

The Linguistic Multiplicity Principle: A theory of legal interpretation must distinguish between different types of linguistic content (and a claim about the relevance of a particular type to legal interpretation must be appropriately based on a theory of law).

It is uncontroversial that linguistic content of the legal texts is highly relevant to legal interpretation. As discussed in section 6, when theorists of legal interpretation write about “the meaning” of a statutory or constitutional provision or other legal text, it is often unclear whether they are referring to the provision’s contribution to the content of the law or to its linguistic meaning. Even once we are clearly focused on linguistic content, however, there are many different types of linguistic content. (Moreover, and this is a separate point, there is a great deal

of controversy about what the theoretically important types are.) For illustrative purposes, I will focus on a few prominent categories.

Semantic content is, roughly speaking, the information conventionally encoded in the linguistic expressions. In non-technical terms, the semantic content of a sentence is approximately its literal meaning.

By contrast, there are pragmatically communicated contents, ones that the speaker means or intends to communicate by uttering certain words (and typically can reliably communicate in that way), but that go beyond the literal meaning of the words. For example, Paul Grice's seminal work introduced the notion of *speaker meaning*. Grice made an important distinction between what linguistic expressions mean (semantic content) and what speakers mean by uttering them. On Grice's account, speaker meaning is the content of certain complex intentions of the speaker. Roughly, the speaker meaning of an utterance is what the speaker, in making the utterance, intends that the hearer come to believe *by recognizing that very intention*. For example, the semantic content of the sentence "I have eaten breakfast" is plausibly that I have eaten breakfast at least one time in my life. In typical contexts, however, I utter this sentence in order to communicate that I have eaten breakfast *today*. To take a different kind of example, suppose that in response to an invitation to a party, I say "I have a deadline that I have to meet." I *mean* that I will not go to the party, and my interlocutor will no doubt be able to infer this. But that I am not going to the party is not part of the literal meaning of the words. Hearers are adept at inferring what speakers mean. Indeed, we recognize the speaker meaning so effortlessly that it often requires technical expertise to explicitly identify the semantic content of the words.

In many — but not all — cases, the speaker meaning does include the literal meaning of the sentences, but it also includes further information. The two examples in the previous

paragraph illustrate the phenomenon that Grice called “*conversational implicature*”. A content that is merely implicated is a component of what the speaker means or intends to communicate that is not part of what the speaker says or asserts. Linguists now distinguish many types of implicature.

Following Grice, many theorists have identified or closely linked what is *said* with the semantic content of the words. Recently, however, several theorists have argued that even what is said typically goes well beyond the semantic content, though it stops short of all that is meant.⁴⁴ On this kind of view, we need a three-way distinction between semantic content, what is said, and what is meant (including what is merely implicated).

Next, we have *communicative content*. Different theorists have different views about what constitutes the communicative content of an utterance. On a broadly Gricean view, the communicative content would be the content of the speaker’s communicative intention in making the utterance. On a more natural understanding, information is not communicated unless there is uptake by the audience, as well as the intention to convey the information. Thus, the communicative content of an utterance could be understood as that part of what the speaker intended to communicate that was recognized by the audience. And there are other possibilities. On some views that have recently entered the legal interpretation debate, communicative content is something like what a reasonable member of the audience would understand the speaker to have intended to communicate. (I discuss this type of content below as part of a family of contents that depend on the understanding of a reasonable member of the audience.) Differently again, there is that part of what the speaker intended to communicate that a reasonable member

⁴⁴ See, e.g., Soames XX.

of the audience would be expected to recognize. For our purposes, nothing turns on which of these contents is communicative content properly understood. For even if a content is not communicative content – indeed, even if it does not play an important role in the study of language – it may be highly relevant to the content of the law. In section 8, I elaborate on potential determinants of the content of the law that are not linguistic contents.

In recent years, theorists of legal interpretation often appeal to what they call “public meaning” or “objective meaning.”⁴⁵ These terms are not standard technical terms in the study of language. Roughly, the idea is to appeal to the understanding of a reasonable member of the audience. But there are many different notions of public meaning. For example, one dimension on which notions of public meaning vary is the *object* of audience understanding. We have already encountered the notion of what a reasonable audience would understand the speaker *to have intended to communicate*. Varying the object of audience understanding yields other notions: what the audience would understand the semantic content to be; what the audience would take the speaker to have asserted or committed herself to (as opposed to merely implicated); what legal norm the audience would take the legislature to have intended to enact;⁴⁶ what legal norm the audience would take the legislature to have enacted. Many notions of public or objective meaning — such as the notion of what legal norm the audience would take the legislature to have intended to enact – are not concerned with linguistic meaning at all, and many others are not important theoretical notions in the study of language. For this reason, I discuss notions of public meaning in section 8, which concerns determinants of the content of the law that are not linguistic contents.

