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Interpretation

Francis J. Mootz III
University of Nevada, Las Vegas -- William S. Boyd School of Law

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Interpretation

Francis J. Mootz III*

> It is in fact the genius of law that it is not a set of "commands," but a set of texts meant to be read across circumstances that are in principle incompletely foreseeable. . . . It is this fact that gives rise to the intellectual and ethical life of legal thought and argument. – James Boyd White[1]

Interpretation is a ubiquitous feature of legal practice. Nevertheless, the relationship between law and interpretation is troubled. Simply put, legal actors find it difficult to acknowledge the centrality of interpretation given the manner in which the validity of the legal system is established. The traditional account of legal practice insists that lawyers read statutes and precedents to recover the meaning embedded in them and then apply these determinate meanings to the case at hand. Under this account, there generally is no need for "interpretation," an activity that suggests that the law is ambiguous and requires the active participation of the lawyer or judge to render the law meaningful for the case at hand. This account is deemed necessary to underwrite the rule of law because it insists that preexisting legal rules are applied rather than fashioned in the course of the application.

Of course, even under this traditional account interpretation is inevitable because individual laws sometimes are opaque and not easily applied, but this interpretive activity is regarded as a regrettable necessity that exists on the fringes of law's primary practice of unproblematic application. The precedent-respecting common law

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1 James Boyd White, "What Can a Lawyer Learn from Literature?," *Harvard Law Review* 102 (1989) 2014–2047, 2035 (reviewing Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, MA: Harvard University Press, 1988)).

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approach in the United States is premised on the belief that judges can understand the plain meaning of the language in prior opinions apart from particular social contexts, and then apply it to present disputes in the course of articulating timeless principles. As law entered the age of statutes and regulations, originalist and plain meaning approaches to these written artifacts developed along similar lines. Much of constitutional theory is grounded in the rhetoric of using strategies designed to absolve the judge of the power and responsibility to make constitutional law. Notwithstanding these earnest efforts to deny or corral interpretation, courts in all of these domains continue to decide, sometimes with a five to four vote over a strenuous dissent, that reasonable minds could not differ about the meaning of the law for the case at hand.

Contemporary work in hermeneutical philosophy, literary theory, and rhetoric has undermined the strategies by which law traditionally has proclaimed its independence from the complexities of interpretation. In this chapter I will adumbrate some of the major themes of, and issues arising out of, these initiatives for law and legal theory. The chapter provides a brief account of some recent scholarly developments in hermeneutical philosophy and connects these developments to the various legal contexts to which they speak. The first section considers a variety of theoretical approaches to interpretation by grouping them according to broadly shared characteristics. Natural law theorists approach questions of legal interpretation from a distinct perspective that seeks to displace legal interpretation with an inquiry into objective moral truths. Scholars who embrace the analytical perspective that is predominant in the Anglo-American tradition regard interpretation as a set of recognized moves within legal practice that may be described accurately but not directed by a methodology grounded in theory. Many contemporary theorists regard a legal text as a means to transmit information, and from this communication orientation argue that the locus of meaning is found in the original intentions of the author(s) or in the original public understanding of the words in the text. Finally, the broad-based "hermeneutic turn" has influenced theorists who regard interpretation as a fundamental feature of knowledge generally, and of legal practice more specifically, and who draw on contemporary European philosophy to articulate the hermeneutical situation of legal actors.[2]

The second section of the chapter describes how different legal contexts shape interpretive practices. Although necessarily brief, this discussion reaffirms my thesis that legal hermeneutics should speak not only to ontological or epistemological

[2] I have defined each school in the broadest manner in this introduction for the purpose of providing an initial orientation. In a chapter of this length it is impossible to describe the complexities of any one school of theory regarding the question of interpretation, and so I certainly do not pretend to provide a definitive picture of legal theory generally. In the text I will focus my study by choosing one or more theorists from each school of legal theory to serve as a concrete, but not necessarily representative, instance of that school of thought.

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accounts of legal reasoning but to legal practice as well. The private law of contracts confronts one group of interpretive dilemmas, and different issues arise in the domain of public law with regard to the interpretation of judicial precedents, statutes, constitutions, and treaties. The space constraints of this chapter permit only a brief sketch of how the imperatives of these distinct forms of legal practice connect to broader theoretical debates.

My discussion unavoidably is overly intellectualized, which suggests incorrectly that I believe academic theories of meaning are more important than practices of meaning making by legal actors. My own theoretical commitments lead me to conclude that a full theoretical consideration of legal interpretation must include detailed examination of the practice in question, and so I shall take account of legal practice to the extent feasible. The growing awareness of the understanding of the relationship between interpretation and law is not solely an academic concern. The practical demands of modern legal systems have pushed legal practice more expressly into the realm of interpretation, even if legal practitioners generally remain uninterested in the intricacies of the theoretical debates. Consequently, it makes good sense to begin this chapter with a simple example of how law has dealt with interpretive principles and theories. I set the stage for my discussion by recounting the historical trajectory of the parol evidence rule in contract law as an example of the increasing visibility of the role of interpretation in law.

Common law courts have long understood the importance of permitting parties to define their obligations under a contract in a manner that is both secure and certain. The "freedom of contract" encompasses not only the "freedom *to* contract," but also the "freedom *from* contract." Parties are free to limit their consensual liability by carefully circumscribing the parameters of their agreement. The parol evidence rule facilitates this important goal by providing that the written memorial of an agreement cannot be undermined by alleged prior agreements that conflict with the memorial, and also prevents enforcement of prior agreements if they are not reflected in a written memorial that constitutes the complete and exclusive agreement of the parties. The classical common law approach to the parol evidence rule employed the infamous "four-corners" rule, under which a written memorial was presumed to be the complete and exclusive statement of the agreement of the parties if it imported a contractual agreement "on its face." Because this rule deviated so dramatically from actual communication patterns in commercial transactions, a number of courts eventually refined their approach and established the new polestar of the parties' intent with respect to the memorial. If the parties intended the memorial to be final as to some terms, it was so construed; if the parties intended the memorial to be final as to all of the terms of their agreement, it was so construed. The evidence of the circumstances attending the creation of the written memorial is indispensable to making this determination, and so no written memorial can be "self-executing" for parol evidence purposes.

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In a related and parallel vein, a number of courts moved from a classical "plain meaning" approach to interpreting the words in a written memorial of the agreement (which amounted to the belief that "interpretation" was unnecessary) to a much more nuanced "context approach" according to which courts read the words within the context of their use by the parties to the contract. This shift followed the broader move away from legal language as a freestanding object to an understanding that legally effective language (such as a memorial of a contractual agreement) serves as a token of legally effective behaviors and commitments that must be investigated in their full complexity. These two developments converge in the "interpretation" exception to the parol evidence rule, which opens many avenues for lawyers to secure the admission of parol evidence by arguing that it is offered for the purpose of interpreting the writing (as broadly construed under the "context approach") rather than seeking to supplement it with additional terms. The tenacity with which some courts continue to cling to more traditional applications of the parol evidence rule indicates the angst occasioned when legal actors confront the full scope of the interpretive nature of law.

This doctrinal example from private law reveals that the issues surrounding legal interpretation flow from two primary questions. First, one must determine the contours of the "object" of interpretation. Originally, courts considered a writing to be an objective fact in the world for purposes of the parol evidence rule, such that this physical entity was the sole focus of interpretation. Today, courts regard a writing as only the gateway to a more contextual inquiry into the relationship between the parties. Interpretation becomes more far ranging when its object is a relationship between parties that includes, but also extends beyond, the language that they have used in structuring the relationship.

Second, one must determine the "goal" of interpretation. The parol evidence rule provides a relatively simple example in this respect because it is now relatively unproblematic to assume as a normative matter that courts should enforce the parties' reasonable expectations engendered by objective manifestations of their intended commitments in a contract. This principle changes in other private law contexts, such as interpreting a will according to the testator's intentions. The goal of interpretation is more complex when the text to be interpreted is a constitution, statute, or judicial precedent. Contract interpretation affects parties to the contract, whereas interpretation of an authoritative legal text affects all those subject to the law. Thus, litigants must address not only whether the object of interpretation extends beyond the legal text, they also must resolve the normative goal of the interpretative practice: Is it to recover the original meaning intended by the authors, to enforce the objective meaning that the text had at the time of enactment, to elucidate the meaning that best implements the underlying purpose of the provision, to do justice according to the text as filtered through contemporary values, or some other goal?

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Theoretical Approaches to Interpretation

The issues and problems relating to interpretation and law have not arisen in the modern research university but instead have persisted for millennia. In the Western tradition, ancient Greece and Rome provide enduring exemplars of attempts to address these issues. Aristotle famously discusses equity as a necessary feature of legal practice to soften the harshness of general rules and to make justice possible. Cicero's discussions of the role of the orator in law and civic life provide a different angle, but one that equally shapes contemporary thinking. It is common for scholars to note these classic touch points before turning quickly to the Enlightenment as the source of our modern traditions.

Patrick Nerhot reminds us that we err by fast-forwarding from the ancient polis to the modern state. In the early centuries of the second millennium a "premodern theologico-juridical episteme" emerged in which religious thinking was "totally impregnated with legal culture just as legal thought is bathed in religious culture."[3] These entwined practices defined truth and authenticity for the community. The great schism of the Protestant Reformation effected a fundamental shift in this defining reality, moving away from the authority of the author as secured by patristic practices and toward the discovery of truth through direct investigation of authoritative texts. Reformulated in a philological manner, this development appeared to "undermine theology at its root," but Nerhot argues that the practices of the jurist provided an abiding link with previous traditions:

> His work is always to reconstitute the truth of something that happened, on the basis of every type of record, written or spoken evidence. His instrument, proof, is a translation of the way we know nature: the jurist's interpretation and argumentation thus come to apply that science, which characterises a society and institutes the signs one must know how to interpret.[4]

The following brief account must necessarily ignore the historical depth and breadth of interpretive practices in law, and so it pays to recall at the outset what must be omitted. Legal interpretation is not just a matter of technique or theory, but rather is a longstanding practice intertwined with other practices relating to fundamental norms of the community and its disciplining epistemologies.[5]

[3] Patrick Nerhot, *Law, Writing, Meaning: An Essay in Legal Hermeneutics*, Ian Fraser, trans. (Edinburgh: Edinburgh University Press, 1992) 63–4.

[4] Ibid., 115.

[5] For an excellent and succinct historical overview of interpretation generally, and the development of legal interpretation more specifically, see Charles Collier, "Law as Interpretation," *Chicago-Kent Law Review* 76 (2000) 779–823. Perhaps the most insightful scholar to address law's historical entanglement with a wide variety of interpretive practices and regimes is Peter Goodrich, whose erudite and sophisticated work includes "Amatory Jurisprudence and the *Querelle Des Lois*" *Chicago-Kent Law Review* 76 (2000) 751–78; *Law in the Courts of Love: Literature and Other Minor Jurisprudences*

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Law as the Dictates of Natural Law

Natural law theories no longer are a predominant force in the secular political realm, but they cast a long shadow. In its most dogmatic form, natural law is not an interpretive theory so much as a claim that interpretations of legal texts are subordinate to objectively discernible moral dictates. Cicero famously offered a succinct definition of pre-Christian natural law based on the Stoic tradition, arguing that natural law is universal, eternal, and unchanging and that these characteristics of reality follow from the fact that natural law is authored and administered by a deity.[6] This philosophy was easily accommodated by Christianity and propagated by the Roman Empire, blossoming centuries later when Aquinas famously differentiated eternal law, natural law, and positive law. He argued that God's divine will is beyond our ken but that we are capable of determining the objective conditions for human flourishing through the use of reason because – to borrow Paul's words – the natural law is written in our hearts.[7] The collapse of the traditional natural law project leaves us in an ontological gap that we now seek to fill by interpreting texts that are legitimated through positive political theory rather than moral correctness.[8] In this respect, natural law theory precedes and is an alternative to the modern interpretive approach to law.[9]

The "new natural law," exemplified in the work of John Finnis, purports to render Aquinas sensible to our secular and rationalist age by arguing that certain basic and incommensurable goods are elements of human flourishing because they arise from a shared human nature. He claims that these goods serve as the basis for ethical decision making through the exercise of shared practical reasoning.[10] The new natural law speaks to interpretive theory to the extent that one believes that the

(London: Routledge Publishing, 1996); and "Historical Aspects of Legal Interpretation," *Indiana Law Journal* 61 (1986) 331–54.

