

# The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation

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*Debates about legal interpretation frequently bypass or give short shrift to the more basic concept of legal “meaning.” Seeking to rectify that deficiency, this Article explores the meaning of “meaning.” Examination of familiar terms of legal argument reveals an astonishing number of possible senses of that term—and, correspondingly, an equally large number of possible referents for ultimate claims concerning what legal provisions mean. These referents include a statutory or constitutional provision’s semantic or literal meaning, its contextual meaning as framed by the shared presuppositions of speakers and listeners, its “real” conceptual meaning, and its intended, reasonable, and previously interpreted meanings.*

*Proponents of interpretive theories such as textualism and originalism sometimes suggest that legal meaning depends on prelegal, linguistic facts that make one of these kinds or senses of meaning uniquely correct. But that suggestion reflects a misunderstanding about how language works. Framing the challenge for legal interpretation as that of choosing the normatively best referent for claims of legal meaning from among otherwise eligible candidates, this Article shows that textualism and originalism, in particular, lack the resources to make the unique, consistent, categorical selections and exclusions that some versions of those theories purport to achieve. Like a variety of other interpretive theories, they lapse into reliance on case-by-case normative judgments.*

*When understood against the background of a careful delineation of the choices that legal interpretation requires, the aspirations of textualism and originalism help to frame a fundamental question: Given the function of interpretive theories to guide or determine choices among otherwise plausible senses of legal meaning, should such theories do so on a categorical or a case-by-case basis? This Article advocates the latter approach. A due appreciation of the interpretive challenge—which frequently requires a choice among the literal, contextually framed and limited, real conceptual, intended, reasonable, and interpreted meanings of statutory and constitutional provisions—reveals the*

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*stark hubris of proposals that commit in advance to categorical selections or even categorical exclusions.*

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## INTRODUCTION

The law reviews and judicial opinions both teem with debates about theories of legal interpretation. Prominent competing theories of statutory interpretation include textualism, legislative intentionalism, and purposivism.<sup>1</sup> With respect to constitutional law, proponents of originalism<sup>2</sup> maintain its preferability to a variety of forms of living constitutionalism.<sup>3</sup> Behind interpretation, however, stands meaning. Almost self-evidently, meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover.<sup>4</sup>

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<sup>1</sup> See Richard H. Fallon Jr, et al, *Hart and Weschler’s The Federal Courts and the Federal System* 622–26 (Foundation 6th ed 2009) (surveying theories of statutory interpretation).

<sup>2</sup> For a discussion of originalism, see notes 179–201 and accompanying text. There are many varieties of originalism. See Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 Duke L J 239, 244–45 (2009) (arguing that originalism is not a single, monolithic ideology, “but rather a smorgasbord of distinct constitutional theories”). All, however, appear to share the premise that “the original meaning (‘communicative content’) of the constitutional text is fixed at the time each provision is framed and ratified.” Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L Rev 453, 456 (2013).

<sup>3</sup> The diversity of varieties of living constitutionalism makes cataloguing impossible. For prominent examples, see Bruce Ackerman, 1 *We the People: Foundations* 44–67 (Harvard 1991) (advancing a theory of constitutional amendment outside of Article V); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 9–119 (Oxford 1982) (describing multiple alternative “modalities” of constitutional interpretation); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 3–12 (Knopf 2005) (defending pragmatic, democracy-promoting interpretation); Ronald Dworkin, *Law’s Empire* 355–99 (Harvard 1986) (defending interpretation that seeks to put recognized authorities in the best moral light); David A. Strauss, *The Living Constitution* 1–5 (Oxford 2010) (analogizing constitutional interpretation to common-law interpretation and arguing that the text matters least when the stakes are highest).

<sup>4</sup> See Keith E. Whittington, *Constructing a New American Constitution*, 27 Const Commen 119, 121 (2010) (“An interpretation of a text attempts to capture the true meaning of the text.”). The relation of “meaning” to “interpretation” can vary with the sense in which the term “interpretation” is used. At least three usages should be distinguished. In

But what is meaning, or what does “meaning” mean?<sup>5</sup> That concept deserves much more careful explication and analysis than it often receives.<sup>6</sup> Do textualists, legislative intentionalists,

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one sense, “interpretation” is a ubiquitous phenomenon that is at work whenever one person successfully grasps the communicative content of a text or utterance. See, for example, Donald Davidson, *Inquiries into Truth and Interpretation* 125, 141 (Oxford 2d ed) (asserting that “[a]ll understanding of the speech of another involves radical interpretation” and that “[w]e interpret a bit of linguistic behaviour when we say what a speaker’s words mean on an occasion of use”); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 207–08 (Clarendon 1993) (stating that “every application of a rule is also an interpretation”). In a second usage, “interpretation” refers to a reflective, problem-solving process that is not involved in all successful communication (which is frequently characterized by simple understanding) and is triggered by an uncertainty or puzzle about either the communicative content of a text or remark or its appropriate application. See, for example, Andrei Marmor, *The Language of Law* 108 (Oxford 2014). In yet a third sense, which is quite specialized and possibly peculiar to law, “interpretation” is often used to refer to the entire process—which may include multiple aspects—by which authoritative actors resolve questions about the meaning or content of law in its application to particular cases. See generally, for example, Scott Soames, *Toward a Theory of Legal Interpretation*, 6 NYU J L & Liberty 231 (2011); Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189 (1987).

Distinguishing these senses of “interpretation” is crucial to understanding a number of legal debates, including a debate about whether constitutional interpretation—when the term is used in the third sense—is properly exhausted by interpretation in the first or second sense. According to some, interpretation in the third sense can include judicial construction or implementation to supplement the meaning that interpretation in the first two senses identifies. See, for example, Solum, 82 Fordham L Rev at 455–58 (cited in note 2); Richard H. Fallon Jr., *Implementing the Constitution*, 111 Harv L Rev 54, 56–61 (1997). Others, however, deny the possibility of a gap between interpretation and construction. See, for example, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 15 (Thomson/West 2012). When “interpretation” is used in the third of the senses that I have distinguished, the identification of the meaning of legal texts is not the sole goal of legal interpretation. Nevertheless, a theory of legal interpretation in this specialized sense will almost invariably, if not necessarily, subsume a theory of interpretation in the first or second sense. To cite just one example, Professor Lawrence Solum defends an originalist theory of meaning (in the first or second sense) while maintaining that constitutional adjudication properly turns on considerations besides the original meaning of constitutional language. See Solum, 82 Fordham L Rev at 536–37 (cited in note 2).

Because the term “interpretation” is commonly used in all three of the senses that I have distinguished, and because each becomes pertinent at different points in this Article, my usage will vary with context, though I shall attempt to be clear about the sense in which I use the term in any particular instance.

<sup>5</sup> For a classic philosophical introduction to the concept of meaning, see generally C.K. Ogden and I.A. Richards, *The Meaning of Meaning* (Harcourt 4th ed 1936). See also Michael L. Geis, *The Meaning of Meaning in the Law*, 73 Wash U L Q 1125, 1128–32 (1995) (distinguishing among uses of the term “meaning” in legal argument).

<sup>6</sup> Conspicuous among those who have put theories of meaning at or near the center of their interpretive theories is the originalist Lawrence Solum. See generally, for example, Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L Rev 479 (2013). In another important contribution to the legal literature, the philosopher

purposivists, originalists, and living constitutionalists all have a clear, shared understanding of the nature of legal meaning? Or do they disagree about what meaning is? Unless legal interpreters—and, in particular, champions of such theories as textualism, originalism, legislative intentionalism, and purposivism—achieve clarity about the nature of legal meaning, they risk slipping into error analogous to that of a person who decides to hunt for his car keys under a street lamp just because the light is good there. At the very least, the debaters will talk past each other.

This Article seeks to illumine debates about theories of interpretation by putting the concept of legal meaning at the center of inquiry and then tracing the sometimes surprising implications of the analysis that emerges. I begin by identifying an astonishing diversity of senses of meaning that constitute what I call potential “referents” for claims of legal meaning. Through my use of this term, I aim to call attention to the sometime willingness of judges, lawyers, scholars, and others to credit different senses of meaning as supplying the ultimate legal meaning of statutory and constitutional provisions in different contexts—even when they purport to apply the same interpretive methodologies in all cases. To be more specific, in claiming what a statutory or constitutional provision means, judges, lawyers, and scholars often invoke or refer to what I characterize as its literal or semantic meaning, its contextual meaning as framed by the shared presuppositions of speakers and listeners, its real conceptual meaning, its intended meaning, its reasonable meaning, or its previously interpreted meaning. Among the foremost challenges for legal interpretation is to determine which of these possible senses constitutes legal meaning, either categorically or in a particular instance.

In framing that challenge, this Article puts squarely on the table the question whether statutory and constitutional provisions have uniquely correct meanings that exist as a matter of prelegal, linguistic fact. It is a measure of confusion about the nature of legal meaning, I think, that proponents of leading interpretive theories sometimes appear to give one answer to this question and sometimes another. On the one hand, it seems well

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of language Scott Soames has constructed a theory of legal interpretation, which he calls “deferentialism,” by beginning with a theory of meaning and defining the aims of legal interpretation in light of it. Scott Soames, *Deferentialism: A Post-originalist Theory of Legal Interpretation*, 82 *Fordham L Rev* 597, 603–06 (2013).

recognized that the choice among competing theories of statutory and constitutional interpretation requires a normative judgment.<sup>7</sup> Proponents of such theories thus put forth normative reasons why their theories deserve acceptance.<sup>8</sup> On the other hand, the champions of competing theories—especially textualism and originalism—sometimes appear to assume that there is a linguistic fact of the matter about what statutory and constitutional provisions mean and to argue that their theories reveal that fact.<sup>9</sup> To be more precise, proponents of such theories sometimes imply that the meaning of a legal text—as of an utterance in ordinary conversation—is necessarily or obviously its literal meaning (in some cases), or its intended meaning (which can be different), or what a reasonable person would have understood it to mean in the context of its promulgation, as framed and limited by its expected applications. In his defense of a textualist approach to statutory interpretation, Justice Antonin Scalia sometimes makes the last of these equations.<sup>10</sup> Other originalists appeal to general, purported facts about linguistic communication

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<sup>7</sup> See notes 214–18 and accompanying text.

<sup>8</sup> See, for example, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *Geo Wash L Rev* 1119, 1121–26 (1998); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the Federal Courts in Interpreting the Constitution and Laws*, in Amy Gutmann, ed., *A Matter of Interpretation* 3, 17 (Princeton 1997):

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.