⁴⁵ Citations.

⁴⁶ In section 8, I introduce the term *legal intention* for such an intention.

It should be clear at this point that there are multiple candidates for linguistic contents that are determinants of the content of the law: so far, we have at least semantic content, what is said, speaker meaning, different notions of communicative content, and the family of ‘public meaning’ notions. There are many other possibilities. Solum, for instance, develops a notion of clause meaning by starting with semantic content and modifying it, for example by adding certain contextual effects, implications, and stipulations. There are more fine-grained distinctions as well. For example, there are many types of implicatures, and it may well be that some types are relevant to the content of the law, while others are not.⁴⁷

I want to forestall one natural misunderstanding. It might be thought that what I have been calling “different types of linguistic meaning” represent different and competing ways of reading texts. It might even be thought that the existence of different types of meaning implies some kind of indeterminacy about the meaning of texts. But this is a mistake. The different types of linguistic meaning are not in competition with each other in a way that would make it coherent for the meaning of a text to be indeterminate between them (or for one of them to be “*the* meaning” of a text). Rather, the point is that there are different types of meaning that play different and compatible – indeed complementary – roles in language and communication.

For example, on a theory that recognizes semantic content, what is said or asserted, speaker meaning, what is conversationally implicated, and what is (successfully) communicated, there is no coherent debate about whether “the meaning” of an utterance is one of these contents rather than another. The utterance may determinately have all these different types of meaning. On a particular occasion, the words uttered have a semantic content, and the speaker uses that

⁴⁷ See Greenberg 2011 XX.

semantic content to assert a particular content. What the speaker means may go beyond what is asserted, for it may include what is conversationally implicated. If things go well, the audience may use the semantic content of the words, among other things, to infer what the speaker means, resulting in successful communication of the speaker meaning. But the audience may fail to infer part of what the speaker intended to communicate, so what is successfully communicated may be only part of what the speaker intended. There is no sense in which, for example, the semantic content, the speaker meaning, and what is successfully communicated are competing readings of the text.

A very different point is that, as I have already hinted, there is a lively debate among different theories of meaning. Some disputes are about relatively fine-grained issues, such as how to understand what is said and how different it is from semantic content. But the study of meaning is a relatively young field, and there are radical disagreements about the most fruitful way of carving up the phenomena.⁴⁸ Again, I do not mean to suggest that the existence of competing theories implies any indeterminacy about meaning. No doubt some theories will turn out to be better than others. The significance for legal interpretation is that, at least at this stage in the study of language and communication, theorists of legal interpretation cannot simply defer to one consensus model of what the relevant types of meaning are.

One immediate consequence of the existence of different types of linguistic content – not to mention candidates that are not linguistic contents – is that a theory of legal interpretation that insists that its preferred candidate is the only available one is flawed. For example, many theorists have tried to argue that there is no alternative to seeking the intentions of framers or

⁴⁸ Citations to, for example, dynamic semantics, relevance theory, radical pragmatics.

legislators, for example on the ground that texts without intentions are just marks on paper.⁴⁹ Conversely, Solum defends his favored ‘clause meaning’ by arguing that, because the framers of the Constitution did not have the intentions constitutive of speaker meaning, the meaning of constitutional provisions must be their semantic content (with certain modifications).⁵⁰ Such arguments neglect many alternative candidates.

A second consequence is that theories of interpretation that assign a role to “the meaning” of the relevant texts, without elaborating the specific type of linguistic content, are underspecified. Similarly, it is common for legal interpreters to make claims beginning “*the meaning of a text is,*” and concluding with a preferred candidate, such as what the speaker intended to communicate or what a reasonable member of the audience at the time would have taken the words to convey. Unfortunately, given the multiplicity of types of linguistic content, no such claim can be correct.

A related pitfall is to specify a type of meaning that, in light of what we know from the study of language, is not well defined. For example, one might be tempted at first blush to take textualists to be concerned with semantic content. Their emphasis on texts naturally suggests the meaning that is encoded in the text. But prominent textualists urge that the relevant factor is not literal meaning. Along the same lines, contemporary textualists endorse canons of interpretation such as *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another) that are probably best understood as ways of getting at what the speaker intended to communicate.⁵¹ But textualists reject the idea of looking to the content of the speaker’s intentions.