6 Cicero, *De Re Publica*, Clinton Walker Keyes, trans. (Cambridge, MA: Harvard University Press, 1928), III, xxii.33.

7 Romans 2:14–15, *The New American Standard Bible* (1995).

8 Peter Goodrich describes the plight of contemporary legal theory with concise accuracy: we have abandoned natural law foundations originally constructed in ecclesiastical venues only to find that the project of developing a secular legal language capable of transforming the management of social conflict into questions of technical rationality is doomed to failure. Goodrich, *Law in the Courts of Love*, 160–61. More recently, Steven Smith has described "law's quandary," arguing that legal reasoning is constituted by a generalized appeal to something beyond immediate, positive legal practice – something analogous to religious ontology – but that we expressly disavow such an ontological grounding. Steven D. Smith, *Law's Quandary* (Cambridge, MA: Harvard University Press, 2004).

9 The theological roots of classical natural law thinking does provide a helpful analogy for contemporary theorists engaged in disputes about legal hermeneutics, inasmuch as the contrast between the tradition-based project of Catholic and Jewish thinkers and the text-based projects of Protestant thinkers illuminates many questions and problems very similar to those discussed by legal theorists.

10 John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980). See also Robert P. George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999).

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interpretation of legal texts includes practical reasoning about the grounds for human flourishing. Heidi Hurd draws this connection by arguing that theorists who embrace moral realism and the connection between law and morality should embrace a fundamental change in legal interpretation. Arguing that law has authoritative status only to the extent that law is "a source of education about antecedently existing moral obligations" and "its ability to inspire insight into genuine truths," Hurd urges theorists to reject a communication model of legal authority and its attendant theories of interpretation and instead to focus on the ways in which legal texts can foster the discernment of moral truths.[11]

Lloyd Weinreb's classical understanding of natural law as *nomos* relates to legal interpretation in a different manner. Weinreb argues that morality is a fact of the social world, but morality does not provide specific answers to legal or moral questions.[12] Natural law is not the guarantor of correct moral and legal judgment, Weinreb explains; rather, it is the ground from which moral and legal judgment issues and against which such judgment is assessed. Seemingly irreconcilable disputes about how to balance liberty and equality demonstrate that natural law does not succeed as a hermeneutical method, but they do evidence the deep *nomos* of communal life that enables us to attribute responsibility and desert in the course of legal interpretation.[13]

We may conclude that the natural law tradition, even in its contemporary manifestations, is not primarily concerned with interpretive practice as much as with establishing some manner of ontological claim. Natural law theorists inquire into a preinterpretive reality, although their work might hold significant implications for theories of legal interpretation. If nothing else, interpretation is a pressing question in legal theory precisely because the vast majority of legal theorists have rejected natural law foundations and adopted some version of legal positivism, in which law is a textual communication that must be interpreted. We now turn to theories that begin with the premise that law is embodied in texts to be interpreted, rather than in the ontology of social life or in the power of human reason.

[11] Heidi Hurd, "Interpreting Authorities," *Law and Interpretation: Essays in Legal Philosophy* 405–32, Andrei Marmor, ed. (Oxford: Clarendon Press, 1995) 432; Heidi Hurd, "Sovereignty in Silence," *Yale Law Journal* 99 (1990) 945–1028. Hurd suggest that the "claim that interpretation necessarily aims to recapture authorial intentions is simply an artificial limitation on the meaning of the term 'interpretation,' and that a more capacious sense of interpretation as recuperating the moral purpose of legislation would provide more guidance than theories built on a notion of law as the communication of a rule." Ibid., 1027.

[12] Lloyd Weinreb, "The Moral Point of View," *Natural Law, Liberalism and Morality: Contemporary Essays* 195–212, Robert P. George, ed. (Oxford: Oxford University Press, 1996) 208–9: "Natural law doesn't provide moral truths, it just rebuts skepticism and existentialism."

[13] Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987) 224–66. Weinreb argues that particularly vexing legal problems – such as affirmative action – are amenable to more satisfactory resolution if we accept his natural law account, Lloyd L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* (Cambridge, MA: Harvard University Press, 1998), and so his work is expressly intended to assist with difficult interpretive problems in law.

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Analytical Legal Positivism and Linguistic Philosophy

H.L.A. Hart famously secured the standing of legal positivism when many theorists concluded that he overcame Lon Fuller's minimalist procedural approach to natural law theory.[14] It is well known that Hart's analytical legal positivism was premised on a position quite close to the linguistic philosophy of the later Wittgenstein, developed in the course of reworking Austin's legal positivism.[15] One might question Hart's confidence in being able to accomplish this task,[16] but his efforts have had enormous influence. Stated succinctly, Hart assumed that language has core meanings that can be applied to situations without difficulty or need for active efforts of interpretation, but in difficult cases on the fringe the meaning of a governing phrase must be interpreted and, after a point, simply would be exhausted.[17] This forms the basis of

[14] H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629; Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958) 630–72.

[15] There are obvious parallels between Hart's approach and that of Wittgenstein: in their discussions of philosophy as a type of therapy, their attempts to avoid metaphysical questions and explanation, and their emphasis on defeasibility as an important, if not central, aspect of concepts. As a historical matter, however, Hart's approach probably derives from J.L. Austin and the advocates of "ordinary language philosophy" at Oxford. The similarities between Hart's work and Wittgenstein's ideas may be explained by the influence of Friedrich Waisman on Hart (as well as by a convergence of ideas between Austin and Wittgenstein).

Brian Bix, "Questions in Legal Interpretation," *Law and Interpretation: Essays in Legal Philosophy* 137–54, Andrei Marmor, ed. (Oxford: Clarendon Press, 1995) 138. Andrei Marmor draws a tighter link between Hart and Wittgenstein:

> I would suggest that as someone who has learnt from (the later) Wittgenstein, Hart would have avoided any attempt to construct what is usually called a *theory* of meaning for a natural language. . . . Hart seems to share Wittgenstein's view that an adequate account of meaning and language must not obscure the fact that the meaning of the words we use is completely overt and manifest in their use.

Andrei Marmor, *Interpretation and Legal Theory* (Portland, OR: Hart Publishing, 2nd rev. ed. 2005) 101.

[16] One commentator notes that Hart often writes as if he simply is applying the unproblematic tenets of modern linguistic philosophy to the study of law without acknowledging that all "the most interesting products of linguistic philosophy, and philosophy of language in general, are extremely controversial. It takes careful argument to distinguish between insights and misconceptions, and it is controversial whether jurisprudence has been advanced by any of Hart's claims about language." Timothy A.O. Endicott, "Law and Language," *The Oxford Handbook of Jurisprudence and Philosophy of Law* 935–68, Jules Coleman and Scott Shapiro, eds. (Oxford: Oxford University Press, 2002) 966.

[17] Brian Bix reports that Hart expressed in a letter to him that he intended his discussion of the open texture of language, and its resulting "partial indeterminacy," to be a general description of language rather than a theory that pertained only to legal regulation. Brian Bix, *Law, Language and Legal Determinacy* (Oxford: Clarendon Press, 1993) 24, n.79. Bix provides a helpful summary of Hart's position in the first chapter of this work, entitled "H.L.A. Hart and the "Open Texture" of Language." Ibid., 1–28.

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Hart's famous distinction between core and penumbra, as explored in his celebrated discussion of the hypothetical ordinance forbidding vehicles in the park.

Hart sharpened his analysis by responding to Dworkin's interpretive critique of analytical legal positivism in his posthumous Postscript to *The Concept of Law*. Hart argues that he does not promote a reductionist plain-meaning approach to language, and he does not ignore the role that principles play in judicial interpretation.[18] Instead, he argues that Dworkin's grand interpretive theory that there is always a "right answer" is counter-factual. Existing legal systems exhibit a pattern within the community of socially recognized rules that are neither self-executing nor can they definitively address all cases within their purview.[19] Hart reaffirms his central argument that the law can run out,[20] but he agrees that the judge is not without constraint of any kind when she fills the gap.[21] He argues against Dworkin's position by insisting that the judge's selection between competing principles is the moment when the judge creates the law of the case, and that Dworkin's judge Hercules could discover a definitive correct answer to resolve hard cases only in the impossible circumstance that "for all such cases there was always to be found in the existing law some unique set of higher-order principles assigning relative weights or priorities to such competing lower-order principles, would the moment for judicial law-making be not merely deferred but eliminated."[22]

Brian Bix assesses Hart's approach to language in light of the need for legal determinacy, concluding that a legal system cannot simply follow the interpretation of legal texts because other values are always implicated in legal decisions.[23] Law is a normative discourse, Bix emphasizes, and so legal meaning cannot simply follow the interpretation of the linguistic meaning of legal texts. For example, courts are empowered to determine when it is appropriate to go beyond the legislature's intent, which is just to say that legal norms sometimes override what might be the accepted linguistic meaning of legal rules.[24] Bix contends that Hart is perhaps best read as

[18] H.L.A. Hart, *The Concept of Law*, Penelope A. Bulloch and Joseph Raz, eds. (Oxford: Clarendon Press, 2nd ed., 1994) 248.

[19] Ibid., 267.

[20] Ibid., 252.

[21] Ibid., 273–74. In this way, Hart began to frame a tentative answer to earlier critics who found his analysis frustratingly vague on the question of whether the judge was constrained by techniques of legal reasoning – which calls into question whether the judge is really unconstrained by law in developing her response to the case – or whether the judge was radically free to decide on the result in the case – which calls into question whether this process is really rational rather than just an assertion of authority. See, for example, Michael Martin, *The Legal Philosophy of H.L.A. Hart* (Philadelphia: Temple University Press, 1987) 49–77.

[22] Hart, *The Concept of Law*, 275.

[23] Bix writes: "The role of language in 'easy cases' is thus at best one factor among many, for the clarity of a legal rule's application to some case *as a matter of language* is neither sufficient nor necessary for the case to be an easy one." Bix, *Law, Language and Legal Determinacy*, 181.

[24] Ibid., 178–9.

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promoting a practice-based theory of law that eschews metaphysical debates about the nature of constructs such as "legislative intent" in favor of examining how claims about legislative intent are used in legal discourse.[25]

Legal positivists following Hart generally remain agnostic about theoretical debates concerning the genuine goal of interpretation, focusing instead on how the law works in practice. Adopting the general perspective of ordinary language philosophy as developed in his day, Hart did not claim to develop or follow a theory of legal language; rather, he sought to understand how law operated given what he assumed were the widely understood limitations of language. His answer, that judges find meanings in texts but also engage in creative but constrained gap filling to effectuate the implications of legal texts for individual cases, might appear undertheorized, but a strong argument may be made that theory will not resolve the matter definitively and that legal theorists are best counseled to direct their attention elsewhere.[26]

Andrei Marmor has perhaps done more than any other analytical philosopher to develop a robust philosophy of legal interpretation. Marmor takes seriously Ronald Dworkin's challenge to positivism rooted in a theory of law as interpretation, and he acknowledges that interpretation "is part and parcel of the legal *practice*" and so it is necessary for legal philosophers to develop "a philosophical account of what it is to interpret the law."[27] Marmor, however, makes clear that interpretation is occasioned only by hard cases, when following the rule manifest in the text becomes problematic for some reason.[28] When confronted with a hard case, Marmor rejects the notion that judges always should follow a particular interpretive theory such as discerning and then following the drafters' original intent; rather, judges should carefully work within the scope of their comparative institutional competence.[29]

Analytical legal positivists caution against the urge to theorize interpretive practices in law rather than tending to those practices. Nevertheless, intense theoretical battles have been waged in recent decades to establish the proper interpretative methodology. We turn now to consider the competing theories that work from the assumption that legal texts are communicating a meaning that must be retrieved by the interpreter.