<sup>9</sup> See, for example, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *Georgetown L J* 1823, 1823–25 (1997) (equating the meaning of the Constitution with its original public meaning, though acknowledging that a theory of adjudication need not necessarily follow linguistic meaning in all cases).

<sup>10</sup> For example, in *Smith v United States*, 508 US 223 (1993), Justice Scalia argued that a criminal defendant who had attempted to trade a gun for drugs did not come within the “ordinary” meaning of the words of a statute applicable to “any defendant who . . . uses [or carries] a firearm,” and he defended this conclusion as follows:

To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, “Do you use a cane?,” he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, *i.e.*, as a weapon. To be sure, “one can use a firearm in a number of ways” . . . including as an article of exchange, just as one can “use” a cane as a hall decoration—but that is not the ordinary meaning of “using” the one or the other.

*Id.* at 241–42 (Scalia dissenting). For further discussion of *Smith*, see notes 31–36 and accompanying text.

to argue that the meaning of statutory and constitutional provisions is fixed at the time of their promulgation.

Efforts to equate legal meaning with extralegal linguistic facts reveal the need for those engaged in debates about legal meaning to look closely both at the diverse senses in which that term can be used in ordinary conversations and at the grounds on which we normally determine what utterances mean. Insofar as participants in legal debates make claims about linguistic meaning, they enter a domain intensely studied by linguists and philosophers of language, whose expertise lawyers may ignore at our peril. So believing, philosophers increasingly insist that they can bring clarity, and in some cases resolution, to debates about legal meaning.<sup>11</sup>

Though deeply respectful of the insights that philosophers of language can bring to legal problems, my examination of claims of meaning in ordinary conversation refutes suggestions that purely linguistic norms could resolve central debates about legal meaning. Surprisingly or not, claims of meaning in ordinary conversation—especially regarding the kind of directive utterances that most closely resemble legal dictates or stipulations<sup>12</sup>—can have the same diversity of senses as claims of legal meaning.<sup>13</sup> As a result, linguistic analysis and the philosophy of language lack the tools to settle controversies in legally disputable cases. Determinations of legal meaning, I thus argue, must rely in part on distinctively legal norms.

With the challenge thus clarified, I turn to an examination of theories of statutory and constitutional interpretation. Such

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<sup>11</sup> See, for example, Marmor, *The Language of Law* at 6–9 (cited in note 4); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in Andrei Marmor and Scott Soames, eds, *Philosophical Foundations of Language in the Law* 217, 217 (Oxford 2011); Scott Soames, *What Vagueness and Inconsistency Tell Us about Interpretation*, in Marmor and Soames, eds, *Philosophical Foundations* 31, 31 (cited in note 11); Soames, 6 *NYU J L & Liberty* at 231 (cited in note 4); Solum, 89 *Notre Dame L Rev* at 479 (cited in note 6).

<sup>12</sup> See Soames, 82 *Fordham L Rev* at 603–06 (cited in note 6) (noting that “since the paradigmatic aim of legal speech is authoritative stipulation, its natural counterparts include ordinary commands, firm requests, or action-guiding directives, rather than cooperative exchanges of information”).

<sup>13</sup> In terms that philosophers of language might find more precise, we could say alternatively—as I am grateful to the philosopher of language Professor Mark Richard for suggesting in a very helpful conversation—that the challenge is to resolve reasonable uncertainty or debate about the proposition that a particular, context-sensitive legal utterance expresses. But claims or debates about meaning are familiar in both ordinary conversation and law, whereas assertions about the propositions that context-sensitive utterances express are not, and I shall therefore use the more familiar vocabulary.

theories present themselves as furnishing the correct or optimal mechanisms for identifying the meaning of legal provisions. But a sharpened understanding of the challenge that these theories confront—made possible by a mapping of possible referents for claims of legal meaning—enables an enriched appreciation of their nature and limits. In particular, examination of textualism, legislative intentionalism, purposivism, and originalism demonstrates that none possesses the resources to make consistent, categorical selections among literal, contextual, real conceptual, intended, reasonable, and interpreted meanings. Examination of theories of statutory and constitutional interpretation in light of the choices that interpreters need to make also yields a more positive insight, facilitated by an important distinction among kinds of interpretive theories. Some theories, including certain versions of textualism and originalism, aspire to select referents for claims of legal meaning, or to exclude otherwise plausible candidates, on a categorical basis—for example, by stipulating that a disputed provision’s legal meaning is always its contextual meaning as framed by the shared presuppositions of speakers and listeners; that legal meaning should never be equated with the legislature’s intended meaning; or that an otherwise erroneous interpreted meaning can never displace an original meaning.<sup>14</sup> By contrast, other interpretive theories, such as those that Professor Ronald Dworkin<sup>15</sup> and Judge Richard Posner<sup>16</sup> have advanced, call for selection among otherwise eligible candidates to supply legal meaning on a case-by-case basis.<sup>17</sup>

The relative inability of theories such as textualism and originalism to make consistent, categorical selections among possible referents for claims of legal meaning should provoke a fresh examination of what we want theories of legal interpretation

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<sup>14</sup> See generally Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw U L Rev 703 (2009).

<sup>15</sup> See, for example, Dworkin, *Law’s Empire* at 400–13 (cited in note 3) (arguing for interpretations that cast legal institutions in the best moral light).

<sup>16</sup> See, for example, Richard A. Posner, *Law, Pragmatism, and Democracy* 57–96 (Harvard 2003) (arguing for legal interpretations that produce the best outcomes); Richard A. Posner, *Overcoming Law* 531–51 (Harvard 1995); Richard A. Posner, *The Problems of Jurisprudence* 454–69 (Harvard 1990); Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo L Rev 1, 1–3 (1996); Richard A. Posner, *Legal Pragmatism Defended*, 71 U Chi L Rev 683, 683–84 (2004).

<sup>17</sup> The same is true of the approach to constitutional adjudication defended in Fallon, 100 Harv L Rev at 1189–94 (cited in note 4) (arguing for legal meanings that are the result of a reflective equilibrium involving diverse kinds of relevant arguments).



to do. In my view, a due appreciation of the nature of the interpretive challenge reveals the hubris of proposals to commit in advance to categorical selections or exclusions among otherwise plausible referents for claims of legal meaning. As I explain, interpretive eclecticism,<sup>18</sup> which need not be lawless, permits better responses to the complexities that a probing of the concept of legal meaning reveals.

This Article develops as follows. Part I demonstrates that participants in legal debates frequently cite a variety of phenomena as fixing or constituting the meaning of statutory and constitutional provisions. Part II shows that the diversity of referents for claims of legal meaning does not reflect a crude failure of lawyers and judges to grasp what “meaning”—as that term is used in ordinary conversation—means. In nonlegal as much as in legal conversation, there are frequently multiple candidates to furnish the meaning of prescriptive utterances. In such cases, Part II argues, purely linguistic norms may fail to pick out a uniquely correct choice. Given the inability of purely linguistic standards to identify correct referents for claims of legal meaning, Part II concludes that standards for the determination of legal meaning are necessarily internal to legal practice and require interpreters to exercise a form of legally constrained judgment or choice. Part III examines leading theories of statutory and constitutional interpretation—including textualism, legislative intentionalism, purposivism, and originalism—and appraises their respective capacities to identify uniquely correct referents for claims of legal meaning. It shows that none of these theories possesses the resources to perform this task without reliance on relatively ad hoc normative judgments. With the limitations of leading interpretive theories thus illumined, Part IV addresses the general question of the desiderata that a theory of statutory interpretation ought to satisfy. It argues against a categorical approach to the resolution of disputed claims of legal meaning and instead endorses case-by-case decisionmaking.

## I. VAGARIES OF LEGAL MEANING

Lawyers, judges, and legal scholars familiarly debate the meaning of legal provisions. By nearly all accounts, their shared

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<sup>18</sup> For a related approach, see Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 124–25, 148–49 (Harvard 1990) (defending an “eclectic” approach to First Amendment adjudication).

concern involves the message or proposition that statutory or constitutional language expresses.<sup>19</sup> But frequently participants in legal debates implicitly point to different phenomena as defining the meaning of statutory or constitutional language. Their disagreement, in other words, goes beyond differing conclusions about how to interpret the same evidence. Disputants not infrequently point to different purported sources or determinants of legal meaning.

At this point, I have no interest in adjudicating the correctness of various possible senses of meaning or the propriety of invoking those diverse senses as referents for claims of legal meaning. In subsequent parts of this Article, I shall take up that challenge. Here, my sole purpose involves explication.

Before going further, I should say a word about vocabulary. Because I want to explore the relationship between legal meaning and conversational meaning, the vocabulary that I use in this Part reflects my sensitivity to parallels between claims of meaning in legal and nonlegal contexts. As a result, in some instances I shall draw on terminology and distinctions developed by philosophers of language. To a surprising extent, however, philosophers of language have failed to converge on a common vocabulary. Moreover, insofar as a standard vocabulary has emerged, it has failed to draw distinctions that legal analysts have emphasized and that, as I argue in Part II, have important analogues in ordinary conversation. Accordingly, in identifying possible referents for claims about the meaning of prescriptive utterances—first in legal discourse, and later in ordinary conversation—I shall use the terminology that I find most linguistically and intuitively helpful, rather than try to track the terminology of any particular philosopher.

#### A. Varieties of, or Divergent Referents for, Claims of Legal Meaning

In debates about legal meaning and interpretation, participants' references to legal meaning sometimes invoke or appeal to each of the following: (1) semantic or literal meaning; (2) contextual meaning as framed by shared presuppositions of speakers and listeners, including shared presuppositions about

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<sup>19</sup> For a partial dissent, see Greenberg, *Legislation as Communication* at 217 (cited in note 11).

application and nonapplication; (3) real conceptual meaning; (4) intended meaning; (5) reasonable meaning; and (6) interpreted meaning.

1. Semantic or literal meaning.

Roughly speaking, a statement’s semantic or literal meaning is the meaning that it would have for someone operating solely with dictionary definitions,<sup>20</sup> rules of grammar, and other general propositions bearing on how the meaning of a sentence emerges from the combination of its elements.<sup>21</sup> Participants in legal discourse frequently assume or argue that a legal provision’s semantic or literal meaning determines its legal meaning. For example, nearly everyone assumes that when the Constitution says that the president must “have attained to the Age of thirty five Years,”<sup>22</sup> “thirty five Years” means thirty-five years. Textualists sometimes say that other factors otherwise pertinent to legal interpretation cannot contradict a provision’s plain or literal meaning.<sup>23</sup> Others maintain even more categorically that a statute’s plain or literal meaning constitutes its legal meaning.<sup>24</sup>

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<sup>20</sup> For brevity of exposition, I put a number of small complexities to one side. See, for example, Geis, 73 Wash U L Q at 1134 (cited in note 5) (pointing out that “dictionary definitions are not definitions at all, but guides to usage, and quite vague guides at that”).