⁴⁹ Citations

⁵⁰ Solum XXX at 52.

⁵¹ See Manning XXX.

Similarly, many legal theorists, including textualists, assume that linguistic meaning changes with context in a way that is not accepted by mainstream views about language. On standard views in the philosophy of language, what textualists mean by context – roughly, surrounding language – is not a determinant of meaning. Rather, context is thought to provide a way of inferring the intentions of the speaker. It can be evidence, for example, of what the speaker intended to communicate. In *Smith*, the famous case concerning the phrase “use a gun”, Justice Scalia suggests that the meaning of “use” changes depending on the context, so that in some contexts, it means something like *use for its intended purpose*. The study of language provides no support, however, for the idea that the meaning of words varies with context in this way.

8. Candidates other than linguistic contents

The Other Determinants Principle: A theory of legal interpretation must recognize potential determinants of the content of the law other than linguistic contents.

There are candidates for determinants of the content of the law other than linguistic contents. One example we have already encountered is the content of the legislature’s or framers’ legal intentions.

Intentions of lawmakers are an important source of potential determinants of the content of the law, and, just as it is important to distinguish different types of linguistic content, we must distinguish different kinds of intentions. First, there are intentions to produce certain consequences in the world, such as to reduce crime or to stimulate research into alternative energy sources. Such *practical* intentions are typically to modify behavior in a particular way.

Second, lawmakers may have *legal* intentions – intentions to modify the content of the law by, for example, creating new legal obligations or powers. Third, they may have various kinds of linguistic intentions, such as which language they intend to be writing in and which particular words they intend to use. An especially important category of linguistic intentions are communicative intentions, for example, the intention to communicate a particular content by uttering a given linguistic expression.

Linguistic intentions are intimately related to the linguistic content of the relevant texts. As noted above, for instance, Gricean accounts maintain that speaker meaning is constituted by the content of a specific kind of communicative intention.

Legal intentions, by contrast, are fundamentally distinct from linguistic intentions: because they are intentions to change the law in a particular way, they need not (and generally do not) include any reference to linguistic expressions or meaning. For example, a typical legal intention might be to increase the penalty for a particular crime or to require employees of restaurants to wash their hands. Thus, legal intentions are a potential determinant of the content of the law that is not any type or part of linguistic content.⁵²

Another such determinant is the notion of statutory or constitutional purpose appealed to by purposivist accounts of legal interpretation. Hart and Sacks's *The Legal Process* is often cited as the classic statement of this kind of approach. A court is to “decide what purpose ought to be attributed to the statute ... on the assumption that the legislature consisted of reasonable persons

⁵² The legislature's legal intention, as I use the term here, must be distinguished from the legislature's intention that the legal norm that it enacts apply or not apply to a particular activity – what we could call its *application intentions*. For example, a legislature might enact a statute with the legal intention of requiring that people with contagious diseases be quarantined on entering the country. The legislature might have an application intention that people with psoriasis be covered by the statute, for the legislature might mistakenly believe that psoriasis is a contagious disease. But that application intention is distinct from the legislature's legal intention. On the distinction between legal and communicative intentions, see Greenberg 2011.

pursuing reasonable purposes reasonably and to interpret the words of the statute immediately in question so as to carry out the purpose as well as possible.” The relevant purpose is not an actual psychological purpose of any individual or group. Rather, it is a kind of constructed purpose that we attribute to the statute on the basis of certain, probably counterfactual, assumptions, e.g., that the statute was the product of one rational mind.

We’ve seen thus far that some influential theories of legal interpretation appeal to candidates that are not linguistic contents. It’s worth noting, in addition, that any serious theory of law accepts that factors other than linguistic contents are relevant to determining the content of the law. This point can easily go unnoticed when considering approaches that hold that a provision’s contribution to the content of the law is a linguistic content, for example, its plain meaning or communicative content. On any account, however, the content of the law depends not merely on the linguistic content of the text, but also on such facts as that the text was enacted in accordance with specified procedures by a certain authority. Plausibly, the relevant facts will include things like the historical context in which the text was enacted. Moreover, accounts of legal interpretation often appeal to real-world consequences and to moral values – democratic considerations, rule of law, popular sovereignty – to support a preferred candidate for a provision’s contribution to the content of the law. The implicit assumption seems to be that such factors have a bearing on how the content of the law is determined. And they lack even the form of linguistic contents.