[25] Bix, "Questions in Legal Interpretation," 140–2.

[26] Joseph Raz has maintained Hart's distinction between applying a legal rule and creatively filling the gaps in the law, with the latter not reducible to a methodology of good judgment. Joseph Raz, "Why Interpret?," *Ratio Juris* 9 (1996) 349–63.

[27] Marmor, *Interpretation and Legal Theory*, 45.

[28] Ibid., 118. Thus, judges can follow the legal rules embedded in statutes with no need to engage in a complex interpretive strategy such as intentionalism. Ibid., 121.

[29] See ibid., 119–30 (Chapter 8: Legislative Intent and the Authority of Law) and 141–69 (Chapter 9: Constitutional Interpretation).

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Law as Communication: Originalism, Intentionalism, and Textualism

Against Hart's relative agnosticism, many theorists have debated the proper manner of interpreting legal texts in the shadow of a simple proposition: that legal texts are communicative events that should be interpreted in light of this function by uncovering a meaning that exists prior to the interpretation. There are two primary variations on this theme that often generally are characterized as "originalism." First, some theorists argue that the legal rule should be regarded as a communication by its drafters, in which case the text means precisely what its drafters intended to communicate. Aptly characterized as "intentionalism," this theory claims the virtue of identifying a univocal meaning for all legal rules, even if that meaning is not always easy to determine. In the face of substantial theoretical and practical critiques, many originalists have more recently rejected the project of uncovering the subjective intentions of the drafters and instead argue that the meaning of a legal text just is the publically understood meaning of the text at the time of its adoption. This move from intentionalism to "textualism"[30] attempts to shore up the ability of legal interpretation to be determinate. Although neither approach lives up to its promise of determinacy when subjected to the demands of practice, both have been highly influential and continue to shape the judicial discourse about interpretation.

A. *Intentionalism*

Francis Lieber was one of the most important hermeneutical theorists in America during the nineteenth century. His text, *Legal and Political Hermeneutics* brought German philosophy to bear on developing legal practices in the new constitutional republic.[31] Even if he now is "famous for being forgotten,"[32] Lieber's translation of the romantic tradition of German hermeneutics to the American setting provided the intellectual basis for the intentionalist approach to interpretation. Lieber sought to preserve the rule of law by identifying and clarifying the "immutable principles and fixed rules for interpreting and construing" the law.[33]

[30] The term "textualism" is sometimes used to refer to a theory that texts can have a "plain meaning" that is understood by the reader without need for extratextual resources. I will not discuss this "plain meaning" fantasy of avoiding the need for interpretation; although it lives on in legal dictum, it is recognized as fantasy by virtually all sophisticated lawyers and theorists.

[31] Francis Lieber, *Legal and Political Hermeneutics, Or, Principles of Interpretation and Construction in Law and Politics with Remarks on Precedents and Authorities* (Boston: Charles C. Little and James Brown, enlarged ed., 1839) (Buffalo, NY: William S. Hein & Co., 1970 reprint).

[32] Michael Herz, "Rediscovering Francis Lieber: An Afterword and Introduction," *Cardozo Law Review* 16 (1995) 2107–33, 2107. Herz introduces an excellent symposium issue dedicated to exploring the relevance of Lieber's book for contemporary debates: "Symposium on Legal and Political Hermeneutics," *Cardozo Law Review* 16 (1995) 2107–351.

[33] Lieber, *Legal and Political Hermeneutics*, viii.

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Lieber begins with the observation that words convey the thoughts of other persons who otherwise are inaccessible to us and that the "true sense" of words is "the sense which their author intended to convey."[34] With the exception of the self-contained symbolic realm of mathematics, language always requires interpretation to discern correctly the author's intention.[35] A strictly literal reading of the words of the text can be misleading because it threatens to wrench them from the sense intended by the author.[36] Thus, Lieber viewed intentionalism as a bulwark against a crude "plain meaning" approach to interpretation.

Even after being interpreted properly, though, Lieber acknowledges that the text might be subject to overriding considerations. He uses the term "construction" to refer to the activity of applying the intended meaning to the case at hand by means of norms and principles that are not specified by the specific meaning of the text.[37] The art of hermeneutics requires both interpretation and construction.[38] Although he recognizes that construction is dangerous because it goes beyond the univocal meaning of the text,[39] Lieber insists that the dynamic character of society makes it undesirable to have the author's intended meaning govern unforeseen situations, "as if the human mind could be permanently fettered by laws of by-gone generations."[40] Construction is inevitable in a legal system, but Lieber advocates a restrained approach by judges to preserve the continuity provided by the abiding singular meaning of the text.[41]

As Lieber was articulating the philosophical bases for intentionalism, his honesty and attention to pragmatic considerations simultaneously undermined its utility. If construction is a necessary element of legal practice, then the intended meaning of the text can provide only a veneer of determinacy and objectivity. Deciding when to construe a legal text in a manner that departs from its intended meaning is not something that is controlled by the text itself, and so Lieber recognizes that every construction has the potential to undermine the rule of law. Lieber recognized that no rule could prevent this excess and so his pragmatic response was simply to caution interpreters.

[34] Ibid., 23. Thus, there can be only one true meaning of a text – that intended by the author – and to speak of a sentence having two meanings "amounts to absurdity." Ibid., 86.

[35] Ibid., 39–40.

[36] Ibid., 66–68. Lieber argues that an interpreter must use good faith in searching for the intended meaning, and that interpretations generally should coincide with common sense on the assumption that this reflects the intent. Ibid., 93–99. Or, by way of summary, "In doubtful cases, therefore, we take the customary signification, rather than the grammatical or classical; the technical rather than the etymological. That which is probable, fair, and customary, is preferable to the improbable, unfair and unusual." Ibid., 120.

[37] Ibid., 56.

[38] Ibid., 64.

[39] Ibid.

[40] Ibid., 135.

[41] Ibid., 121–22, 136.

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Lieber's theoretical groundwork provided the vocabulary that we continue to use in theoretical discussion. In a number of provocative books, Raoul Berger famously argued that the intentions held by the constitutional framers were historical facts that established the meaning of the Constitution. Two successive books in the 1970s seemingly established that his methodology rose above politics by adhering to the true meaning of the Constitution. Arguing against the Nixon administration's efforts to establish a broad-based "executive privilege" that was not grounded in the Constitution, Berger's approach was cheered by the American left.[42] A few years later when he argued that much of the Warren Court's jurisprudence was illegitimate in light of the intended meaning of the Fourteenth Amendment, Berger was regarded as a spokesperson for the American right.[43]

Berger's work became the basis for a broad-based effort by conservative politicians, judges, and scholars to turn back the perceived liberal activism of the Warren and Burger courts and to thwart what they perceived as the antidemocratic practice of amending the Constitution by means of judicial review.[44] The idea, however, that judicial practice could be restrained effectively by requiring recourse to the drafters' intentions was subjected to withering theoretical and practical critiques that appeared to relegate intentionalism to the dustbin of legal theory.[45] What could it possibly mean to determine the "intended" meaning of a document written by a group of people 200 years earlier and then effectuated by votes in various states and subsequently amended after a wrenching civil war? Some theorists still insist that the true meaning of a text just is the meaning intended by its author, but this approach no longer has substantial influence.

[42] Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, MA: Harvard University Press, 1974).

[43] Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977).

[44] Edwin Meese III, "The Supreme Court of the United States: Bulwark of a Limited Constitution," *South Texas Law Review* 27 (1986) 455–66 (articulating the policy reasons for the adherence to original intent as part of President Reagan's conservative approach to government). Key political statements regarding the Reagan administration's originalist theories and competing speeches by several judges are included in *Originalism: A Quarter-Century of Debate*, Stephen G. Calabresi and Antonin Scalia, eds. (Washington, DC: Regnery Publishing, Inc., 2007) 47–112.

[45] See Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980) 204–238 (describing the multiple difficulties in determining the drafters' intentions); Ronald Dworkin, "The Forum of Principle," *New York University Law Review* 56 (1981) 469–518 (arguing that judges are political actors even when purporting to locate original intent); Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96 (1983) 781–827 (arguing that originalism is rendered incoherent by its own premises); H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (1984) 885–948 (arguing that an originalist theory was self-defeating because the drafters did not endorse originalism); Paul Finkelman, "The Constitution and the Intentions of the Framers: The Limits of Historical Analysis," *University of Pittsburgh Law Review* 50 (1989) 349–98 (arguing that historical inquiry cannot resolve how we should rule ourselves).

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B. *Textualism*

More recently, a "new originalism" has spread across the legal academy like a prairie fire. Interestingly, the modern impetus for (which is not to say the leading light of) this theoretical movement is a sitting judge, albeit a former law professor. Supreme Court Associate Justice Antonin Scalia has argued that legal texts – statutes and constitutions alike – should not be interpreted according to the presumed intentions of the drafters, but rather in accordance with how the text would have been understood at the time of its enactment.[46] The goal of this strategy is to avoid the hopeless search for the subjectively held intentions of the drafters in favor of specifying the objective fact of how ordinary readers would have understood the text at the time it was enacted.

Political scientist Keith Whittington provided one of the first detailed defenses of textualist "new originalism" as an approach to constitutional meaning.[47] Whittington argues that modern theorists have erred by trying to reduce all of Constitutional practice to interpretation, rather than recognizing that interpretation is a judicial function that is only one part of constitutional rule. In Whittington's terminology, constitutional interpretation is the search for the meaning in the text, whereas constitutional construction is a creative political act that necessarily goes beyond the meaning of the text.[48] Judges are empowered to interpret the text according to the meaning that it held at the time of enactment, but only political actors (such as administrative agencies or the legislature) are empowered to construe the Constitution to deal with gaps or to elaborate its meaning.[49] He grounds this approach in

[46] Justice Scalia criticizes those who would treat statutes differently from the Constitution, stating: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." Antonin Scalia, "Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," *A Matter of Interpretation: Federal Courts and the Law* 3–47, Amy Gutman, ed. (Princeton, NJ: Princeton University Press, 1997) 38.

[47] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, KS: University Press of Kansas, 1999); Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004) 599–613.

[48] Whittington explains:

> As the name suggests, constitutional interpretation is a fairly familiar process of discovering the meaning of the constitutional text. The results of this process are recognizable as constitutional law, capable of being expounded and applied by the courts. Though still concerned with the meaning of the text, constitutional construction cannot claim merely to discover a preexisting, if deeply hidden, meaning within the founding document. It employs the "imaginative vision" of politics rather than the "discerning wit" of judicial judgment. Construction is essentially creative, though the foundations for the ultimate structure are taken as given. The text is not discarded but brought into being.

Whittington, *Constitutional Interpretation*, 5.

[49] Ibid., 9. On the role of democratically responsive actors to engage in constitutional construction, see Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 1999).