<sup>21</sup> See Marmor, *The Language of Law* at 22–23 (cited in note 4).

<sup>22</sup> US Const Art II, § 1, cl 5.

<sup>23</sup> See, for example, Scalia, *Common-Law Courts* at 16 (cited in note 8) (“[W]hen the text of a statute is clear, that is the end of the matter.”); John F. Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2434 n 179 (2003) (“[T]he modern textualists’ concerns come into play only when courts use background statutory purpose to contradict or vary the clear meaning of a specific statutory provision.”) (emphasis omitted).

<sup>24</sup> See, for example, John F. Manning, *Second-Generation Textualism*, 98 Cal L Rev 1287, 1288 (2010) (“Textualism maintains that judges should seek statutory meaning in the semantic import of the enacted text.”); John F. Manning, *Competing Presumptions about Statutory Coherence*, 74 Fordham L Rev 2009, 2010 (2006) (defining textualism as “a philosophy that gives precedence to a statute’s semantic meaning, when clear”). For a discussion of the plain-meaning approach to statutory interpretation, see generally Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S Ct Rev 231.

2. Contextual meaning as framed by the shared presuppositions of speakers and listeners, including shared presuppositions about application and nonapplication.

Philosophers of language sometimes draw a distinction between semantics, which is concerned with the context-independent meaning of words, phrases, and sentences, and pragmatics, which involves the meaning of utterances in particular contexts.<sup>25</sup> Even if the vocabulary is unfamiliar, the distinction between the literal meaning of sentences and the contextual meaning of particular utterances of those sentences should not occasion controversy.<sup>26</sup> Nor should it be controversial that legal meaning is sometimes, perhaps typically, defined by contextual rather than semantic meaning.<sup>27</sup>

As Justice Scalia points out, “[n]ail in a regulation governing beauty salons has a different meaning from nail in a municipal building code.”<sup>28</sup> In a case of this kind, context disambiguates an otherwise ambiguous term. In a different kind of example, Judge Frank Easterbrook, another leading textualist, asserts that context can restrict the communicative significance of a statute’s literal language. As a case in point, he offers criminal statutes that include no express exception for self-defense.<sup>29</sup> In the context of the Anglo-American legal tradition, he argues, such an exception is implicitly understood and

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<sup>25</sup> See, for example, Patrick Griffiths, *An Introduction to English Semantics and Pragmatics* 153 (Edinburgh 2006) (“Pragmatics is about the use of utterances in context, about how we manage to convey more than is literally encoded by the semantics of sentences.”). By contrast, “[s]emantics is the study of context-independent knowledge that users of a language have of word and sentence meaning.” *Id.* at 21.

<sup>26</sup> Philosophers of language frequently refer to the role of context in furnishing the meaning of what a sentence communicates as one of “pragmatic enrichment.” See, for example, Andrei Marmor, *The Pragmatics of Legal Language*, 21 *Ratio Juris* 423, 423 & n 1 (2008). Using a more technical vocabulary, Professor Soames identifies what I call “contextual or pragmatic meaning” with what a sentence “was used to assert or stipulate” on a particular occasion of its utterance. Soames, 82 *Fordham L Rev* at 600 (cited in note 6). Professor Solum labels a similar conception of an utterance’s meaning its “communicative content.” Solum, 89 *Notre Dame L Rev* at 484 (cited in note 6).

<sup>27</sup> As Professor John F. Manning has noted, modern adherents to both textualist and purposivist interpretive theories agree about the frequently decisive significance of context. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum L Rev* 70, 73, 79–80 (2006). See also Scalia and Garner, *Reading Law* at 16 (cited in note 4).

<sup>28</sup> Scalia and Garner, *Reading Law* at 20 (cited in note 4).

<sup>29</sup> See Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 *Harv L Rev* 1913, 1913–14 (1997).

requires no articulation.<sup>30</sup> If Easterbrook is correct, it is not because the implicit understanding of a statute’s reach is necessarily limited to cases that the legislature and its immediate audience would have foreseen and expected the statute to control. Statutes routinely apply to factual situations that no one specifically anticipated. Nevertheless, shared background presuppositions regarding application and nonapplication can frame or limit a statute’s meaning.

One further example should suffice to illuminate the relationship of semantic meaning to contextual meaning and the resulting potential for controversy in the identification of legal meaning. *Smith v United States*<sup>31</sup> presented the question whether a criminal defendant who had attempted to trade a gun for drugs fell within a statute that enhanced the penalty for drug offenses for any person who “uses or carries a firearm” in the course of drug trafficking.<sup>32</sup> The majority held that the penalty-increasing provision applied, essentially in reliance on its semantic meaning.<sup>33</sup> To trade an item is one way to “use” it in the literal sense.<sup>34</sup> Justice Scalia dissented in an opinion that he has subsequently cited as epitomizing his textualist interpretive philosophy.<sup>35</sup> According to him, interpretation should reflect “ordinary meaning,” and “[t]he ordinary meaning of ‘uses a firearm’ does *not* include using it as an article of commerce.”<sup>36</sup> If Scalia has an arguable position—as he surely does, even if one ultimately disagrees with it—it is not because of anything about the meaning of “use” or even “uses a firearm” that a dictionary or a grammar book would reveal, but because it is more apt to equate statutory meaning with contextual meaning as framed by the shared presuppositions of speakers and listeners.<sup>37</sup> Contextual meaning (as thus defined) can of course itself be vague

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<sup>30</sup> See *id.* But see *United States v Oakland Cannabis Buyers’ Cooperative*, 532 US 483, 490 (2001) (Thomas) (terming it “an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute”).

<sup>31</sup> 508 US 223 (1993).

<sup>32</sup> *Id.* at 227, quoting 18 USC § 924(c)(1).

<sup>33</sup> *Smith*, 508 US at 227–31.

<sup>34</sup> *Id.* at 230.

<sup>35</sup> See Scalia, *Common-Law Courts* at 23–24 (cited in note 8).

<sup>36</sup> *Smith*, 508 US at 242 n 1 (Scalia dissenting).

<sup>37</sup> According to Professor Lawrence M. Solan, the “ordinary meaning” of language in context is often rooted in prototypes, or in prototypical rather than literal uses. Lawrence M. Solan, *The New Textualists’ New Text*, 38 *Loyola LA L Rev* 2027, 2039–44 (2005).

or disputable.<sup>38</sup> Clearly, however, there can be a distinction between a statute's semantic meaning and its contextual meaning as framed by shared presuppositions, sometimes including presuppositions about applications and nonapplications.

### 3. Real conceptual meaning.

Although contextual meaning as framed by the shared presuppositions of speakers and listeners depends partly on its widely understood applications and nonapplications, lawyers and judges sometimes argue that the meaning of a legal provision must be applied in ways that might have surprised those who enacted it, as well as most of their contemporaries. An example comes from the Equal Protection Clause of the Fourteenth Amendment.<sup>39</sup> Almost no one believes that the Equal Protection Clause was widely understood at the time of its ratification to bar discrimination against women. Nevertheless, some argue that when legal provisions employ moral concepts, such as that of equality, then legal meaning depends on moral meaning, truth, or reality.<sup>40</sup> If so, the Equal Protection Clause may forbid gender-based discrimination, even if the generation that ratified it did not so recognize.<sup>41</sup> Others make similar claims about the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>42</sup> Even if the generation that adopted that clause did not regard the death penalty as cruel and unusual, capital punishment may be cruel and unusual as a matter of moral fact, and if so, it is argued, the clause's prohibition should apply.

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<sup>38</sup> See id at 2048–53 (arguing that “[o]rdinary [m]eaning is [h]ard to [f]ind”).

<sup>39</sup> US Const Amend XIV, § 1.

<sup>40</sup> See generally, for example, Michael Moore, *Moral Reality*, 1982 Wis L Rev 1061; Michael S. Moore, *Moral Reality Revisited*, 90 Mich L Rev 2424 (1992). See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution 7–10* (Harvard 1996).

<sup>41</sup> See Steven G. Calabresi and Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex L Rev 1, 2–15 (2011) (distinguishing between the original meaning of the Equal Protection Clause and original expectations concerning its application, and arguing that its original public meaning forbade sex-based discrimination that tended to subordinate women even if most of the public did not so apprehend in 1868).

<sup>42</sup> See, for example, Mark D. Greenberg and Harry Litman, *The Meaning of Original Meaning*, 86 Georgetown L J 569, 603–13 (1998).

#### 4. Intended meaning.

In debates about statutory interpretation, it is frequently argued that the touchstone for determining a statute’s meaning is the intent of the legislature.<sup>43</sup> The idea of legislative intent is complex and ambiguous in multiple ways.<sup>44</sup> Different authors use it to refer to the “illocutionary” intent of the members of the legislature to say what a statute says;<sup>45</sup> the psychological intentions of legislators to change or not change the law in particular ways (as illuminated, for example, by legislative history);<sup>46</sup> the purposes that the legislature sought to achieve;<sup>47</sup> and a collective or group intention to effect reasonable changes in the law by adopting statutory or constitutional language.<sup>48</sup> For now, suffice it to say that all of these usages find resonance in judicial decisions. In particular, in a once broadly accepted but now more controversial practice, courts sometimes conduct elaborate canvasses of legislative history, including committee reports and the statements of prominent proponents, in their efforts to ascribe meaning to vague or ambiguous terms.<sup>49</sup> In the constitutional domain, some originalists argue for defining

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<sup>43</sup> See, for example, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U Chi L Rev 800, 817 (1983) (“The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”). See also generally Stanley Fish, *There Is No Textualist Position*, 42 San Diego L Rev 629 (2005); Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 Cardozo L Rev 1109 (2008).

<sup>44</sup> See Richard Ekins, *The Nature of Legislative Intent* 13, 15–47, 218–43 (Oxford 2012) (distinguishing various conceptions of legislative intent and defending as central the intention to change the law in the complex, reasoned way that a statute or a constitutional provision does).

<sup>45</sup> See, for example, Soames, 6 NYU J L & Liberty at 242 (cited in note 4). This seems to be so minimal a conception of legislative intent as to be unobjectionable even to textualists. See, for example, John F. Manning, *Textualism and Legislative Intent*, 91 Va L Rev 419, 431–32 (2005) (denying that a legislature has a collective intent beyond the text that it enacts).

<sup>46</sup> See, for example, Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va L Rev 1295, 1335–60 (1990).