It is often implicitly assumed that the role of democratic considerations, consequences of an interpretive method, and the like is to favor one candidate content over others (or, less plausibly, to help to determine what a text’s linguistic meaning is). But if such factors are relevant to the content of the law, it can’t be assumed that this is the only kind of role they can

play. Theories of law may assign a wide range of roles to factors other than linguistic contents. On Ronald Dworkin's influential theory, as mentioned, a statute's contribution to the content of the law is roughly the principles that would best fit and justify the statute's enactment. On this theory, the statute's contribution is not any linguistic content of the statutory text, and moral values play a more complex role in determining a statute's contribution than favoring one linguistic content over others.

Another kind of non-linguistic candidate for a determinant of the content of the law emerges from consideration of the notion of 'public' or 'objective' meaning introduced in the previous section. We saw, for example, that by varying the object of audience understanding, we obtain a range of contents such as what the reasonable audience member would take the legislator to have intended to communicate.

Such contents inevitably involve a degree of idealization or construction. We need to specify what counts as a reasonable member of the audience, what knowledge a reasonable member of the audience is taken to have, and so on. For example, it is often the case that many or most members of Congress did not read the relevant words of a statute and therefore have no linguistic intentions with respect to them. Moreover, to the extent that they have linguistic intentions, the two Houses of Congress and the President may well have different linguistic intentions. Are we to ask what a reasonable member of the audience who knows such facts about the legislative process would take Congress and the President to have jointly intended? Presumably not. We might rather ask what a reasonable person would take a single hypothetical speaker who had uttered the words of the statute to have intended.

At this point, it is clear that we are in the business of *constructing* a content. There are various ways to flesh out the relevant stipulations. Perhaps the single hypothetical speaker

should be taken to be ideally rational. And what context should be stipulated? Theorists who favor an objective notion of communicative content generally assume that we should take the relevant context to be ordinary communication or conversation. In ordinary conversation, a standard view is that the audience works out what the speaker intended to communicate by assuming that the speaker is trying to comply with certain principles, such as Grice's principle of cooperation and maxims of conversation. But why should we take the question to be what a speaker who had uttered the words in ordinary communication and in compliance with conversational principles would have intended? The purposes and context of legislation are very different from ordinary communication. We might instead ask what a single rational lawmaker who had complied with all applicable principles of *legislation* would have intended.

The existence of candidates for a provision's contribution to the content of the law other than linguistic contents reinforces the inadequacy of defending a theory of interpretation by simply offering considerations that favor one's preferred candidate over one or two other salient candidates. For example, to defend the theory that a statute's contribution is its communicative content, it won't do to argue that semantic content is too skeletal or is otherwise a poor candidate. Even showing that one's preferred candidate is better than all other linguistic contents isn't enough.

9. Legal interpretation and legal positivism

This section shows that satisfying the Linkage Principle is more difficult than might initially appear. The most widely held contemporary theory of law is inconsistent with any controversial theory of legal interpretation.

The Linkage Principle holds that a theory of legal interpretation is responsible to a theory of law. Hartian legal positivism is the most widely held theory of law today, and is dominant in U.S. law schools. Many theorists of legal interpretation seem to assume that some version of that theory is true, and many more would probably point to it if challenged as to which theory of law they presuppose.⁵³ Perhaps surprisingly, however, Hartian positivism cannot form the basis for a controversial theory of legal interpretation. According to Hartian positivism, the fundamental determinant of the content of the law is the convergent practices of judges and other legal officials. The problem is that, as a result, no theory of legal interpretation that departs from the consensus practices of judges can be correct.

On the Hartian account, the rule of recognition, which is the fundamental or ultimate determinant of how the content of the law is determined, is constituted by the convergent practices of judges and other legal officials. I will skip the details for present purposes, but the basic point is that what makes it the case that a particular aspect of a constitution or a statute determines the content of the law is a convergent practice among at least a large majority of judges. For example, if judges: 1) regularly treat, say, a statute's semantic content as its contribution to the law; 2) are disposed to criticize other judges who fail to do so (or threaten to fail to do so); and 3) regard such criticisms as justified, then a statute's semantic content is its

⁵³ For example, Larry Alexander explicitly claims that legal positivism supports his particular originalist approach to legal interpretation. Alexander 2015. And, in a recent public exchange at the American Philosophical Association's 2014 Pacific Division Meeting, Scott Soames suggested that he would appeal to Hartian legal positivism as the basis for his account.

contribution to the law. To the extent that there is no consensus on what constitutes a statute's contribution to the content of the law, a statute's contribution is indeterminate.