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democratic legitimacy: interpretation is the discovery of what past democratic activities mean, whereas construction is a democratically sanctioned activity that accords with but extends beyond the meaning of the constitutional text.[50]

Textualism appears to offer a reasonable means of addressing the most vexing issues in constitutional theory. There is no counter-majoritarian difficulty because judges legitimately play a vital role by striking down unconstitutional statutes and regulations according to objective criteria. There is no fear of tyrannical judges because they are constrained to interpret the constitutional text in accordance with its original public meaning and are not permitted to amend the meaning through flexible interpretive standards.[51] The theory does not rest on an implausible view of mechanical jurisprudence, inasmuch as Whittington agrees that discovering the original meaning requires an artful practice that will be filled with controversy and dissent.[52] The theory is not guilty of bootstrapping because it acknowledges that originalism is not an interpretation of the original public meaning of the Constitution but rather is a construction of American constitutionalism grounded in political theory and prudential reasoning.[53] Finally, the theory avoids allegations of consigning politics to the "dead hand" of previous generations because judicial interpretation respects democratic choices and is supplemented by constitutional construction by political actors to address pressing issues not resolved by interpretation.[54]

The allure of the "new originalism" has been strong.[55] Perhaps the most interesting development has been Jack Balkin's announcement that he adheres to new originalism, that originalism does not conflict with the notion of a living constitution, and that Roe v. Wade is defensible on originalist grounds; all this despite his standing as a leading liberal constitutional theorist who cut his scholarly teeth writing about semiotics and deconstruction.[56] Balkin argues that originalists (often

[50] Whittington, *Constitutional Interpretation*, 110–59 (Chapter 5: Popular Sovereignty and Originalism).

[51] "The definition of a single interpretive method . . . not only allows the various participants in the dialogue to speak intelligibly to one another but also provides the framework for judicial accountability. Recognized interpretive standards allow criticism of the Court." Ibid., 14.

[52] Ibid., 4, 174–5.

[53] Ibid., 15.

[54] Ibid., 204–08. Whittington uses Lieber's vocabulary of "interpretation" and "construction," but he emphasizes that he rejects Lieber's willingness to permit courts to engage in the full range of constitutional rule. Ibid., 221, n. 3. The linchpin of his theory is that courts may not engage in constitutional construction under the guise of interpreting the constitution. Ibid., 12.

[55] The growing literature includes "Symposium," *George Washington Law Review* 66 (1998) 1081–1394; Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004); John O. McGinnis and Michael B. Rappaport, "A Pragmatic Defense of Originalism," *Northwestern University Law Review* 101 (2007) 383–97; and Lawrence B. Solum, "Semantic Originalism" (May 28, 2008) available at SSRN: http://ssrn.com/abstract=1120244.

[56] See Jack M. Balkin, "Abortion and Original Meaning," *Constitutional Commentary* 24 (2007) 291–352 ("Abortion") and Jack M. Balkin, "Original Meaning and Constitutional Redemption," *Constitutional Commentary* 24 (2007) 427–532 ("Constitutional Redemption").

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unwittingly) confuse the original meaning of the text with a supposition of how the text was expected to be applied; in effect, he indicts their tendency to slip from textualism to intentionalism.[57] If theorists resolutely attend to the original meaning of the constitutional text at the time of its enactment, Balkin insists, they will find that original meaning originalism "is actually a form of living constitutionalism."[58] This is true because the Constitution is comprised both rules and principles, and the original meaning of a principle such as "equal protection of the laws" is capacious enough to permit judicial elaboration in accordance with changing social contexts as long as we do not limit the principle by construing it in terms of how the drafters anticipated that it would be applied in the future.[59]

Balkin distinguishes the original meaning of the text from its application to the case at hand, which appears to parallel Whittington's distinction between interpretation and construction. Balkin, however, argues that judges should engage in constitutional construction in the course of applying textual principles to new situations, whereas Whittington argues that constitutional construction is reserved to the democratic branches of government. Whether the text embodies a clear principle with uncertain application (underdetermined meaning) or an unclear principle (vagueness), Whittington argues that when judicial interpretation fails to answer the question before the court it should reveal as much constitutional meaning as exists and then defer to political construction. Both claim the mantel of a textualist approach to originalism, but a huge gulf remains between Balkin's effort to demonstrate the constitutional legitimacy of *Roe v. Wade* under the original understanding of principles announced by the Privileges and Immunities clause and the Equal

[57] Balkin, "Abortion," 292–3. Balkin adopts the line of argument that Ronald Dworkin has long pressed against originalists by accusing them of slipping from "semantic originalism" to "expected application originalism." See Ronald Dworkin, "Comment," in *A Matter of Interpretation: Federal Courts and the Law* 115–27, Amy Gutman, ed. (Princeton, NJ: Princeton University Press, 1997); Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006) 117–39. In fact, we can assume that virtually all theorists would ostensibly accept Balkin's position (Marmor, *Interpretation and Legal Theory*, 155–60), but Balkin renews Dworkin's point that originalists tend to slip into an illegitimate mode of considering how the drafters would wish their words to be applied.

[58] Balkin, "Constitutional Redemption," 449.

[59] This same distinction might be characterized with Gottlob Frege's terminology of sense and reference. Christopher R. Green, "Originalism and the Sense-Reference Distinction," *St. Louis University Law Journal* 50 (2006) 555–627. "The Justices' failures to appreciate the difference between the meaning historically *expressed* by constitutional language, on the one hand, and the tangible outcomes *accomplished* by that language, on the other hand, lead to a frustrating dynamic. . . . I will here defend an answer based on Frege's sense-reference distinction: the *sense* of a constitutional expression is fixed at the time of the framing, but the *reference* is not, because it depends on the facts about the world, which can change." Ibid., 559–60. In turn, this distinction is similar to John Stuart Mill's terminology of connotation and denotation, and Rudolph Carnap's terminology of intensions and extensions. Ibid., 561.

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Protection clause and Whittington's insistence that when interpretations of the text do not provide an answer the matter must be left to politics.[60]

The underlying premise of the diverse perspectives discussed previously, including Marmor's elaboration of a legal hermeneutics congenial to analytical legal positivism, is the idea that legal interpretation is founded on communication in a text that precedes the interpretation. This Anglo-American tradition in the philosophy of language has been challenged by contemporary European philosophers working in philosophical hermeneutics, semiotics, and deconstruction, to which we now turn.

The Hermeneutical Turn in Law and Philosophy

Francis Lieber translated nineteenth-century German hermeneutical philosophy to the developing American legal culture, but contemporary hermeneutics has changed substantially since his day.[61] In his early lectures, Martin Heidegger's creative reading of Aristotle as providing a "hermeneutics of facticity" set the stage for the development of a philosophical hermeneutics.[62] Philosophical hermeneutics breaks with parochial attention to interpretation within particular disciplines and investigates the hermeneutical mode of being that girds all inquiry and understanding as an active involvement in the world rather than a "presuppositionless apprehending of something presented to" a self-contained subject as an object.[63] Put simply, Heidegger

[60] The existence of this gulf and the blurred lines that demarcate it are revealed in two critiques of Balkin's position. Mitchell Berman challenges Balkin from a nonoriginalist position, asking why constitutional principles should be interpreted in accordance with the original meaning of the principle embedded in the text rather than in accordance with the principles as understood in contemporary society, but he interprets Balkin's reply as agreeing that constitutional principles are a matter of contemporary elaboration in a manner that the text can bear. Mitchell N. Berman, "Originalism and its Discontents (Plus a Thought or Two About Abortion)," *Constitutional Commentary* 24 (2007) 383–404, 392–93, 402. On the other hand, Randy Barnett challenges Balkin from an originalist position by cautioning him against finding principles in the text, constructing constitutional doctrine on the basis of those principles, and then applying the doctrine and principles in contemporary contexts without returning to the text as the ultimate arbiter: "it is the text, properly interpreted and specified in light of its underlying principles, *not the underlying principles themselves*, that are to be applied to changing facts and circumstances by means of constitutional doctrines." Randy E. Barnett, "Underlying Principles," *Constitutional Commentary* 24 (2007) 405–16, 413. Nevertheless, Barnett concludes that Balkin has embraced the originalist method and is concerned only with those who might misread him as adopting a position that authorizes the contemporary elaboration of constitutional principles. Ibid., 416.

[61] Francis J. Mootz III, "The New Legal Hermeneutics," *Vanderbilt Law Review* 47 (1994) 115–43 (reviewing *Legal Hermeneutics: History, Theory and Practice*, Gregory Leyh, ed. (Berkeley, CA: University of California Press, 1992).

[62] Martin Heidegger, *Phenomenological Interpretations of Aristotle: Initiation into Phenomenological Research*, Richard Rojcewicz, trans. (Bloomington, IN: Indiana University Press, 2001); Martin Heidegger, *Ontology: The Hermeneutics of Facticity* (Bloomington, IN: Indiana University Press, 1999).

[63] Martin Heidegger, *Being and Time*, John Macquarrie and Edward Robinson, trans. (New York: Harper & Row, 1962) 192.

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rejects that idea that a reader confronts a text like a freestanding object that has an objective meaning prior to the interpretive event. Heidegger's impact on the philosophy of interpretation is most evident in the diverse (and somewhat contesting) philosophical projects undertaken by Hans-Georg Gadamer, Paul Ricoeur, and Jacques Derrida.[64]

Gadamer contends that interpretation is a way of being rather than a conscious activity taken up when a text proves to be vague or ambiguous, concluding that "understanding is always interpretation."[65] He defines interpretation as a (never complete) fusing of the horizons of the text and reader, with the former having an effective history constituted by past interpretations and the latter having a prejudiced forestructure of meaning that confronts the text in the form of a question. From this, Gadamer concludes that understanding occurs only through application, that there is no pregiven meaning of the text that can be understood in the abstract and then later applied to a given situation.[66] Legal hermeneutics is exemplary in this regard because a "law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted,"[67] with the result "that discovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process."[68] Gadamer responds to the persistent demand that theorists provide a scientific account of how there can be objective meaning by arguing that legal interpretation exemplifies why this fantasy can never be fulfilled.[69]

[64] I shall concentrate on Gadamer's influence due to space constraints, and in recognition that deconstructive approaches differentiate themselves precisely by seeking to problematize the question of interpretation rather than seeking to develop a different understanding of interpretation.

[65] Hans-Georg Gadamer, *Truth and Method*. Joel Weinshiemer and Donald G. Marshall trans. (New York: Continuum, 2nd rev. ed. 1989) 307. Gadamer continues:

> Our consideration of the significance of tradition in historical consciousness started from Heidegger's analysis of the hermeneutics of facticity and sought to apply it to a hermeneutics of the human sciences. We showed that understanding is not a method which the inquiring consciousness applies to an object it chooses and so turns it into objective knowledge; rather, being situated within an event of tradition, a process of handing down, is a prior condition of understanding. *Understanding proves to be an event*, and the task of hermeneutics, seen philosophically, consists in asking what kind of understanding, what kind of science it is, that is itself advanced by historical change.

Ibid., 309.

[66] Ibid., 307–11.

[67] Ibid., 309.

[68] Ibid., 310.