<sup>47</sup> See, for example, Soames, 6 NYU J L & Liberty at 244 (cited in note 4).

<sup>48</sup> See, for example, Ekins, *The Nature of Legislative Intent* at 218–43 (cited in note 44).

<sup>49</sup> For a recent defense of this practice by a retired Supreme Court justice, see John Paul Stevens, *Law without History?* (The New York Review of Books, Oct 23, 2014), archived at <http://perma.cc/ZR4L-2KNM>, reviewing Robert A. Katzmann, *Judging Statutes* (Oxford 2014). References to the intent of the Framers are undoubtedly subject to the same vagaries and indeterminacies as references to the intent of legislatures enacting ordinary statutes.

constitutional meaning by reference to the intent of the Framers.<sup>50</sup>

### 5. Reasonable meaning.

In their highly influential *Legal Process* materials,<sup>51</sup> Professors Henry Hart and Albert Sacks advanced a theory of interpretation that counseled interpreters to view statutes as the products of reasonable legislators seeking to promote reasonable goals through reasonable means.<sup>52</sup> The resulting equation of statutory meaning with reasonable meaning has become controversial. Some object that judges charged with ascribing reasonable meanings to statutes will impermissibly substitute their personal, normatively charged conceptions of reasonableness for the policy judgments that statutes actually reflect.<sup>53</sup> Nevertheless, lawyers and judges frequently assert that the meaning of a statutory or constitutional provision is the meaning that reasonable legislators would have intended it to have or that reasonable people would have understood it as having.<sup>54</sup>

Although sometimes defined in terms of the purposes of a reasonable legislature, reasonable meaning can differ from an actual legislature's intended meaning. In perhaps the most familiar (though not the exclusive) usage of the term, "intended meaning" refers to the empirical psychological intentions of particular members of Congress, as identified by excursions into

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<sup>50</sup> See, for example, Larry Alexander, *Originalism, the Why and the What*, 82 *Fordham L Rev* 539, 540 (2013).

<sup>51</sup> Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1378 (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds) (urging interpreters to presume that the legislature consists of "reasonable persons pursuing reasonable purposes reasonably").

<sup>52</sup> See *id.* at 1374–80.

<sup>53</sup> See, for example, Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 *Minn L Rev* 241, 251 (1992) ("[I]f I ask what 'reasonable people pursuing reasonable purposes reasonably' would have wanted in a given context, am I not likely to assume that those reasonable people are similar to the reasonable person I know best—myself—and, thus, would want what I think is the right answer?").

<sup>54</sup> Even textualists often equate the meaning of a statute with the meaning that a reasonable person would have ascribed to it. See, for example, Manning, 106 *Colum L Rev* at 91 (cited in note 27) (noting that textualists determine statutory meaning based on "evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words"). See also Scalia and Garner, *Reading Law* at 16 (cited in note 4) ("In their full context, words mean what they conveyed to reasonable people at the time they were written.").



legislative history.<sup>55</sup> By contrast, reasonable meaning depends on the imputed aims of hypothetical, reasonable legislators,<sup>56</sup> sometimes with respect to matters on which the legislative history sheds no specific light.

#### 6. Interpreted meaning.

The traditional doctrine of stare decisis prescribes adherence to prior judicial interpretations of statutes and constitutional provisions, even when a prior interpretation might be adjudged mistaken as a matter of first impression.<sup>57</sup> As the Supreme Court affirmed in a recent case, adherence to precedent “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>58</sup> In applying the doctrine of stare decisis, judges and lawyers frequently equate legal meaning with interpreted meaning. At the same time, the Court invariably characterizes stare decisis as a principle of policy, subject to exceptions, such that the doctrine’s authority in any particular case may occasion debate.<sup>59</sup> Despite its seemingly entrenched status, some originalists contend that stare decisis has no proper application in constitutional cases.<sup>60</sup> Theirs remains a distinctly minority view, however.

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<sup>55</sup> See, for example, Zeppos, 76 Va L Rev at 1335–60 (cited in note 46).

<sup>56</sup> See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 677 & n 11 (1997); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv L Rev 370, 370–71 (1947).

<sup>57</sup> See *United States v Shaughnessy*, 234 F2d 715, 719 (2d Cir 1955) (“Stare decisis has no bite when it means merely that a court adheres to a precedent it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the Court has come to regard it as unwise or unjust.”). See also Larry Alexander, *Constrained by Precedent*, 63 S Cal L Rev 1, 4 (1989); Frederick Schauer, *Precedent*, 39 Stan L Rev 571, 575 (1987).

<sup>58</sup> *Michigan v Bay Mills Indian Community*, 134 S Ct 2024, 2036 (2014), quoting *Payne v Tennessee*, 501 US 808, 827 (1991).

<sup>59</sup> See, for example, *Seminole Tribe of Florida v Florida*, 517 US 44, 63 (1996).

<sup>60</sup> See, for example, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const Commen 289, 291 (2005); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const Commen 257, 269 (2005); Gary Lawson, *The Constitutional Case against Precedent*, 17 Harv J L & Pub Pol 23, 24 (1994).

## B. Further Evidence-Based Disagreement about Legal Meaning

In emphasizing that disputes about legal meaning can turn on deeper disagreements about the phenomena to which claims of meaning properly refer, I do not mean to imply that this is the only source of puzzlement, uncertainty, or debate about statutory or constitutional meaning. Other disagreements involve the proper weighing of evidence. For example, people might agree about the proper grounds for a claim of legal meaning in a particular case—for instance, that the controlling consideration is a provision’s intended meaning, or its contextual meaning as framed by the shared presuppositions of speakers and listeners, or its interpreted meaning—but nevertheless disagree about the content of the intended, contextually defined, or interpreted meaning. Not infrequently, the evidence may leave reasonable doubt about the proper conclusion.

The possibility of evidence-based disagreement adds an enormously important layer of complexity to debates about legal meaning. In assessing theories of legal interpretation such as textualism, legislative intentionalism, purposivism, and originalism—as I do later in this Article<sup>61</sup>—it will therefore be important to consider such theories’ respective capacities to resolve questions about how to specify the content of such disputed candidates to furnish legal meanings as contextually defined, intended, and reasonable meanings. For purposes of conceptual clarification, however, disputes about the proper referents for claims of legal meaning have a logical primacy. We need to know what we are looking for before we can ascertain whether the evidence sufficiently establishes what needs to be proved.

## II. CONVERSATIONAL MEANING AND ITS LIMITS AS A GUIDE TO LEGAL MEANING

Given the contested nature of legal interpretation, participants in legal debates have sometimes sought to clarify and possibly resolve points of theoretical contention by examining what “meaning” means in ordinary, nonlegal discourse. As noted above, textualists such as Justice Scalia sometimes assert that, absent special reasons to conclude the contrary, legal meaning, like conversational meaning, reflects the way in which ordinary

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<sup>61</sup> See Part III.A.

people use and understand words in ordinary contexts.<sup>62</sup> Some originalists suggest that the meaning of legal provisions cannot change because of general facts about how language works: the communicative content of an utterance is fixed at the time of its utterance.<sup>63</sup> More recently, the philosopher of language Scott Soames has developed a theory of legal interpretation, which he calls “deferentialism,” that rests on general claims about how we ascertain meaning in “ordinary speech.”<sup>64</sup>

In seeking to understand legal meaning, attention to the norms that govern ascriptions of meaning in ordinary conversation is almost self-evidently appropriate. The laws of the United States are written in English by English speakers and are addressed primarily to an audience of English speakers. Beyond any shadow of a doubt, the proper resolution of issues of legal meaning and interpretation can depend, in some instances and to some extent, on the proper resolution of general issues about language use as illuminated by work within the philosophy of language.

Here, however, my interest is specific, not general. It involves whether linguistic norms bearing on the determination of meaning in ordinary conversation can resolve disputed questions concerning legal meaning, and the kind and weight of evidence that would be necessary to establish particular claims. Although attention to the meaning of “meaning” in ordinary conversation will prove illuminating in many ways, the flat answer to the foregoing question is no.

To summarize my conclusions, the same ambiguity in the meaning of “meaning” that permits dispute about the proper referent for claims of legal meaning—or the sense of meaning that ought to constitute legal meaning in a particular case—also exists with regard to the meaning of directive utterances

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<sup>62</sup> See note 10 and accompanying text. See also Scalia and Garner, *Reading Law* at 16 (cited in note 4) (“In their full context, words mean what they conveyed to reasonable people at the time they were written.”); *Chisom v Roemer*, 501 US 380, 410 (1991) (Scalia dissenting) (“[O]ur job is to determine whether the ordinary meaning includes [particular cases], and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.”) (emphasis omitted).

<sup>63</sup> Professor Solum has labeled this view “the Fixation Thesis” and has characterized it as a defining tenet of constitutional originalism. Solum, 82 *Fordham L Rev* at 459 (cited in note 2). See also Lawrence B. Solum, *Should We Be Originalists?*, in Robert W. Bennett and Lawrence B. Solum, *Constitutional Originalism: A Debate* 36, 36–63 (Cornell 2011).

<sup>64</sup> Soames, 82 *Fordham L Rev* at 597–99 (cited in note 6).

in nonlegal settings. There are many, almost precisely parallel, possible senses of meaning in ordinary conversation and thus an analogous array of potential referents for claims of conversational meaning. Purely linguistic norms frequently provide no authoritative resolution of disputes about appropriate referents. In any case, despite important parallels, salient differences between legal and ordinary, nonlegal discourse would frustrate any effort simply to apply what we might think of as the model of conversational meaning—even to determine what, for legal purposes, ought to count as contextual meaning as framed by the shared presuppositions of speakers and listeners, intended meaning, or reasonable meaning. In short, at the end of our exploration of claims of meaning in ordinary conversation, the challenges confronting judges, lawyers, and other legal interpreters will remain largely as we left them at the end of Part I. Indeed, I would expect that attention to the range of possible referents for claims of meaning in ordinary conversation would, if anything, fortify, rather than refute, arguments that in many cases there are multiple plausible referents for claims of legal meaning.

In exploring questions involving the meaning of prescriptive statements or stipulations in nonlegal contexts, I do not propose to summarize debates within the philosophy of language or depend on a particular position within those debates.<sup>65</sup> At some points, as explained above, my terminology will deviate from that which philosophers of language most commonly employ. Rather, operating with the linguistic intuitions of a competent speaker of English, I hope more directly to persuade English-speaking readers that their linguistic intuitions about the meaning of directives or prescriptive statements in ordinary, nonlegal conversation may sometimes be conflicted, inconsistent, or uncertain.