The immediate consequence is that no theorist of legal interpretation can base her theory on Hartian positivism if her theory is to prescribe any approach to legal interpretation that diverges from what is accepted by a large majority of judges. That is, a theorist of legal interpretation who wishes to do anything but repeat the accepted consensus among judges needs a theory of law other than Hartian positivism. For example, an intentionalist or textualist position on Constitutional interpretation is inconsistent with Hartian positivism. For there is anything but a consensus among judges that intentionalism or textualism is correct.

This objection is closely related to Dworkin's argument from theoretical disagreement in *Law's Empire*. Dworkin argues that legal positivists cannot explain disagreement about the grounds of law – about what are the ultimate determinants of law.

The problem that I am posing for theories of legal interpretation differs from Dworkin's theoretical agreement objection to positivism in several ways. Most importantly for present purposes, Dworkin framed his argument as moving from the claims that theoretical disagreement is common and that legal positivism is unable to account for it, to the conclusion that legal positivism is flawed. Given this framing of the argument, Brian Leiter and others have pointed out a way for positivists to respond.⁵⁴ Positivists can argue that lawyers and judges who seem to be engaging in theoretical disagreements are in fact either mistaken or disingenuous. For example, when judges seem to be disagreeing about the role of plain meaning in determining the content of the law, they may simply be *deluded* in thinking that there is a fact of the matter on

⁵⁴ See Leiter, XXX.

the question. In fact, the rule of recognition does not settle the question, so the law is indeterminate as to the role of plain meaning. Alternatively, the judges may be *pretending* to argue about what the law is, though they in fact realize that there is no answer. They maintain the pretense for political reasons.

Whatever the merits of Leiter's response as a response to Dworkin, his response is not available to a theorist of legal interpretation. A theorist of legal interpretation cannot take the position that she is erroneous or disingenuous in claiming that own her approach to legal interpretation is correct. If she accepts the Hartian view that the ultimate determination of the content of the law rests on the consensus practices of judges, she cannot argue that a non-consensus method of legal interpretation is correct. In simple form, the dilemma is that the following three propositions are inconsistent: 1) method of legal interpretation M is not widely accepted; 2) method of legal interpretation M is legally correct; 3) legal positivism in its dominant Hartian form is true.

In other words, my objection, unlike Dworkin's, is directed at theories of interpretation, not at legal positivism. Legal positivism can respond to Dworkin's objection by accepting that there is a significant amount of indeterminacy with respect to how the content of the law is determined. (And positivists can try to argue that indeterminacy at this level does not result in widespread indeterminacy with respect to run-of-the-mill cases because all plausible accounts of interpretation overlap in their implications for such cases.) But a theorist of legal interpretation cannot accept that it is indeterminate which account of legal interpretation is correct.

A positivist theorist of legal interpretation might try to argue that the correct account of legal interpretation is made correct not by the rule of recognition, but by substantive law. For example, some theorists have claimed that the correct account of statutory interpretation is

determined by the Constitution. It is surely correct that there can be second-order legal standards that govern legal interpretation. The problem, however, is that on the Hartian theory of law, there can be legal standards that determine that a particular method of interpretation is correct only if those standards are recognized by the rule of recognition. In other words, a reading of the Constitution, court decisions, or customs that determines that, say, intentionalism is the correct method of reading statutes would have to itself follow from the consensus practices of judges. Unfortunately, in the U.S. legal system, the consensus practices of judges do not yield second-order standards that resolve the lively disputes over which method of legal interpretation is correct.

Alternatively, a theorist might argue that at a high level of generality there is a consensus among judges on the theorist's preferred method of interpretation, and that the disagreement is in the application of that consensus. For example, it might be argued that there is a consensus that the communicative content of the legislative texts is determinative, but that some judges have mistaken views about what constitutes the communicative content. Or that there is a consensus that a statute's contribution to the content of the law is whatever the best understanding of democracy says that it should be, but a disagreement about what democracy requires.