[69] In an encyclopedia entry on "Interpretation," Gadamer condenses his extended argument in *Truth and Method*, ibid.,324–41, regarding the exemplary status of legal hermeneutics. Gadamer writes:

> In light of this issue, the venerable tradition of juristic hermeneutics attains a new life and relevance. Within the dogmatics of modern law this tradition could only play a troubling role, seeming like a never completely avoidable stain on a self-fulfilling dogmatics. Nevertheless, one should make no mistake: jurisprudence is a normative discipline and performs the necessary

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Ronald Dworkin generally is regarded as a hermeneutical thinker in this vein, and in *Law's Empire* he cites Gadamer approvingly.[70] In fact, though, Dworkin does not embrace the ontological claims girding philosophical hermeneutics; rather, he proposes an interpretive ethic that he regards as politically superior to the rule-focused practice described by legal positivists.[71] Dworkin has been a powerful force in jurisprudence because he charts a distinctive course between the semantic sterility of much of legal positivism and the unpersuasive claims of natural law theorists, arguing that judges are engaged in an interpretive activity that continually refines legal principles in the context of individual cases by ensuring that their decisions fit within the existing legal framework and reach morally correct results. Toward this end, Dworkin expertly deconstructs the analytical distinction between simply applying the law and creatively filling the gaps, arguing that judges should expressly adopt an interpretive ethic that identifies general principles within the legal corpus into which their decision must fit, and then works to ensure that the law has normative

> dogmatic function of supplementing the law. As such, it performs an indispensable task, because it bridges the unavoidable gap between the universality of settled law and the concreteness of the individual case. In this regard, we should remember that Aristotle in his *Nicomachean Ethics* already staked out the hermeneutical space within legal doctrine for this process with his discussion of the problem of natural law and the concept of *epieikeia* [decency; *epieikes*, decent people]. Also, if we think back on the history of this concept, we find that the problem of an understanding exegesis [*verstehen Auslegung*] of the law is indissolubly linked with application.

Hans-Georg Gadamer, "Classical and Philosophical Hermeneutics," *The Gadamer Reader: A Bouquet of the Later Writings* 44–71, Richard E. Palmer, trans. and ed. (Evanston, IL: Northwestern University Press, 2007) 59–60. Gadamer emphasizes that Heidegger changed the intellectual landscape fundamentally. The efforts by Emilio Betti and others to preserve the romantic and idealist tendencies of nineteenth-century hermeneutical philosophy could not answer the essential questions raised by philosophical hermeneutics.

> For instance, the basically psychological underpinnings of hermeneutics during the period of German idealism proved to be dubious. Is the meaning of a text really exhausted by arriving at the meaning that was psychologically "intended" by the author, the *mens auctoris* [mind of the author]? Is understanding to be conceived of as nothing more than the reproduction of the author's original production? It is quite clear that this view cannot hold true in the case of juridical hermeneutics, which manifestly exercises a creative legal function.

Ibid., 57.

[70] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) 55, 62.

[71] In one of his important early essays on this topic, Dworkin argued that judges "develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; and they call this their legal philosophy. Any judge's opinion about the best interpretation will therefore be the consequence of beliefs other judges need not share." Ronald Dworkin, "Law as Interpretation," *Critical Inquiry* 9 (1982) 179–200, 196. Most recently, Dworkin describes his interpretive approach in terms of a constellation of choices regarding semantics, jurisprudence, doctrine, and adjudication. Dworkin, *Justice in Robes*, 1–35. Dworkin admits that he cannot compel other theorists to adopt his approach by appealing to a demonstrable constitutional method, ibid., 127, but he is unmindful of the degree to which he shares substantial ground with his positivist opponents in his understanding of interpretation as a matter of politics or style.

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justification while maintaining institutional integrity. There are no "gaps" in this account, because Dworkin believes that judges are inevitably engaged in an interpretive, normative, and political undertaking such that the resolution of difficult cases is not a different kind of practice.

Although appealing, in the end Dworkin's approach fails to realize the benefits claimed at the opposite ends of the spectrum that he bisects: his theories are a bit too grand to map onto the practice of law in any convincing manner, but at the same time his discussion of principle pales in comparison to the robust moral realism of natural law. Although Dworkin has identified good reason to reject both poles of the contemporary debate between positivists and natural law adherents, we might conclude that a more radical hermeneutical approach is required to secure his theoretical gains.[72] For example, Patrick Nerhot challenges the intellectualist assumption that legal interpretation is employed by a herculean judge drawing upon preexisting norms and a fixed conceptual structure, arguing instead that law is a rhetorical-hermeneutical activity all the way down.[73]

> What is it that is being interpreted in legal science? The idea currently accepted by legal practitioners interpreting the law is that interpretation relates to entities prior to all legal activity, which are imposed on all such practitioners: legal norms. These are posited as preconstrued, and antecedent to any research (whether for identifying or for interpreting the rule); the rule, "the norm," is the *starting-point* for thinking on what the law "says." The rule speaks to us; interpretation consists in understanding what it is saying to us. Contrary to this conception, we shall say that *the legal rule, far from being the starting-point, is a result; and specifically, that of the activities, in the broad sense, of the interpreter.*[74]

[72] Bernard S. Jackson, "Semiotics and the Problem of Interpretation," in *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* 84–103, Patrick Nerhot, ed. (Dordrecht: Kluwer Academic Publishing, 1990) 84 (arguing for a semiotic correction of Dworkin's "rationalist model of interpretation").

[73] Nerhot writes:

> Theory sometimes loses sight of the banal fact that at the origin there is the social problem and not a normative category; in other words that legal principles are never static elements of a scholastically constructed edifice, but topics, selection criteria of the legal assessment. Through interpretation the principal emerges, with the special feature that legal hermeneutics has a practical purpose. Thus the anticipated representation of the result that the interpreter supposes to be legally relevant before asking any interpretive question at all delimits the scope and direction taken by the interpretive methods . . . Understanding of the rule develops in the hermeneutic circle as the relationship between the question asked and the solution pursued, and this circle, far from being closed on itself, is a *continuous creation* . . .

Nerhot, *Law, Writing, Meaning*, 41. He summarizes by emphasizing that "what we call 'the law' corresponds to the historical space where legal experience is developed and expresses those principles." Ibid., 42.

[74] Patrick Nerhot, "Interpretation in Legal Science: The Notion of Narrative Coherence," *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* 193–225, Patrick Nerhot,

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Legal practice is an argumentative and creative activity in which invention plays the primary role rather than discovery. Nerhot insists that law is interpretive, but we must understand this claim in a deep sense that all argumentation is interpretive.[75]

In my work I have tried to make good on the radical claims of philosophical hermeneutics for legal theory.[76] This is not to say that hermeneutical insights generate a unique interpretive method; in fact, just the opposite is true. Accepting the ontological claims that human understanding is interpretive and that interpretation never involves a freestanding object subjected to the analytical gaze of a disinterested interpreter holds significance primarily because it cautions against the theoretical urge to methodize legal practice. There is a positive lesson as well: An interpreter will approach a text differently if she takes to heart the lessons of philosophical hermeneutics. Rather than Dworkin's Hercules believing that he can discern the best means of advancing the law with coherence and integrity, Gadamer's Hermes is wary of being more than an imperfect messenger who must recognize the need to place his own presuppositions at risk in response to the legal tradition.

"Putting at risk" is the guiding normative implication of critical hermeneutics, providing an alternative account of integrity to which judges should aspire. Gadamer writes:

> Hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation. But this means: Always recognize in advance the possible correctness, even the superiority of the conversation partner's position. Is this too little? Indeed, this seems to me to be the kind of integrity one can demand only of a professor of philosophy. And one should demand as much.[77]

Should we not demand such integrity from legal actors as well? The integrity called for is more than polite listening, but less than a virtuoso performance by the expert judge; it is a self-effacing response to the constantly renewed truth of tradition that contains the resources for critical insight.[78]

ed. (Dordrecht: Kluwer Academic Publishers, 1990) 196. In contrast, even Dworkin's capacious constructivist view of legal principle appears to unfold against an abiding backdrop of morality.

75 Ibid., 200–1.

76 Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa, AL: University of Alabama Press, 2006); Francis J. Mootz III, "A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory," *Brooklyn Law Review* 68 (2003) 683–719; Mootz, "The New Legal Hermeneutics;" Francis J. Mootz III, "The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur," *Boston University Law Review* 68 (1988) 523–617.

77 Hans-Georg Gadamer, "On the Origins of Philosophical Hermeneutics," *Philosophical Apprenticeships* 177–93, Robert K. Sullivan trans. (Boston, MA: The MIT Press, 1985) 189.

78 Although Gadamer casts interpretation as a dialogic fusion of horizons with a traditionary understanding, his philosophical approach provides a firm basis for understanding the inevitability and limits of critical thinking about the tradition if one engages in a hermeneutic dialogue.

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The judicial virtues implied by the ontological claims of philosophical hermeneutics are not foreign to legal practice, but humility and "putting at risk" is rendered more difficult in the age of theory and judicial methodology. Although philosophical hermeneutics teaches that originalism is a false ideal, it recognizes the historicity of all understanding; although it rejects the subject-centered approach by Dworkin, it recognizes the ethical dimension of interpretation; and although it denies the timeless truths of natural law philosophy, it accepts the power of the experience of truth that exists beyond methodological understanding. Ironically, perhaps the closest affinity exists between analytical legal philosophy and philosophical hermeneutics, if we construe them as dividing the labor of legal scholarship between sociological description of practice and philosophical inquiry into the nature of that practice.

Interpretation in Specific Legal Contexts

My overview of the competing theories of interpretation has not attended sufficiently to the specific legal contexts in which the interpretation takes place. In this section I compare the private law task of interpreting a contract to the public law task of interpreting constitutions, statutes, and regulations, with the aim of confirming that interpretation is first and foremost a practice that is only later theorized.

Contract Law

When the object of interpretation is a memorial of a contractual agreement, the courts are concerned with adjudicating the rights and duties of the two parties to the contract. One of the guiding themes of contract law generally is the protection of reasonable expectations, and over time this value has been vindicated in connection with contract interpretation. Originally, courts adopted a subjective approach to interpretation and concluded that if the minds of the parties had not met there could be no agreement, as evidenced in the famous case of *Raffles v. Wichelhaus*.[79] This view of contract interpretation might be plausible with regard to face-to-face negotiations that are akin to a conversation, in which one understands the other party only if one understands what that person is intending to say. With an increasing

> The dialogical character of language . . . leaves behind it any starting point in the subjectivity of the subject, and especially in the meaning-directed intentions of the speaker. Genuinely speaking one's mind has little to do with a mere explication and assertion of our prejudices; rather, it risks our prejudices – it exposes oneself to one's own doubt as well as to the rejoinder of the other.
>
> Hans-Georg Gadamer, "Text and Interpretation," *Dialogue and Deconstruction: Gadamer-Derrida Encounter* 21–51, Diane P. Michelfelder and Richard E. Palmer, eds. (Albany, NY: SUNY Press, 1989) 26. See Francis J. Mootz III, "The Quest to Reprogram Cultural Software: A Hermeneutical Response to Jack Balkin's Theory of Ideology and Critique," *Chicago-Kent Law Review* 76 (2000) 945–89.

[79] 159 Eng. Rep. 375 (1864).

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number of commercial deals concluded solely through written documentation, through intermediaries, and over a period of time, contract scholars argued that courts should enforce the "objective" meaning of the contract documents, which is to say that contracts should be enforced according to how a reasonable person would understand the documents.[80] This approach culminated in the first Restatement of Contracts declaring that the meaning of an integrated memorial of a contract might be something that neither of the parties intended nor understood.[81] When the document was not an integration of the contract it was to be interpreted in accordance with "the meaning which the party making the manifestations should reasonably expect that the other party would give to them," thereby effectuating the principle of reasonable expectations directly.[82]

Despite the superficial appeal that an integrated memorial of a contract ought to be interpreted objectively rather than attempting to "bend what he said to what he wanted,"[83] it was a triumph of theory over common sense to suggest that the parties might commit themselves to an agreement that meant something that neither party intended. The modern approach to contract interpretation adopts a "modified objective" theory grounded in the reasonable expectations of the parties as determined by the context of their agreement. As reflected in the Restatement (Second) of Contracts, interpretation of the words used by parties to the agreement is now uniformly governed by a determination of their shared meaning or meanings which they had reason to understand.[84]

We can return for clarification to the example with which we opened this chapter: the parol evidence rule. The modern approach freely admits parol evidence to interpret a writing adopted by the parties as a complete integration of their agreement, and under the Uniform Commercial Code a broad category of evidence is freely admissible to determine the scope of the parties' agreement.[85] Moreover, any

[80] "For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense."