In proceeding in this way, I assume that “meaning” is a “folk” concept, the extension or proper usage of which depends heavily on how ordinary people use the term and would apply it in testing cases.<sup>66</sup> If so, philosophers of language who propound

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<sup>65</sup> For an introductory survey of issues and positions, see Jeff Speaks, *Theories of Meaning* (The Stanford Encyclopedia of Philosophy, Apr 23, 2014), archived at <http://perma.cc/P3QD-TKHF>.

<sup>66</sup> The notion of a “concept” presents a number of complications in its own right that I shall not attempt to pursue here. See Eric Margolis and Stephen Laurence, *Concepts* § 1 (The Stanford Encyclopedia of Philosophy, May 17, 2011), archived at <http://perma.cc/V2WG-XQ88> (discussing disputes about the nature of concepts that

theories or analyses of meaning are engaged in an enterprise in which ordinary English speakers are entitled to have views of their own.<sup>67</sup>

#### A. Some Meanings of Conversational “Meaning”

In probing possible meanings of “meaning” in nonlegal conversation, I take as my principal example an analogue to a chestnut of legal debates about statutory interpretation: “No vehicles in the park.”<sup>68</sup> But I want to remove the hypothesized directive from its traditional legal context by imagining that the wealthy owner of a large, privately held tract of land decides to open it for recreational use as a park, hires a gatekeeper, and delivers the instruction—which she posts publicly—“No vehicles are allowed in the park.” Let us also imagine that she issues a further prohibition: “People of good character only.” For a variety of purposes, ordinary people in ordinary conversations would naturally and appropriately talk about the meaning of these proscriptions. As in law, the question thus arises: When we talk about their meaning, to what do we refer?

As the following analysis will reveal, the roster of possible senses of meaning—and thus of what I am calling possible “referents” for claims about the meaning—of directive utterances in ordinary conversation closely parallels Part I’s catalogue of possible referents for claims of legal meaning.

##### 1. Semantic or literal meaning.

Directives such as “No vehicles in the park” or “People of good character only” have semantic or literal meanings, determinable in the same ways as the semantic or literal meanings of

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“often reflect deeply opposing approaches to the study of the mind, to language, and even to philosophy itself”). Following Professor Frank Jackson, I shall assume that the term “concept” refers to “the possible situations covered by the *words* we use to ask our questions.” Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* 33 (Oxford 1998). A folk concept, roughly speaking, is one rooted in the understandings and usages of ordinary people. This assumption makes linguistic intuitions relevant because “[i]n as much as [one’s] intuitions are shared by the folk, they reveal the folk theory” that presumptively defines a folk concept’s extension. *Id.* at 37.

<sup>67</sup> For a defense of conceptual analysis as a tool of jurisprudential inquiry, see generally Ian P. Farrell, *H.L.A. Hart and the Methodology of Jurisprudence*, 84 *Tex L Rev* 983 (2006).

<sup>68</sup> This much-discussed example apparently originated in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv L Rev* 593, 607 (1958). For a more recent discussion, see Scalia and Garner, *Reading Law* at 36–38 (cited in note 4).

legal provisions. A prescription's literal meaning can, of course, be vague or ambiguous, as the example of "No vehicles in the park" immediately brings out: dictionary definitions of "vehicle" are unlikely to rule baby carriages or tricycles decisively in or out.<sup>69</sup> Perhaps more important, however, is that a directive's or an assertion's literal meaning is frequently not what a competent speaker of the language would understand its actual meaning to be in the context in which it is uttered. For example, an emergency room doctor who tells a patient "You are not going to die" does not promise eternal life but offers a short-term prognosis.<sup>70</sup>

2. Contextual meaning as framed by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications.

In ordinary conversation, features of context—and expected applications of words and phrases within that context—play a vital role that philosophers of language call "pragmatic enrichment."<sup>71</sup> For example, the word "bay" can refer to either a horse or a body of water, but the context of a reference to a bay will ordinarily remove all ambiguity. In the case of "No vehicles in the park," features of context will indicate the park to which the exclusion applies and might similarly indicate whether it encompasses baby strollers, tricycles, or bicycles. For example, if the park owner issued the further directive "Children of all ages welcome," that bit of context might indicate that baby strollers and tricycles should not be classified as excluded "vehicles."

The imagined directive "People of good character only" introduces further complexities. Let us imagine that in the Jim Crow South, this formulation would have been widely understood, in context, to indicate that only Caucasians could enter. More specifically, I want to assume that the author of the directive would have intended—and most of its immediate audience would have anticipated—its application to exclude all African Americans. In this context, there can be little doubt that the

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<sup>69</sup> For example, Black's Law Dictionary defines "vehicle" as "an instrument of transportation or conveyance" but without reference to whether that definition would apply to conveyances designed exclusively for children. *Black's Law Dictionary* 1788 (Thomson Reuters 10th ed 2014). It then immediately offers a second definition that restricts the term to "wheeled conveyance[s] that . . . [are] self-propelled." *Id.*

<sup>70</sup> See Marmor, 21 *Ratio Juris* at 426 (cited in note 26).

<sup>71</sup> See, for example, Marmor, *The Language of Law* at 22–27 (cited in note 4).

utterance's contextual meaning, as framed by the shared presuppositions of speakers and listeners, is a candidate to supply its meaning. But the definition of a prescription's contextual meaning in terms of its understood or expected applications may rankle in this case—and may raise the question whether its meaning, or even its contextual meaning, is always so limited.

### 3. Real conceptual meaning.

With our eyes still on the Jim Crow South, let us now suppose that an African American of impeccable character arrives at the park's gate seeking admission and is told that the contextual meaning of "People of good character only" excludes all blacks. The African American protests: "Even if most white people around here think that 'People of good character only' should be applied to exclude all blacks, having good character, which the directive says is what matters, is a matter entirely independent of race. When the directive's meaning is understood correctly, I am entitled to get in."

Has this imagined protestor made the same sort of linguistic mistake as a patient in an emergency ward who interprets "You are not going to die" as having assured her of immortality? The answer, I think, is no. Even in the context of its utterance, "good character" may very well mean good character. Consider this example: a parent who instructs a child "Never be cruel" might well be misunderstood if taken to mean "Never do anything that I, as currently informed, think to be cruel."<sup>72</sup> The instruction never to be cruel at least as plausibly means—even in context—never to do anything that really is cruel.<sup>73</sup> Might the same be the case with "People of good character only"?

Philosophers of language seem to agree that ordinary usage of some concepts makes their proper application depend on what is really the case, rather than on what most people currently take to be the case, about their extensions. The paradigmatic example involves "natural kinds,"<sup>74</sup> such as gold. At some point in the past, people may have been mistaken about which metal

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<sup>72</sup> For other examples making a similar point, see Greenberg and Litman, 86 *Georgetown L J* at 603–13 (cited in note 42); John Perry, *Textualism and the Discovery of Rights*, in Marmor and Soames, eds, *Philosophical Foundations of Language in the Law* 105, 105 (cited in note 11).

<sup>73</sup> See Greenberg and Litman, 86 *Georgetown L J* at 603–13 (cited in note 42).

<sup>74</sup> Saul A. Kripke, *Naming and Necessity* 134–35 (Harvard 1972). See also, for example, Hillary Putnam, *Mind, Language, and Reality* 215–71 (Cambridge 1975).

objects were and were not gold. Nevertheless, when they said “gold,” they meant to designate the kind of thing that really is gold, defined in terms of its chemical composition. In other words, the meaning of “gold” did not depend on anyone’s expected applications of the concept to particular items or substances—some of which might well have been mistaken—but rather on what gold really is.

If moral concepts work in similar ways, as some philosophers believe,<sup>75</sup> the correct understanding or application of the concept of “good character” depends on what good character really is (as the protestor that I imagined above forcefully asserted) or on the morally best interpretation of the concept of good character.<sup>76</sup> In so saying, I do not imagine myself to be resolving a debate about what “People of good character only” really would have meant if uttered in the Jim Crow South in a context in which most people would have expected its application to exclude non-Caucasians. Ronald Dworkin maintained that directives that include normative concepts are most charitably interpreted in light of the morally best conceptions of those concepts, at least in the context of constitutional law;<sup>77</sup> Lawrence Solum argues instead for an “Original Conceptions” interpretation.<sup>78</sup> Without taking sides for the moment, I mean only to explicate a thoroughly imaginable debate about the sense properly ascribed to claims of meaning in ordinary conversation.

#### 4. Intended meaning.

In the case of an emergency room doctor who assures a patient “You are not going to die,” what may seem crucial is the message, information, or content that the doctor intends to convey. If the patient asks “What did the doctor mean?” what she wants to know is likely to be roughly “What was the doctor trying to tell me?” This recognition supports the identification—

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<sup>75</sup> See, for example, Moore, 1982 Wis L Rev at 1145 n 194 (cited in note 40).

<sup>76</sup> See Ronald Dworkin, *Justice for Hedgehogs* 6–11 (Harvard 2011); Ronald Dworkin, *Justice in Robes* 154–56 (Harvard 2006).

<sup>77</sup> See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L Rev 1249, 1253 (1997).

<sup>78</sup> Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L Rev \*44–50 (forthcoming 2015), archived at <http://perma.cc/PW2C-T4MN>.



often associated with Professor Paul Grice—of the meaning of an utterance with the speaker's intended meaning.<sup>79</sup>

There can, of course, be a gap between what people mean and what they say. The author of the directive "No vehicles in the park" may also have meant to say "Shoes required," but if she did not, "No vehicles in the park" simply does not mean "Shoes required." Nevertheless, a speaker's intended meaning (which may be relevantly analogous to the intent of the legislature, though with an important qualification that I shall discuss below<sup>80</sup>) will often be a good candidate in ordinary conversation to furnish the meaning of an utterance that otherwise would have been unclear. If, for example, it is known whether the park owner intended bicycles either to come within or to fall outside the proscription "No vehicles in the park"—perhaps she had been railing against the hazards that bicycles pose just before issuing her directive—then someone, in conversation, might take that knowledge as determinative of the proscription's meaning.<sup>81</sup>

Rather than treating a speaker's intended meaning as distinct from an utterance's contextual meaning, we could undoubtedly say that a speaker's intentions are one factor, out of many, that a reasonable listener would take account of in determining what I have called an utterance's contextual meaning as framed by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications.<sup>82</sup> But I shall resist that approach. There may be at least some instances in which we could single out the speaker's intended meaning as an independent candidate to furnish an utterance's meaning—as I have suggested, for example, in the case of a patient whose only interest in asking what a doctor's remark meant involves the content that the doctor intended to convey.