It is not at all plausible, however, that there is such a consensus. Judges do not all agree that, for example, communicative content or plain meaning is controlling. They don't even agree that the linguistic content of the relevant texts is controlling. Nor do they agree that democratic considerations are the relevant ones. The only kind of consensus is on bland platitudes such as that the meaning of the relevant texts is important. There is neither a consensus of belief nor of practice on any of the issues on which theories of legal interpretation disagree.

10. Applications

Although the principles rest on extremely basic assumptions, they have surprisingly far-reaching implications for a wide range of existing theories of legal interpretation. I have mentioned a few examples along the way. In this section, I examine the implications of the principles for several theories of legal interpretation in more detail.

[This section remains to be written. What follows is really just a placeholder — discussion of one recent theory of legal interpretation. Ultimately, I plan to discuss influential representatives of major camps.]

Scott Soames's *Deferentialism*

Scott Soames, a prominent philosopher of language, has in recent years developed a theory of statutory and constitutional interpretation that he calls *Deferentialism*. According to this theory, roughly, we should interpret a statutory or constitutional provision in accordance with its *asserted content* except to the extent that that asserted content is in conflict with “the chief publicly stated purpose that proponents of the law advanced to justify it.” In case of such conflict, “the judicial authority must make new law by articulating a minimum change in existing law that maximizes the fulfillment of the original rationale for the law.” Soames identifies asserted content with what a reasonable person who understood the meanings of the words and the relevant background would take to have been asserted or stipulated by the lawmaker in adopting the text.

Soames does not try to show that the two main components of his account – asserted content and publicly stated purpose – or the roles that he assigns to them have any basis in a theory of law.

First, he says very little about why the chief purpose that proponents of the law advanced to justify it should get the extremely important role that he gives it in constituting the Constitution's contribution. He says only that this stated purpose is what is epistemically accessible and worthy of deference. These considerations are plausibly relevant for normative reasons (though Soames does not say so). For example, epistemic accessibility arguably matters for reasons of fairness and democracy. Similarly, one might argue that democracy does not support giving weight to policy goals of legislators that were not made public. If the view is that the content of the law depends on such normative considerations, then one needs a full-scale consideration of what is supported by all the relevant considerations. On the other hand, if the content of the law does not depend on such normative considerations, then it is unclear why they are relevant to legal interpretation.

Second, with respect to asserted content, much of Soames's argument is directed at showing that the semantic content of the texts is not a good candidate. For example, Soames insists that, in *Smith v. United States* (the notorious "uses ... a firearm" case), "there is no real alternative . . . to identifying the legal content with what Congress actually asserted." He simply ignores all candidates that are not linguistic contents. As the Linguistic Multiplicity Principle and the Other Determinants Principle make clear, eliminating semantic content falls far short of showing that asserted content constitutes the Constitution's contribution to the content of the law.

At various points, Soames relies heavily on an analogy to ordinary communication:

according to Deferentialism, the content of a legal provision can no more be identified with the meanings of the sentences in the text, or with the lawmakers' policy goals in adopting it, than the contents we assert ordinary life can be identified with the linguistic meanings of the sentences we use, or with our conversational goals in using them.... Legal content is determined in essentially the same way that the asserted or stipulated contents of ordinary texts are.

This theme runs through all of Soames's work on legal interpretation, so I take it to lie at the heart of his argument. The first premise is that, in ordinary communication, the contents that we assert can't be identified with the meanings of the sentences we use or with our conversational goals. Soames then infers that the asserted content of legal texts can't be identified with the meanings of the sentences or with the policy goals of the lawmakers. Thus far, all of his claims are about language, and have strong support in the contemporary study of language.

But Soames next seems to simply assume that the asserted content constitutes the Constitution's contribution to the content of the law. That is, he seems to move without argument from the asserted content of the Constitution to the duties and rights it contributes to the law. In taking for granted that the content asserted by the lawmakers constitutes the provision's contribution to the content of the law, Soames violates the Meaning Versus Law Principle.

Most importantly, it is difficult to see what plausible and coherent theory of law could underwrite Soames's theory. On the one hand, his theory seems to claim on exclusively

linguistic grounds that a particular version of ‘asserted content’ constitutes the content of the law. On the other hand, the theory apparently relies on normative considerations to displace asserted content in specified circumstances, yet takes no account of other normative considerations. What plausible theory of law could imply this structure?

11. Conclusion

A few basic principles of legal interpretation, which derive from difficult-to-dispute starting points, have powerful implications. They provide constraints that theories of interpretation must meet and a framework for evaluating such theories.