Oliver Wendell Holmes, "The Theory of Legal Interpretation," *Harvard Law Review* 12 (1899) 417–20, 419.

[81] See Restatement of Contracts §226, comment b (the meaning of language used "is not necessarily that which the party from whom the manifestation proceeds, expects or understands") and Restatement of Contracts §230, comment b (an integrated memorial of a contract "may have a meaning different from that which either party supposed it to have").

[82] Restatement (First) of Contracts §233.

[83] Holmes, "The Theory of Legal Interpretation," 417.

[84] Restatement (Second) of Contracts §§201–203.

[85] The canonical case under the UCC is *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981), in which the court determined that the parol evidence rule is not implicated by the admission of evidence of course of performance, course of dealing and usage of trade to establish that the price term "posted price at time of delivery" in fact represented the agreement of the parties that the price term would be "posted price at time of delivery, but no higher than the posted price at the time of contracting."

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relevant evidence is admissible to determine if the parties intended a writing to be a complete integration of their agreement.[86] Most courts have rejected a simple rule-based effort to construe the meaning of written memorials in favor of understanding contractual meaning as a contextual fact, leading them to investigate the objectively manifested intentions of the parties rather than making presumptions that any documents generated by the parties were complete and intended to speak for themselves.[87]

Arthur Corbin summarized his elegant approach to these matters as a cultivation of the good sense of the common law rather than as a theoretical insight to be brought to bear on the law.

> All rules of interpretation, whether stated by a court or by a writer, are mere aides to the court, the lawyer, and the layman, in ascertaining and enforcing the intention of the parties. No supposed rule should be given any respect when it fails of that purpose.
>
> I shall continue to do my best to clarify the process and the law of interpretation, of both words and acts as symbols of expression; to demonstrate that no man can determine the meaning of written words by merely glueing his eyes within the four corners of a square of paper; to convince that it is men who give meanings to words and that words in themselves have no meaning; and to demonstrate that when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.[88]

Given that the reference to the parties' intentions is to be understood in accordance with the modified objective approach that Corbin championed, it is evident that Corbin appreciated the complexities of language and interpretation. In his discussion of the parol evidence rule, Stanley Fish happily skewered the ideologically driven efforts by Judge Kozinski to resist the need for interpretation of written agreements

[86] Restatement (Second) of Contracts §210.

[87] For the connections between the context rule of interpretation and the parol evidence rule in the common law, see *Berg v. Hudesman*, 801 P.2d 222 (Wash. *en banc* 1990). For the connections as recognized under the Uniform Commercial Code, see §202, Comment 1 ("This section definitely rejects: (a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon; (b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it is used; and (c) The requirement that a condition precedent to the admissibility of [extrinsic evidence] is an original determination by the court that the language used is ambiguous.")

[88] Arthur L. Corbin, "The Interpretation of Words and the Parol Evidence Rule," 50 *Cornell Law Quarterly* (1964) 161–90, 171, 164.

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and lauded the ability of most legal practitioners to cobble together workable rules that accept both the inevitability and instability of interpretation.[89] His praise of legal practice is vintage Fish:

> The failure of both legal positivists and natural law theorists to find the set of neutral procedures or basic moral principles underlying the law should not be taken to mean that the law is a failure, but rather that it is an amazing kind of success. The history of legal doctrine and its application is a history neither of rationalistic purity nor of incoherence and bad faith, but an almost Ovidian history of transformation under the pressure of enormously complicated social, political and economic urgencies, a history in which victory – in the shape of *keeping going* – is always being wrested from what looks like certain defeat, and wrested by means of stratagems that are all the more remarkable because, rather than being hidden they are almost always fully on display. Not only does the law forge its identity out of the stuff it disdains, it does so in public.[90]

The interpretation of contracts is an immense subject that connects with the theories of interpretation discussed previously, but we might close by agreeing with Fish that the common law has displayed an amazing capacity to get the work of interpretation done without being frozen by indecision or being hamstrung by the felt rhetorical necessity to claim constantly that its amazing feats are unproblematic.

Statutory Law

Interpreting statutes and regulations presents a different question entirely because the interpretation is binding on all persons subject to the rule rather than just two parties to a contract. At the height of the objective approach to interpretation of contracts, Holmes argued that there is no difference: "Different rules conceivably might be laid down for the construction of different kinds of writing.Yet in fact we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means."[91] As courts moved to a contextual approach to meaning that embraced the modified objective

[89] Stanley Fish, "The Law Wishes to Have a Formal Existence," *There's No Such Thing as Free Speech and It's a Good Thing Too*, 141–79 (Oxford: Oxford University Press, 1994) 144–47. Fish criticizes Kozinski's opinion in *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988), in which Kozinski criticizes the landmark development of the parol evidence rule by the Supreme Court of California in *Pacific Gas & Electric, Co. v. G.W. Thomas Drayage & Rigging Co.*, 68 Cal. 2d 33 (1968).

[90] Ibid., 156. Fish argues that the development of the parol evidence rule is a wonderful example of the law building the road upon which it is traveling, creating a formal existence on the run, so to speak, rather than finding it already given. Ibid.

[91] Homes, "The Theory of Legal Interpretation," 419.

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theory, Corbin argued that statutes required the same recuperation of manifested intentions as contracts.[92] Nevertheless, the public law character of statutory text has certainly shaded how it is interpreted.

The interpretation of statutes in the United States has a long history that is shaped by the English common law legacy and the peculiarities of American legal history.[93] In the common law era English courts viewed statutes as isolated efforts to articulate the principles of the common law, and so they construed statutes narrowly against established common law doctrines. In the democratic ethos of nineteenth-century America, judges were regarded with suspicion and accused of undermining legislation with their exercise of "equitable interpretation," but courts generally continued to interpret statutes narrowly even without a guiding theoretical dogma. In the twentieth century judges more readily acknowledged the primacy of legislation, but focused on effectuating the purpose of statutes rather than attending only to a claimed "plain meaning." Despite the sometimes dogmatic claims of theorists and commentators, judges for the most part have assumed a partnership with legislatures and sought pragmatic solutions to problems of interpretation that often employed an eclectic mix of interpretive strategies responsive to the comparative institutional competencies.[94] William Popkin describes the modern theoretical focus by most commentators as displaying a lack of faith in "ordinary judging" by attempting to cabin judgment with purportedly objective principles.[95]

[92] Corbin, "The Interpretation of Words and the Parol Evidence Rule," at 187–8. Corbin rejects the claim that the plain meaning of the statute constructs a "semantic stone wall" that a judge should obey, pointing out the existence of plain meaning is predicated on the judge's unexamined assumptions and context rather than seeking the context in which the statute was written. Statutes never announce their own ambiguity; rather, Corbin writes, ambiguity is apparent only after examining the statute in contextual detail. Corbin essentially argues for a purposivist approach to legislative intent.

[93] The brief historical overview in this paragraph is drawn from William D. Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Durham, NC: Duke University Press, 1999).

[94]

> When the common law was dominant, courts developed various approaches that allowed them to shape statutory meaning based on the assumption that legislatures did not always get things right and needed a lot of help making law, reinforced in the latter part of the nineteenth century by split between law and the people. Increased legislative competence forced courts to be less arrogant regarding statutes and their own lawmaking potential, and this change in attitude eventually evolved into purposive interpretation in which the judge's creative role could be grounded in affirmative assumptions about creative legislation and about the link between the law and the people that was supposed to exist in a democracy.

Ibid., 149. In a similar vein, William Eskridge argues that in the first thirty years of the new Republic the courts used an eclectic blend of text, history, purpose, context and norms to interpret statutes, underscoring the extent to which theory-driven approaches are a relatively new phenomenon. William N. Eskridge, Jr., "All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776–1806," *Columbia Law Review* 101 (2001) 990–1106.

[95] Popkin, *Statutes in* Court, 151–255.

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The infamous case of *Rector, Holy Trinity Church v. U.S.*[96] is a watershed for contemporary statutory practice and theory. Justice Brewer sought to avoid the plain meaning of a statute prohibiting a corporation from making a contract with a foreign alien to perform work and then assisting in his importation because the Court did not believe that the statute should apply to a church that hired a pastor from England. The majority opinion evidences the eclectic approach by considering the language of the statute in context, the purpose of the statute, and the legislative history. The Court famously concluded with a wholly intentionalist argument, suggesting that the United States is a Christian nation and it would be absurd to impute an intention to the legislature to forbid churches from hiring ministers from abroad. In this case, one might argue that the Court was working in partnership with the legislature in the manner of "ordinary judging," but the extent of its equitable reshaping of the patent rule suggested that courts might be free to import all manner of bias through the guise of interpretation.

A short time later Roscoe Pound argued that statutory law is properly conceived as the communication of author's intent and that deviating from the "genuine" interpretation of this fixed, historical fact is to engage in spurious interpretation.[97] As in the *Holy Trinity Church* case, Pound's insistence on following the intentions of the drafters is embedded in an argument that heeds the plain meaning of the statute and the context of enactment as revealing its underlying purpose. The reference to legislative intent is ubiquitous in the reported cases, but it is apparent that courts have used this concept in imprecise, contradictory, and changing ways even as they have sought to secure a determinate guide for interpretation. We might say that the constant reference to "intent" as cover for the practice of ordinary judging has created a quagmire into which modern theorists have fallen. The question is whether the lawyers and judges have been pulled in with them.

Attempting to escape the confused notions of an "intent" or "purpose" that guides interpretation, Justice Scalia has adopted a textualist approach to interpreting statutes and sought to provide a model to reorient statutory interpretation. He agrees that statutes must be read within their legal context and rejects the idea that judges can refer simply to a literal reading of the specific language of a statute, but his focus is the narrow question of the ordinary meaning of the words used at the time of the enactment. He recoils from the general practice of looking to the legislative history to discern the subjective intentions of the drafters and the purpose of the statute in question, arguing that these open-ended and unreliable concepts permit judges too

[96] 143 U.S. 457 (1892).

[97] "The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule." Roscoe Pound, "Spurious Interpretation," *Columbia Law Review* 7 (1907) 379–86, 381.

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much leeway in deciding cases, and – even if these concepts are constraining – are not democratically and constitutionally validated. His erstwhile opponent in many decisions is Justice Stevens, who uses a variety of traditional approaches to statutory interpretation in an effort to effectuate the underlying purpose.[98]

Justice Scalia is not an unadorned textualist, however. As a textualist he readily endorses the grammatical canons of construction and is far more wary of substantive canons that tip the scales of judgment when a statutory text is opaque.

> To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another. But it is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight. . . . Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it. The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity.[99]

And in fact, Justice Scalia relies on the rule of lenity despite its conflict with the textualist theory of meaning.[100] More generally, he is criticized for not using the

[98] A few classic examples illustrate this divide. In *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989) the Court considered a rule of evidence that permitted the introduction of the criminal convictions of a witness so long as the probative value outweighed any prejudice to the "defendant." The case involved a civil plaintiff who was injured while on work release, and the court below held that the prejudicial effect of introducing evidence of his criminal history was irrelevant because he was a plaintiff in the case. Writing for the Court, Justice Stevens engaged in a lengthy and detailed reconstruction of the drafting history of the rule to determine that Congress was attempting to protect criminal defendants from prejudice. Justice Scalia concurred, but chastised the majority for its inquiry. Scalia argued that the court should consider extratextual materials only to confirm that the literal reading of the rule was absurd, and then interpret the text by doing the least violence to it. He insisted that the Court focus first on the words of the text as ordinarily understood, and only if that leads to an absurdity should the Court engage in the benign fiction that the statute should be read to cohere with related areas of law. Finally, Justice Blackmun in dissent argued for an expansion of the protective aspects of the rule by applying it to all parties, basing his analysis on the policy underlying the gradual liberalization of the rule over time.