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<sup>79</sup> See Marmor, *The Language of Law* at 19 (cited in note 4) ("According to a Gricean view . . . [w]hatever the speaker actually intended to say is the content asserted."); Paul Grice, *Studies in the Way of Words* 117 (Harvard 1989) (characterizing an utterer's meaning as "basic" and other notions of meaning as "(I hope) derivative").

<sup>80</sup> See notes 124–30 and accompanying text.

<sup>81</sup> See Soames, *What Vagueness and Inconsistency Tell Us* at 36 (cited in note 11) (asserting that when meaning is otherwise vague or indeterminate, to grasp what a speaker meant, it is appropriate to "look[] to his reason for making the remark") (emphasis omitted).

<sup>82</sup> See, for example, Soames, 82 *Fordham L Rev* at 598 (cited in note 6) (equating legal meaning with a conjunction of "*what the lawmakers meant*" and what a reasonable person familiar with other contextual factors would understand their words to have meant).

Moreover, even if we accepted that a speaker's intended meaning was ultimately just a factor bearing on an utterance's contextual meaning as framed by the shared presuppositions of speakers and listeners, there would often be heuristic value in singling out the speaker's intended meaning as a potential determinant of the meaning of her utterances because of the contrast or even conflict between it and other possible factors bearing on contextual meaning. If one person says that "No vehicles in the park" includes tricycles because the speaker of the utterance so intended, or that "People of good character only" means "No non-Caucasians" because that is what the speaker meant to communicate, we can understand perfectly well the disagreement that exists when someone else replies, "But that is not what she said, and her private intentions are not determinative of what her directive meant." The issue of the significance of a speaker's intentions—which can sometimes be very real—comes out most clearly if we conceptualize the speaker's intended meaning as an independent candidate to furnish the meaning of an utterance in ordinary conversation.

##### 5. Reasonable meaning.

Suppose that an accident happens within the park. Someone falls and is badly injured or suffers a heart attack. A desperate phone call brings an ambulance to the gate. Does "No vehicles in the park" exclude rescue vehicles even in cases of life-threatening emergency?<sup>83</sup> We might say that it does—perhaps the gatekeeper should admit the ambulance anyway, but if she does so, she will violate her instructions.<sup>84</sup>

But would we necessarily say that? Suppose that the worst happens: The vehicle is excluded, and the victim of the accident dies. The owner returns. The gatekeeper tells her, "I did as you instructed." How might the park owner respond?

She might say, "It was not my intended meaning to exclude ambulances," but she might also say something such as this: "Ordinary principles of conversational interpretation call for us

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<sup>83</sup> For discussions of this example, see Ekins, *The Nature of Legislative Intent* at 276–82 (cited in note 44) (supporting "equitable interpretation"); Timothy Endicott, *Legal Interpretation*, in Andrei Marmor, ed., *The Routledge Companion to Philosophy of Law* 109, 119–20 (Routledge 2012).

<sup>84</sup> See Marmor, *The Language of Law* at 32–33 (cited in note 4) ("Judges may well have a moral obligation to ignore what the law says when not doing so would result in very bad consequences.").

to ascribe a *reasonable meaning* to prescriptions and other utterances unless something about the context indicates otherwise." Think again of the emergency room doctor who assures a patient "You are not going to die." In ordinary conversation, we do not waste time and breath offering elaborations and qualifications of our utterances that ought to be obvious to any reasonable person.<sup>85</sup> And, the park owner might insist, a reasonable person would not understand a prescription of "No vehicles in the park" (given the most plausibly imaginable circumstances of its utterance) to encompass an ambulance in a situation of life-threatening emergency.

Work in pragmatics may support the same conclusion, though, once again, I do not mean to rest my conclusion on any philosophical theory at this point. If I tell a group of friends "Everyone is invited to the party," I do not mean—nor would my listeners reasonably understand me to mean—literally everyone in the world. The reference to "everyone" is impliedly limited.<sup>86</sup> Analogously, the proscription "No vehicles in the park" may be subject to an implicit domain restriction excluding cases of life-threatening emergency.<sup>87</sup>

Because I have described the notion of reasonable meaning as depending on the meaning that a reasonable person would ascribe to an utterance in a particular context, what I am calling "reasonable meaning" could, like the speaker's intended meaning, plausibly be viewed as a subcategory of, or a feature bearing on, contextual meaning as framed by the shared presuppositions of speakers and listeners. Without denying that possibility, I offer a separate account of reasonable meaning to highlight the distinctive significance of moral or practical reasonableness in ascribing meaning to a prescription, especially when neither the speaker nor the speaker's audience is initially likely to foresee—or thus to anticipate how the prescription would apply to—a situation in which the directive's literal application would have jarring consequences. To be concrete, I am imagining that the speaker who says "No vehicles in the park" is thinking about automobiles driven for recreational purposes, not ambulances, and

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<sup>85</sup> See Robert Stalnaker, *Common Ground*, 25 *Linguistics & Philology* 701, 701–02 (2002).

<sup>86</sup> See David Lewis, *On the Plurality of Worlds* 164 (Basil Blackwell 1986) ("[P]art of the ordinary meaning of any idiom of quantification consists of susceptibility to restrictions; and that restrictions come and go with the pragmatic wind.")

<sup>87</sup> See generally Lynsey Wolter, *Domain Restriction*, in Louise Cummings, ed, *The Pragmatics Encyclopedia* 133 (Routledge 2010).

has not turned her attention to the proscription's proper application beyond the paradigm cases that she has in mind. If the contextual meaning of "No vehicles in the park" embraces ambulances, it is not because this was a specifically expected application; and if it does not, it is not because the case of ambulances was specifically understood as not being included, either by the speaker or by her audience at the time that she uttered her directive. The moral reasonableness of a particular ascribed meaning possesses a distinctive importance.

#### 6. Interpreted meaning.

Despite the directive "No vehicles in the park," suppose that the gatekeeper routinely admits an ice cream truck on summer afternoons without incurring objection from the park's owner. When the gatekeeper goes on vacation, a substitute occupies the gatehouse when the ice cream truck arrives. Does the park owner's directive "No vehicles in the park" dictate the exclusion of ice cream trucks? We may suppose that the substitute gatekeeper would have said yes if the matter were one of first impression. But now a history of contrary practice has accumulated. Based on past experience, the truck driver expects to get in. Inside wait families and children who have counted on being able to purchase snacks and cold drinks. In this context, my linguistic intuition tells me that whatever "No vehicles in the park" meant in the first instance, it is at least plausible and possibly correct to say that it has now acquired an interpreted meaning, and that in the context of past interpretive practice, "No vehicles in the park" has come to mean "No vehicles except ice cream trucks (and emergency vehicles)."

Once more, this is admittedly not the only possible way to characterize the resulting state of affairs. For example, we might say that although "No vehicles in the park" applies to ice cream trucks—for surely an ice cream truck is a vehicle—it no longer ought to be given that prohibitory effect. The conclusion that the prohibition applies (even if the gatekeeper should possibly ignore it) indeed might prove irresistible if we began with the premise that a prescription's meaning is conclusively fixed at the time of its utterance.<sup>88</sup> But my linguistic intuitions make

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<sup>88</sup> For a defense of this premise, see Solum, 82 *Fordham L Rev* at 456 (cited in note 2) (asserting that constitutional originalists are united in believing that "the original

me doubt that premise. It now seems widely (though not universally) acknowledged that a poem, play, or novel can sometimes acquire new meaning in light of events subsequent to the time when it was written.<sup>89</sup> And in law, as I have noted, we frequently use “meaning” to refer to “interpreted meaning.”<sup>90</sup> Even if that usage is sometimes controversial, it often provokes no resistance. Fortified by these analogies, I see no reason to exclude the possibility that a prescriptive utterance could acquire an interpreted meaning, including—sometimes, anyway—one that conflicted with its original literal or contextually understood meaning. In such a case, if someone inquires what the prescription means, we might want to explain that a discrepancy has emerged between possible referents for claims of meaning. If the reference is to what the directive initially meant in the context of its utterance, then “No vehicles in the park” applies to ice cream trucks. In another sense, however, “meaning” can refer to the import that a directive has come to have over time—even, I believe, in ordinary conversation.

#### B. Stakes and Interests

Having offered some candidates to define what we might have in mind when we refer in ordinary conversation to the meaning of a prescriptive statement—including semantic or literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, a speaker’s intended meaning, reasonable meaning, and interpreted meaning—I would ask the reader to consult her own linguistic intuitions and consider whether they decisively mark one of these candidates as the uniquely correct meaning of “No vehicles in the park.” For my own part, I can imagine circumstances in which I would credit each of the candidates. Moreover, as I have signaled, this conclusion reinforces my sense that there can be multiple possible referents for claims of legal meaning.

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meaning (‘communicative content’) of the constitutional text is fixed at the time each provision is framed and ratified”).

<sup>89</sup> See, for example, A.P. Martinich, *Four Senses of ‘Meaning’ in the History of Ideas: Quentin Skinner’s Theory of Historical Interpretation*, 3 *J Phil Hist* 225, 233 n 17 (2009) (“As T.S. Eliot insightfully explained . . . the meaning (s-meaning) of a literary work changes as its position in literary history changes with the change of time.”). In Professor A.P. Martinich’s sense, “s-meaning” involves “importance or significance” and “is always relative to some person or group.” *Id.* at 228.

<sup>90</sup> See Part I.A.6.

Even and perhaps especially when we are not self-conscious about the multiplicity of different kinds of possible meaning, our efforts to identify meaning in ordinary conversation are often guided by reasons, interests, or purposes.<sup>91</sup> For many purposes, our central aim may be to grasp the content that a speaker intended to convey. Imagine, for example, an employee who wants to follow her boss's instructions, or a lost motorist trying to follow someone's directions.

Obviously, however, we cannot always or even typically have direct access to speakers' intentions. In addition, the meaning of language depends heavily on convention and broadly shared understandings.<sup>92</sup> If, for example, I know that a rule prescribes "No vehicles in the park," my concern may be to determine whether I will be admitted or excluded if I arrive riding a bicycle or pushing a baby carriage. In cases such as these, my practical interest may pull my focus away from the speaker's intended meaning and toward contextual meaning as framed by a well-informed person's expected applications or—what may be different—toward interpreted meaning.