The different approaches to statutory interpretation often are claimed to be the basis for different results. In *Chisom v. Roemer*, 501 U.S. 380 (1991), the Court considered whether the Voting Rights Act relating to the election of "representatives" applied to judicial elections. Justice Stevens' majority opinion drew on the remedial purpose of the Act to conclude that the use of the term "representative" rather than "legislator" was intended to apply to judicial elections. Justice Scalia dissented, arguing that the word "representative," as ordinarily understood, does not apply to judges and then criticizing the Court for broadening the scope of the Act under the guise of interpretation to serve as a generalized weapon to combat discrimination.

[99] Scalia, *A Matter of Interpretation*, 28–9.

[100] For cases this term, see *United States v. Santos*, 128 S. Ct. 2020 (2008) (Scalia, J., concurring); *Begay v. United States*, 128 S. Ct. 1581 (2008).

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textualist approach rigorously, suggesting that it does not provide the objective or determinate answers that he claims.[101]

There can be no doubt that textualist arguments hold great sway in the academy and for certain judges, but the practice of deciding cases tends to undermine the desire for theoretical purity. Justice Scalia gave rise to the modern textualist movement, but his work as a judge suggests that even the most ardent proponent cannot help deviating at times. William Eskridge has articulated a "dynamic" approach to statutory interpretation that has served as the theoretical counterweight to Justice Scalia's textualist revolution.[102] Drawing on contemporary philosophical hermeneutics, Eskridge contends that judges generally use practical reasoning and a variety of interpretive strategies to determine the meaning of the statute for the case at hand in light of the character of interpretation.[103] He summarizes, with coauthor Philip Frickey, his central conclusions:

> First, statutory interpretation involves creative policymaking by judges and is not just the Court's figuring out the answer that was put "in" the statute by the enacting legislature. An essential insight of hermeneutics is that interpretation is a dynamic process, and that the interpreter is inescapably situated historically.
>
> Second, because this creation of statutory meaning is not a mechanical operation, it often involves the interpreter's choice among several competing answers. Although the interpreter's range of choices is somewhat constrained by the text, the statute's history, and the circumstances of its application, the actual choice will not be 'objectively' determinable; interpretation will often depend on political and other assumptions.
>
> Third, when statutory interpreters make these choices, they are normally not driven by any single value . . . The pragmatic idea that captures this concept is the "web of beliefs" metaphor . . . [ed. note: they then argue that another helpful metaphor is Charles Peirce's contrast of a chain of arguments no stronger than the weakest link and a cable woven from various threads.] In many cases of statutory interpretation, of course, the threads will not all run in the same direction. The cable metaphor suggests that in these cases the result will depend upon the strongest overall combination of threads.

[101] Randy Barnett, "Scalia's Infidelity: A Critique of Faint-Hearted Originalism," 75 *University of Cincinnati Law Review* (2006) 7–24; Jack Balkin, "Abortion," 297 (arguing that Justice Scalia is forced to adopt a "faint-hearted originalism" because he begins with an overly narrow conception of originalism that would lead to unacceptable results).

[102] William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994); William N. Eskridge, Jr., "Gadamer/Statutory Interpretation," *Columbia Law Review* 90 (1990) 609–81; William N. Eskridge, Jr., "Dynamic Statutory Interpretation," *University of Pennsylvania Law Review* 135 (1987) 1479–1555.

[103] Eskridge, *Dynamic Statutory Interpretation*, 55–7; William Eskridge, Jr. and Philip Frickey, "Statutory Interpretation as Practical Reasoning," *Stanford Law Review* 42 (1990) 321–84.

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> Our model holds that an interpreter will look at a broad range of evidence – text, historical evidence, and the text's evolution – and thus form a preliminary view of the statute. The interpreter then develops that preliminary view by testing various possible interpretations against the multiple criteria of fidelity to text, historical accuracy, and conformity to contemporary circumstances and values. Each criterion is relevant, yet none necessarily trumps the others.[104]

Eskridge contends that dynamic statutory interpretation is a descriptive account of how judges resolve interpretive problems, but also that it is normative to the extent that it cautions against unrealistic efforts to reduce statutory interpretation to a single valence.[105] Courts rarely endorse Eskridge's dynamic approach expressly, but he would argue that the great weight of legal practice supports the hermeneutic understanding of statutory interpretation as practical reasoning.

[104] Eskridge and Frickey, "Statutory Interpretation as Practical Reasoning," 345, 347–8, 351, 352.

[105] The evolution of the "pragmatist" Judge Posner might be a case in point of this kind of practical reasoning. Although strongly committed to an interpretive perspective guided by economic theory, Judge Posner more recently has embraced the necessity of practical reasoning and ordinary judging in at least some cases where the literal meaning of the statute is not in question. Richard Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995); Richard Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990). Against Judge Easterbrook's willingness to affirm a sentence of 20 years for the sale of LSD under a criminal statute that was (in the case of LSD, bizarrely and almost certainly mistakenly) geared toward weight rather than dosage, Judge Posner expressly and eloquently argued for a broad view of interpretation that utilized the tools of ordinary judging.

> Well, what if anything can we judges do about this mess? The answer lies in the shadow of a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatists' view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with the moral values and practical concerns of civilized society.
>
> . . . .
>
> The literal interpretation adopted by the majority is not inevitable. All interpretation is contextual. The words of the statute – interpreted against a background that includes a constitutional norm of equal treatment, a (closely related) constitutional commitment to rationality, and evident failure by both Congress and the Sentencing Commission to consider how LSD is actually produced, distributed, and sold, and an equally evident failure by the same two bodies to consider how the interaction between heavy mandatory minimum sentences and the Sentencing Guidelines – will bear an interpretation that distinguishes between the carrier vehicle of the illegal drug and the substance or mixture containing a detectable amount of the drug. The punishment of the crack dealer is not determined by the weight of the glass tube in which he sells the crack; we should not lightly attribute to Congress a purpose of punishing the dealer in LSD according to the weight of the LSD carrier. We should not make Congress's handiwork an embarrassment to the members of Congress and to us.

United States v. Marshall, 908 F.2d 1312, 1334–35, 1337–38 (7th Cir., 1990) (Posner, J., dissenting).

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Constitutional Law

Even if one believes that legislation is a democratically sanctioned communication of a rule that must be followed, the Constitution presents a different case. As the constituting document of the polity, it gestures toward timeless and enduring principles that can provide stability to society over time. A constitution that required constant emendation to deal with changes in society would not be constituting a polity as much as serving as a super-statute. On the other hand, a written constitution must mean more than an invitation for judges to rule as they deem best.

There have been various interpretive approaches to the Constitution that reflect its status as a founding document for the polity. John Hart Ely famously argued that the Constitution should be interpreted in a manner that reinforces democratic responsiveness,[106] Ronald Dworkin contended that moral reasoning is at the root of constitutional interpretation,[107] and Randy Barnett has sought the "lost constitution" that instituted libertarian rights and limited government.[108] The complexity and diversity of constitutional litigation is such that it is difficult enough for courts to attempt to articulate a unified approach to the First Amendment, let alone an overriding interpretive approach to the Constitution. The encrustation of precedent appears to be relatively resilient against the contemporary quest for a unified theory of interpretation that produces a method or approach that renders decisions more predictable and legitimate. The Court famously refused to overrule *Roe v. Wade*[109] in the interest of doctrinal purity, citing the need to respect the settled expectations engendered by precedents and acknowledging that constitutional interpretation requires reasoned judgment rather than recovery of a fixed and unchanging meaning.[110]

In a remarkable case decided in 2008, though, the Court openly confronted the question of the interpretative principles that guide adjudication of constitutional rights because it was faced with a rare case involving an Amendment that had not been interpreted extensively by the Court. In *District of Columbia v. Heller*,[111] the Supreme Court determined by a five to four vote that a District of Columbia law effectively banning private ownership of handguns violated the Second Amendment, holding that the Amendment protected an individual right to own handguns for

[106] John Hart Ely, *Democracy and Distrust: A Theory of Judicial* Review (Cambridge, MA: Harvard University Press, 1980); John Hart Ely, "Toward a Representation-Reinforcing Mode of Judicial Review," 37 *Maryland Law Review* (1978) 451–87.

[107] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1986).

[108] Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2005); Randy Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 2000).

[109] 410 U.S. 113 (1973).

[110] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[111] 554 U.S. – (2008) (slip op.)

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the purpose of self-defense. The opinions in the case illustrate a sharp contrast between application of the new textualist methodology to the Constitution and more traditional inquiries into purpose and precedent.

Justice Scalia's majority opinion provides the first thoroughly new textualist reading of the Constitution by the Court. He begins with the central textualist tenet – that meaning precedes application – by spending more than fifty pages analyzing the "meaning of the Second Amendment" before turning "finally to the law at issue here."[112] Combing the historical record to determine how the famously ungrammatical and ambiguous Amendment[113] would have been understood by the public at the time of its adoption, Justice Scalia concludes that it means that individual citizens have a right to own handguns for their personal defense.[114] His opinion breaks down the single sentence of the Amendment to its constituent clauses, which are defined by reference to dictionaries from the period. The Court struck down the gun control legislation for violating a constitutional right, acknowledging that the rampant urban violence in Washington, D.C. might lead some to believe that a right to own guns is anachronistic, but concluding nonetheless "that it is not the role of this Court to pronounce the Second Amendment extinct."[115]

There are immediate and obvious contradictions raised by Scalia's attempt to provide a genuinely textualist interpretation of the original meaning of the Second Amendment. He begins by ignoring the prefatory clause regarding the Militia until after determining the meaning of what he construes to be the operative clause, although he provides no objective grammatical or historical justification for this approach.[116] He rejects the arguments of professional linguists expressed in an amicus brief and assumes that there can be a truth of the matter to historical research.[117] After determining the original meaning of the Amendment he then asks whether any precedents foreclose the application of this meaning, suggesting that *stare decisis* might trump the original meaning to some extent.[118] He acknowledges that the right is not unlimited, and that there will be exceptions for restricting ownership by persons who are mentally ill or convicted felons, and for restricting possession of handguns in government offices or schools, but again the historical record appears to provide

[112] Ibid., 2, 56. This is a weak rhetorical device rather than a phenomenology of the act of decision making, of course, because the entire historical discussion is oriented around the notion that ownership of a weapon to protect one's home was an understood meaning of the Amendment. In other words, it would be utterly fantastic to assume that Justice Scalia would have written these same fifty pages describing the original meaning of the Amendment if he had no idea of the nature of the dispute before the Court!

[113] The Second Amendment provides, in full: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[114] *District of Columbia v. Heller*, 554 U.S. at 8–15 (slip. op.).

[115] Ibid., 64.

[116] Ibid., 3–5. Justice Stevens chides the majority for this approach, arguing that it is a legitimate move for an advocate, but not for a judge. Ibid., 8–9 (Stevens, J., dissenting).

[117] Ibid., 15–16.

[118] Ibid., 47.

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no justification for these potential exceptions.[119] It takes little effort to see the cracks in Justice Scalia's effort to hew to the original public meaning and nothing more, even if one grants that determining the original public meaning is appropriate.

Justice Stevens dissented based on an interpretation of the Amendment grounded in its text, history, and the *Miller* precedent that permitted the banning of sawed-off shotguns because there was no nexus with militia service.[120] His dissent centers on a historical understanding that the purpose of the Amendment was to ensure that the new federal government could not oppress the states by regulating ownership of weapons by able-bodied white males, who comprised each state's militia.[121] The opinion is shaped by Justice Scalia's historical bent, but it seeks a higher level of generality. Rather than determining how individual words and phrases would have been understood at the time of enactment, Justice Stevens inquires into the original understanding of the purpose of the Amendment. Justice Breyer's dissent is more openly critical of the new textualist methodology and the lack of definitive evidence for Justice Scalia's claim that self-defense is a core value of the Amendment, leading him to conclude that the new originalist project is bankrupt, even as it triumphs in this case.[122]

[119] Ibid., 54–55. Justice Scalia suggests, "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us," ibid., 63, but it is curious how he came up with his admittedly incomplete list in textualist fashion if he had not already consulted the historical sources. The early case law interpreting *Heller* already is drifting away from the perceived solid ground of an original understanding of the amendment. See, e.g., *U.S. v. Knight*, – F. Supp. 2d –, 2008 WL 4097410 (D. Me. 2008) (upholding statutory prohibition on the possession of firearms by a person under a restraining order regarding domestic violence). A prominent judge on the conservative Court of Appeals for the Fourth Circuit has chastised Justice Scalia's opinion for its activist character, going so far as to proclaim that *Heller* is guilty of the same sins as *Roe v. Wade*, 410 U.S. 113 (1973). J. Harvie Wilkinson III, "Of Guns, Abortions, and the Unravelling of Law," *Virginia Law Review* (2009).

[120] *Heller*, at 8–9 (Stevens, J., dissenting).

[121] Ibid., 26–27 (Stevens, J., dissenting). In other words, Justice Stevens is making an argument that combines originalism and purposivism, claiming that the "proper allocation of military power in the new Nation was an issue of central concern for the Framers" that led to the enactment of the Second Amendment.

[122]

> At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pickup a loaded gun on their parents' bedside table? That they . . . would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment – judicial judgment exercised within a framework for constitution analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*.
>
> Ibid., 43 (Breyer, J., Dissenting).

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The dissenting opinions are equally open to criticism. They too look to history, but they do so in a manner that appears to provide greater ability to adapt the text to modern problems; however, they provide no convincing explanation as to why they do not simply operate at a general level of constitutional values and adopt the best approach to the problem at hand. If history is inconclusive, why must it play such a large role in their opinion? The case, then, appears to be a battle between the faint-hearted originalists and the faint-hearted purposivists.

The *Heller* case is interesting precisely because it pits competing approaches to constitutional interpretation against each other in legal practice, rather than in the self-referential world of academia. The case makes clear that new textualism has a very real effect on legal practice and strongly influences even the dissenters. Under the stresses of a real case, however – and particularly the institutional constraints of the appellate process – the case seems to confirm that no theory can deliver a knockout punch that eliminates the art of judging.

At this point it pays to return to the level of theory and reconsider its connections to the practice of constitutional decision making. If the practice of new originalism is a political approach to constitutional practice, this begs the question: How can we judge this practice if there is no theoretically secured notion of the nature of the constitution and the legitimate means of interpreting it? As mentioned previously, there is a (perhaps surprising) confluence of some forms of analytical legal positivism with philosophical hermeneutics in describing the role of theory for legal philosophers. I explore this connection within the scope of constitutional theory and practice as a means of bringing my analysis full circle.

Joseph Raz promotes an exclusive positivism that locates the validity of legal rules in social fact rather than normative evaluation. There is much that can be said about legal rules by a positivist, but when considering constitutional law as the ground of such rules he concludes that constitutions are "self-validating. They are valid just because they are there, enshrined in the practices of their countries," but he also immediately modifies this stark approach with an important qualification:

> *As long as they remain within the boundaries set by moral principles*, constitutions are self-validating in that their validity derives from nothing more than the fact that they are there. It should be added that this conclusion follows *if morality underdetermines* the principles concerning the form of government and the content of individual rights enshrined in constitutions.[123]

In other words, the opacity of morality provides a wide arena within which a constitutional tradition may develop, and within this arena the "constitution of a country is a

[123] Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in *Constitutionalism: Philosophical Foundations* 152–93, Larry Alexander, ed. (Cambridge University Press, 1998), 173.

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legitimate constitution because it is the constitution it has."[124] The founding fathers have an important practical and symbolic value, but – especially with respect to older constitutions – their intentions and understandings cannot legitimately claim supremacy in guiding the interpretation of the constitution.[125]

Raz argues that contemporary decision makers owe no obeisance to past understandings of the constitution, and insists that constitutional interpretation always blends a conserving and innovating function. Because these features cannot be strictly differentiated in a particular interpretive act, there can be no theoretical prescription for constitutional practice: "There is little more that one can say other than 'reason well' or 'interpret reasonably.' What little there is to say consists mainly of pointing out mistakes that have been made attractive by the popularity among judges, lawyers, or academic writers."[126] Although constantly revised through interpretation, the original constitution is not discarded any more than the constant adaptation of a house over two centuries means that the original house has disappeared; Raz makes clear that interpretive development does not entail a loss of identity.[127]

Raz's conceptual approach coincides with Gadamer's ontological account of understanding. Gadamer dismisses the methodologies of intentionalism and new originalism as false ideals – mistakes that have been made attractive, in Raz's phrasing – that mask the reality that every interpretation is application within a particular context that cannot hew to some supposed previously existing meaning of the text. Constitutional practice simply exists, and the hermeneutical discernment of constitutional meaning cannot be subjected to a method. This does not yield quiescence, but instead invests interpretation with an unavoidable ethical dimension.

Raz and Gadamer echo Jürgen Habermas's efforts to describe law as existing between social fact and moral norm, which is to say that law mediates social organization and moral norms.[128] Habermas, however, defends a discourse theory of law rooted in his theory of communicative action, reaching beyond the more

[124] Ibid.
[125] Ibid., 69, 76.
[126] Ibid., 180.
[127] Ibid., 191.
[128] It is surprising that Raz does not draw explicitly from Habermas's detailed work, in which Habermas describes how "mediation through law serves the role of concretizing moral principles – that is, of giving them the concrete content they must have in order for people to be able to follow them." Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, William Rehg, trans. (Cambridge, MA: The MIT Press, 1996) (1992) 172. Habermas makes just this point against the backdrop of a broad survey of continental and Anglo-American political and legal theory. To manage the dissensus resulting from the collapse of a unified lifeworld and the plurality of lived experience, Habermas contends that law serves "as a transformer in the society-wide communication circulating between system and lifeworld," ibid., 81, or as described by Talcott Parsons, as a "transmission belt." Ibid., 76. Law serves an important function by relieving citizens of the burden of acting morally in the face of the unprecedented cognitive, motivational and organizational demands of the modern, fractured world. Ibid., 114.

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modest implications of the conceptual work by Raz and the ontological explorations of understanding by Gadamer. Habermas regards Gadamer's hermeneutics as implausible in the fragmented world of post-Enlightenment, and he criticizes legal positivism for restricting the role of rationality too severely.[129] Rather than Dworkin's monological Hercules, Habermas insists that legal argumentation validates legal practice if it is dialogically grounded and the society embodies the material features to sustain such a discourse.[130] Habermas is the most prominent defender of a post-Enlightenment and post-metaphysical philosophy of meaning that provides more than minimal guidance to legal practice.[131] Whether Habermas or anyone else can succeed in this endeavor is philosophically contested and one of the great questions facing contemporary legal theory.

Conclusion: The Future of Scholarship on Interpretation

Interpretation is Janus-faced. It preserves and innovates; it recovers and projects; it acknowledges and creates. As a result, legal interpretation unavoidably is a high-wire act without a safety net. Preservation and stability are vitally important values, but the need to apply the law in new contexts and under changed circumstances is no less important. There can be no calming of this hermeneutical anxiety – no stabilization of interpretive vertigo – achieved through practical engagement or theoretical reflection. The future is interpretation, but it is an uncertain future that we must cobble together as we move forward in both practical and theoretical ways.

The scholarship on legal interpretation would benefit by undertaking several initiatives that move beyond the debates described in this chapter. Most important, scholars should pursue a more robust description of the hermeneutical situation in which interpreters find themselves. This is not to call for a naturalistic inquiry in the sense of reductionist empiricism, but rather to promote bringing cognitive studies, psychology, sociology, linguistics, and other disciplines to bear on elucidating hermeneutical capacities. Nietzsche described our nature as interpretive, but we have only begun to understand this feature of human nature. Hermeneutical philosophy should chart a place between Heideggerian mysticism and linguistic scientism, bringing interdisciplinary knowledge to bear on interpretation as an embodied experience. This project is anticipated by philosophical hermeneutics, which rejects the

[129] Ibid., 199–203.

[130] Ibid., 222–7.

[131] Habermas concludes that certain rights follow from the discourse principle, including those oriented to establishing the private autonomy of legal persons as potential addressees of the law, rights that secure equal opportunity to participate in the processes of opinion and will formation that generate legitimate law, and rights to the provision of living conditions that enable the exercise of rights. Ibid., 122–31. This stands in contrast to Raz and Gadamer.

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idea that interpretation is simply a strategy or methodology that one may employ to investigate objects.

This philosophical reorientation would have significant effects in legal studies, not the least of which would be to clarify that originalism is a political theory rather than a theory of interpretation and that it must be judged politically. More generally, regarding interpretation as a way of being rather than a conscious activity would explode the assumption that legal actors can step outside the hermeneutical uncertainty of ordinary life and adopt a "legal" point of view that resolves the dilemmas of interpretation. The result should be to integrate studies of legal interpretation with inquiries into judgment, discernment, and understanding in different venues. This would not deny the importance of the legal context, but rather would reject the dogma that the legal context is able to tame or escape the hermeneutical situation.

By focusing on the hermeneutical situation, scholars would be able to highlight the full ethical dimension of interpretation. Too many theories of interpretation attempt to quell uncertainty by regarding interpretation as a rule-bound activity that could be judged as easily as determining whether a baker properly followed a recipe. Certainly there is skill and judgment involved in baking, but if one is constrained to follow a recipe there clearly is a metric against which to judge the performance. In contrast, there is no recipe for interpretation, which is to say that there is no methodology against which interpretive performances may be judged. Interpretation is a judgment made without benefit of a metric, and so this activity is ethical in a much deeper sense than the ethical obligation to follow authoritative procedures. Future scholarship should explore the moral agency that exists because of, and not despite, the fact that socially constructed actors work within longstanding narrative discourses. The irreducible fact is that this activity always demands the exercise of creative judgment, even if the actor denies this ethical moment.

My suggested course of inquiry goes against the grain of most legal scholarship, and even most philosophy, but a bold reorientation is precisely what we require. By adopting a phenomenological approach to the interpretive nature of our existence and then tracing the effects of this mode of being for legal practice, scholars have the best chance for overcoming the destructive disjunction of theory and practice that mars most academic inquiry. As things stand now, when reflecting on the current situation we might indict interpretive theory for attempting to arrest the activity of interpretation, to constrain an unruly play by posting boundaries and prescriptions from outside the practice. Under this view, legal practice is dynamic, supple, and precognitive, even if it cloaks its activity with a superficial obeisance to the theoretical model of the day (whether it be original intent, textualism, or consequentialism). It is equally plausible that we might indict practitioners for plodding along by repeating mantras that have no conceptual integrity or practical utility. Under this view, legal theory is an insightful corrective, even if it hides its practical effect behind academic jargon that purports to rise above mundane matters.

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The dilemma of contemporary legal hermeneutics is that both views are correct. The play of interpretation occurs, in part, in the interplay of theory and practice. The future of legal interpretation is a continuation of this frustrating dance, which lacks both a rhythm and an end. By focusing on the hermeneutical situation we might eliminate the gulf between theory and practice, but not the challenge of interpretation. Theorists and practitioners perennially claim that they have unlocked the secret of interpretation. To do so, however, would mean the end of history and the denial of the future.