An interest in maintaining social cooperation on widely agreeable terms may also cut in favor of ascriptions of reasonable meanings in some cases. Indeed, it will frequently be the unreasonableness of crediting what we might think of as a provision's first-blush or prereflective meaning as its actual meaning that triggers a self-conscious awareness of the need for interpretation in the first place.<sup>93</sup> Once more, however, practical as well as theoretical considerations militate against going too far in the direction of treating reasonable meaning as the correct referent for claims of meaning in all conversational contexts. For many reasons and purposes, we want to maintain the distinction between what a reasonable person would have said or meant, if

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<sup>91</sup> See Deirdre Wilson and Dan Sperber, *Relevance Theory*, in Laurence R. Horn and Gregory Ward, eds, *The Handbook of Pragmatics* 607, 610 (Blackwell 2004) ("Human cognition tends to be geared to the maximization of relevance.").

<sup>92</sup> At the same time, it is important to recognize that "the importance of context, which is by definition particular," undercuts any effort to characterize the function of conventions in contributing to conversational or legal meaning as "exhaustive and formal." Ekins, *The Nature of Legislative Intent* at 187 (cited in note 44).

<sup>93</sup> See Richard H. Fallon Jr, *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Role of Values and Judgment within Both*, 99 *Cornell L Rev* 685, 698–703 (2014) (discussing "interpretive dissonance").

sufficiently deliberative and foresighted, and what a person actually did say on a particular occasion.

In cases that I have framed as involving a choice among possible senses of or referents for claims of meaning, one could of course object that any apparent conflict is at most a pseudoconflict. On this view, in talking about the meaning of directives such as "No vehicles in the park" or "People of good character only," we might talk intelligibly about the semantic meaning of the sentences in which they appeared, or about their contextual meaning as framed and limited by expected applications on a particular occasion of utterance, or about real conceptual meaning, the speaker's intended meaning, or reasonable or interpreted meaning. But when we notice that we might sensibly call attention to any of these phenomena, we see that no necessary conflict exists among what I have identified as rival claims of meaning. If one person says that the meaning of "No vehicles in the park" is the utterance's contextual meaning as framed by the shared presuppositions of speakers and listeners, and someone else says that it is the speaker's intended meaning, and a third person says that it is the directive's interpreted meaning, then their disagreement, it might be said, is semantic, not substantive. The appearance of disagreement results only because different people are talking about different things. If they so acknowledged, and if each made clear exactly what she had in mind, they might find that they all actually agreed about what the semantic meaning was, what the contextual meaning as defined by shared presuppositions was, what the speaker's intended meaning was, what the interpreted meaning was, and so forth.

Although this point includes more than a grain of truth, it is often difficult to separate the semantic from the substantive in disputes about legal meaning. The reason is that the ultimate dispute is likely to involve judgments of salience, implicating the question of which sense of meaning ought to be embraced as furnishing a provision's legal meaning in a particular case in light of context-specific interests or concerns. Something similar may be true of many debates about the proper ascription of conversational meaning, as I have illustrated by exploring the proper application of such nonlegal directives as "No vehicles in the park" and "People of good character only."

### C. Addressing a Challenge

A number of philosophers of language who are interested in legal interpretation, as well as a number of philosophically sophisticated law professors, disagree with my claims about the need for choice among multiple candidates to supply legal or conversational meaning.<sup>94</sup> But the terms of disagreement require care in unpacking. The leading figures who have advanced contrary positions—including the philosopher of language Scott Soames and the law professor Lawrence Solum—agree that the term “meaning” can have multiple senses, as I have sought to demonstrate.<sup>95</sup> So recognizing, both nonetheless maintain that there is one sense of meaning that is uniquely fundamental: it represents a linguistic fact of the matter that should anchor all judgments about the proper assignment of meaning to legal provisions and conversational utterances alike.<sup>96</sup> In the view of both, moreover, this purported linguistic fact of the matter does not correspond to any of the multiple possible senses of meaning that Part I and Part II.A elaborated. Soames gives pride of place to what he calls “asserted or stipulated content.”<sup>97</sup> “In general,” Soames writes:

what a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker’s use of *S* to be intended to convey and commit the speaker to.<sup>98</sup>

Professor Solum’s position appears similar to Soames’s. Solum equates the centrally relevant sense of linguistic meaning with

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<sup>94</sup> See, for example, Solum, *The Fixation Thesis* at \*1 (cited in note 78) (arguing that the meaning of legal text is fixed at the time of enactment).

<sup>95</sup> See, for example, Soames, 6 NYU J L & Liberty at 236 (cited in note 4) (“Contemporary philosophy of language and theoretical linguistics distinguish *the meaning of a sentence S* from its *semantic content relative to a context*, both of which are distinguished from (the content of) *what is said, asserted, or stipulated by an utterance of S*.”); Solum *The Fixation Thesis* at \*1 (cited in note 78).

<sup>96</sup> See Solum, *The Fixation Thesis* at \*17–18 (cited in note 78) (distinguishing “meaning in the applicative sense” and “meaning in the purposive sense” from the central case of “meaning in the communicative sense” or “linguistic meaning,” for reasons rooted in “the nature of [ ] communication”) (emphasis and quotation marks omitted); Soames, 6 NYU J L & Liberty at 236 (cited in note 4).

<sup>97</sup> See, for example, Soames, 6 NYU J L & Liberty at 242 (cited in note 4).

<sup>98</sup> Soames, 82 Fordham L Rev at 598 (cited in note 6).



what he calls “communicative content,”<sup>99</sup> which he regards as a function of semantic meaning and the contextual facts that give rise to what philosophers of language call “pragmatic enrichment.”<sup>100</sup>

In light of the multiple possible senses of meaning that I have distinguished, Soames’s and Solum’s conceptions of what they call asserted or communicative content is strikingly open-ended. In Soames’s terms, asserted content “is determined by a variety of factors, including the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of speakers-hearers, and obvious features of the context of utterance.”<sup>101</sup> I have characterized factors such as these as supporting sometimes-divergent senses of meaning and, indeed, have suggested a longer list.<sup>102</sup> But according to Professor Andrei Marmor—who offers another variant of the position that I have associated with Soames and Solum—what I have characterized as diverse senses of meaning are not competing candidates to count as the meaning of prescriptive utterances but are instead “different aspects or different building blocks of communicated content”: “The relation here is more like parts to the whole, not like a choice between ‘it can mean X or it can mean Y.’”<sup>103</sup> In other words, the asserted or communicative content of an utterance depends on, but is not reducible to, semantic or literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, the speaker’s intended meaning, reasonable meaning, and (possibly, but not necessarily) interpreted meaning.

If meaning is identified with asserted, communicative, or communicated content, and if this notion is left where Soames, Solum, and Marmor appear to leave it, then there will be many cases in which I would be left entirely in doubt about exactly what content an utterance communicates. Consider the question whether trading a gun for drugs constitutes “using” a firearm in

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<sup>99</sup> Solum, 89 *Notre Dame L Rev* at 484 (cited in note 6).

<sup>100</sup> Solum, 82 *Fordham L Rev* at 465 n 47 (cited in note 2).

<sup>101</sup> Marmor and Soames, *Introduction*, in Marmor and Soames, eds, *Philosophical Foundations of Language in the Law* at 8 (cited in note 11).

<sup>102</sup> See, for example, Soames, 6 *NYU J L & Liberty* at 241 (cited in note 4) (asserting that “what language users intend to say, assert, or stipulate is a crucial factor, along with the linguistic meanings of the words they use, in constituting what they do say, assert, or stipulate”) (emphasis omitted).

<sup>103</sup> E-mail from Andrei Marmor to Richard Fallon Jr (July 4, 2014) (on file with author).

connection with drug trafficking, or whether the directive “Persons of good character only,” if uttered in the Jim Crow South, would have excluded all African Americans. In cases such as these, my objection to a view that equates meaning with a linguistic fact of the matter involving what a reasonable reader or listener would understand the speaker to have communicated is partly conceptual and partly practical. In cases of puzzlement or uncertainty about the meaning of prescriptive utterances, we need to make judgments concerning which meaning it is most appropriate to ascribe under the circumstances. Think again of “No vehicles in the park.” To tell a reasonable hearer or reader who is puzzled about the meaning of that proscription in a particular case that she should regard the utterance’s meaning as a matter of linguistic fact—defined by what an imagined reasonable person would take it to mean—obscures the nature of the judgment that the imagined reasonable person would need to make.

If in doubt, the reasonable person cannot proceed by taking or imagining the outcome of an opinion poll.<sup>104</sup> Uncertainty and division seem inevitable. So the question becomes how a reasonable person, taking due account of what others would think, would resolve the question for herself. So framed, the question is not one about what the interpreter would wish that an utterance meant if she could give it any content that she might prefer. Linguistic norms matter. Accounts of the shared presuppositions of speakers and listeners may range from the highly plausible to the patently tendentious. Nonetheless, the concept of reasonableness possesses normative as well as descriptive content.<sup>105</sup> To

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<sup>104</sup> See Alan D. Miller and Ronen Perry, *The Reasonable Person*, 87 NYU L Rev 323, 391 (2012) (maintaining that “a positive definition of reasonableness is a logical impossibility” because “no positive definition can satisfy” all of the axioms that a positive definition would need to embrace).

<sup>105</sup> Professor John Rawls thus distinguished what is reasonable from what is rational:

[K]nowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others’ well-being.

John Rawls, *Political Liberalism* 48 n 1 (Columbia 1993), citing W.M. Sibley, *The Rational versus the Reasonable*, 62 *Philosophical Rev* 554, 560 (1953). See also T.M. Scanlon, *What We Owe to Each Other* 191–92 (Harvard 1998) (suggesting that rationality entails a simple capacity for means-ends analysis while reasonableness involves “tak[ing] others’ interests into account”).

act reasonably in ascribing meaning to utterances that are otherwise vague or ambiguous is to act with interests, values, or purposes and to judge, in light of them, which possible meaning it is most reasonable or appropriate to ascribe under the circumstances.<sup>106</sup>

In response to the phenomena of reasonable uncertainty and disagreement about utterances’ meanings, Soames and Solum both emphasize that communicative or assertive content, understood as a matter of linguistic fact, is often sparse, minimal, or indeterminate as applied to particular cases. Accordingly, with respect to the cases that I have put forth, perhaps all that can be said as a matter of linguistic fact is that a reasonable person would adjudge the language in question to be vague or indeterminate with respect to the question in issue. In Soames’s vocabulary, vague legal language thrusts onto judges the burden of “modify[ing] the vague content by [ ] precisifying it” or rendering determinate provisions that are linguistically indeterminate.<sup>107</sup> Agreeing in spirit, Solum draws a similarly sharp distinction between legal “interpretation,” which aims at the discovery of communicative content, and “construction,” by which judges give determinate “legal content” to language that, as a matter of linguistic fact, is indeterminate.<sup>108</sup> According to Solum, linguistic meaning, which is fixed, constrains “construction” but does not determine it.<sup>109</sup>

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<sup>106</sup> My suggestion that ascriptions of meaning are often salience driven largely echoes the conclusions of Professor Deirdre Wilson and social scientist Dan Sperber. See Wilson and Sperber, *Relevance Theory* at 607, 625–28 (cited in note 91). “Relevance theory,” which aims to connect the philosophy of language with cognitive psychology, seeks to explain successful linguistic communication, including the communication of nonliteral meanings, by emphasizing the cognitive notion of relevance in the processing of linguistic information or inputs. *Id.* at 607–08. According to Wilson and Sperber:

[A]n input (a sight, a sound, an utterance, a memory) is relevant to an individual when it connects with background information he has available to yield conclusions that matter to him: say, by answering a question he had in mind, . . . settling a doubt, confirming a suspicion, or correcting a mistaken impression.

*Id.* at 608. Although relevance theory does not imply—indeed, it denies—that ascriptions of meaning characteristically require self-conscious normative judgments, it emphasizes that people, including reasonable people, ascribe meaning in light of and in response to their sometimes-distinctive aims, purposes, and concerns. For a fuller articulation and defense of relevance theory, see generally Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (Oxford 2d ed 1995).

<sup>107</sup> Soames, 6 NYU J L & Liberty at 243 (cited in note 4).

<sup>108</sup> Solum, 82 Fordham L Rev at 495–503 (cited in note 2).

<sup>109</sup> Solum, *The Fixation Thesis* at \*7 (cited in note 78) (noting that along a continuum of constraint, “[a]t the minimum, originalists can agree that the doctrines of

Clearly, however, neither Soames nor Solum views a minimalist conception of linguistic or communicative content—which they depict as existing as a matter of fact—as empty. To the contrary, Soames contemplates that for judges to accept linguistic content as determining legal meaning might sometimes generate unacceptable results, some of them arising from inconsistencies between the “content of a [ ] law and the transparent purposes for which it . . . [was] adopted.”<sup>110</sup> Based on the example that he offers to illustrate this phenomenon, he appears to have in mind cases involving a divergence between what he calls linguistic meaning and what I have called reasonable meaning or the speaker’s intended meaning, such as the possible application of “No vehicles in the park” to an ambulance summoned to aid a heart attack victim.<sup>111</sup> In such cases, Soames concludes that courts may, as a matter of law, “be required to make the minimal modification of the content of an existing law” in order to “maximiz[e] the fulfillment of discernible legislative purposes.”<sup>112</sup> But the requisite modification constitutes a rejection of a provision’s meaning (defined as asserted content), not an identification or specification of it.

For my own part, I find this conceptualization more discordant than consonant with my own legal and linguistic intuitions, as reflected in my suggestion that reasonable meaning is as eligible a sense of meaning in ordinary conversation as in legal analysis. Anyone who shares my intuitions will question whether Soames’s specialized equation of meaning with a vague but nevertheless restricted notion of asserted content clarifies or distorts legal analysis that proceeds along the lines that he

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constitutional law and decisions in constitutional cases should be consistent with the original meaning”).

<sup>110</sup> Soames, 6 *NYU J L & Liberty* at 244 (cited in note 4).

<sup>111</sup> Soames offers the example of a town ordinance enacted against the background of “a rash of sexual assaults by men . . . picking up high school girls after school”: “It shall be a misdemeanor . . . for children on their way to or from school to accept rides in automobiles from strangers.” *Id.* In testing the meaning of this ordinance, Soames imagines that “months after the wave of crimes has abated, Susan, a high school senior late for her afterschool job at the Mini Mart, accepts a ride from an obviously sweet, distinctly undangerous, little old lady, whom she doesn’t know, but who works at the school cafeteria.” *Id.* In this case, Soames concludes, “the local magistrate might defensibly” hold the ordinance inapplicable since “a literal application of the law would harm Susan, without serving the purpose for which the ordinance was clearly intended,” and the lawmakers’ “perlocutionary intentions”—involving what they meant to achieve when they enacted the law—could permissibly be held to prevail over their “illocutionary intentions” in saying what they said. *Id.* at 242–44.

<sup>112</sup> *Id.*

suggests (by modifying the content of the law, rather than interpreting or applying it).

With Soames, my disagreement may largely involve the aptness of alternative characterizations. With Solum, the bone of contention appears more substantive. Whereas Soames believes that judges should be able to “modify” the law in cases of “inconsistency” between a law’s asserted content and “the transparent purposes for which it” was adopted,<sup>113</sup> Solum maintains that permissible judicial “construction” of a law must in all cases be consistent with what he calls its “communicative content.”<sup>114</sup> If Solum’s standards of consistency are the same as Soames’s, he would appear to believe that “No vehicles in the park” inescapably excludes ambulances, both linguistically and—because judicial construction must be consistent with a law’s communicative content, as he defines it—also legally. Within the domain of law, Solum’s insistence on consistency between linguistic meaning and permissible construction would also appear to limit the extent to which what I have called “interpreted meaning” could justify judicial adherence to even long-settled precedents if they deviate from (rather than offer a linguistically permissible construction of) the original communicative content of statutory and constitutional provisions. As I have made clear, my linguistic convictions about the intelligibility of interpreted meanings that diverge from original meanings are as firm as my legal convictions concerning the centrality of *stare decisis* to American legal practice.<sup>115</sup>

At the end of the day, I believe that the imperialistic sense of “meaning” that Soames and Solum advance under the rubric of “asserted” or “communicative” content seeks to endow their preferred conception with a false sense of linguistic necessity.<sup>116</sup> If we had good reason to do so, we could undoubtedly privilege their specialized, restrictive sense of meaning for legal and other purposes. And for some purposes, I would unhesitatingly

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<sup>113</sup> *Id.* at 243–44.

<sup>114</sup> Solum, *The Fixation Thesis* at \*10–11 (cited in note 78).

<sup>115</sup> As a number of authors have recognized, *stare decisis* does its principal work in cases in which a court believes that an earlier, precedential case was wrongly decided; otherwise, a court could simply reexamine and reaffirm the earlier conclusion. See, for example, Alexander, 63 S Cal L Rev at 4 (cited in note 57); Schauer, 39 Stan L Rev at 575 (cited in note 57).

<sup>116</sup> Having offered his account of meaning, Soames insists flatly that “[t]his is what meaning is.” Scott Soames, *Princeton Foundations of Contemporary Philosophy: Philosophy of Language* 172 (Princeton 2010).

stipulate, such privileging would be abundantly justified. To take the plainest example, the definition of “meaning” in the restricted sense that Soames and Solum regard as fundamental may have enabled enormous advances for scholars doing technical work in linguistics and the philosophy of language. It is less obvious, however, whether the specialized notion of meaning employed by philosophers of language provides the most illuminating analysis of either the folk concept of meaning or the legal concept of meaning.

In my view, it does not. A vague, minimalist, yet nonetheless imperialist insistence that references to the “meaning” of legal language always reflect what philosophers of language call “asserted” or “communicative” content excludes too much of the richness of how we speak and think. In law, and indeed in conversation, the concept of meaning is capacious enough to encompass literal or semantic meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, intended meaning, reasonable meaning, and previously interpreted meaning.

To put the point slightly more tendentiously, there frequently is no single, linguistic fact of the matter concerning what statutory or constitutional provisions mean. Rather, there can be a multitude of linguistically pertinent facts, generating different senses of meaning, which in turn support a variety of claims. In cases of conflict or uncertainty, it is sensible enough to talk about what disputed provisions mean. But the question of practical importance is what judges or other officials ought to do or how they ought to resolve hard cases when no sense of meaning controls as a matter of linguistic necessity. The need for choice among alternative candidates to furnish legal meaning on grounds of policy, morality, practicality, or prudence will emerge as a principal theme of Part IV.<sup>117</sup>

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<sup>117</sup> On this point, my position closely approximates that of Professor Mark Greenberg. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 *Yale L J* 1288, 1328–31 (2014) (explaining that courts need to rely on legal reasons to explain the relevance to legal meaning in a particular case of such factors as “how Congress intended [its] language to be construed, whether Congress would have wished its language to cover the situation, how the statutory phrase is most reasonably read, what Congress intended to communicate, and the purpose of the statute,” and recommending that the controlling concerns include such values as democracy and fairness).

#### D. Some Gaps between Conversational and Legal Meaning and Their Relevance

So far I have argued that there are multiple possible senses of meaning and that the linguistic norms bearing on conversational meaning will frequently fail to identify one as uniquely correct without a further judgment of salience or practical appropriateness. But if there are similarities between conversational and legal meaning, several differences also merit notice. Although legal meaning depends partly on linguistic norms, the determination of legal meaning can pose distinctive legal challenges.

1. Contextual meaning as framed by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications.

If meaning depends on context, the context for legal interpretation can be, and often is, importantly different from that of conversational interpretation. As is almost too plain for discussion, the context for the promulgation of a statute or a constitutional provision is a legal context.<sup>118</sup> Among other things, a statutory or constitutional provision's drafters will have worked against the background of prior law, presumably with the purpose of rectifying some perceived deficiency. Both the enacting legislature and a text's legally educated readers will assume that conventions of legal interpretation apply.<sup>119</sup>

Moreover, in seeking to discern what an utterance means in nonlegal discourse, we frequently rely on knowledge about the speaker. As textualists emphasize, however, legal texts do not have unitary authors.<sup>120</sup> They often reflect compromises.<sup>121</sup> In identifying the meaning of a statute or constitutional provision, it is therefore frequently infeasible to take account of known psychological facts about a speaker in the same way as we might in identifying the meaning of remarks in a conversation. In sum,

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<sup>118</sup> See generally Joseph Raz, *Intention in Interpretation*, in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* 249 (Oxford 1996).

<sup>119</sup> For a detailed and provocative effort to identify the most pertinent conventions, see Scalia and Garner, *Reading Law* at 425–41 (cited in note 4).

<sup>120</sup> See, for example, Manning, 91 Va L Rev at 428–31 (cited in note 45); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239, 244 (1992).

<sup>121</sup> See Manning, 91 Va L Rev at 430–31 (cited in note 45); Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533, 540–41 (1983).

once we recognize that statutes draw their meaning at least partly from the distinctively legal context of their enactment and that they have multiple authors, we cannot sensibly insist that what we might call “the model of conversational interpretation” will tell us how to identify their contextually defined and limited meaning<sup>122</sup>—at least not without a series of adjustments that would raise questions about whether it remains the same model at all.<sup>123</sup> As we shall soon see, similar difficulties attend efforts to rely on conversational analogues to identify a speaker’s intended meaning and its legal parallel, the intent of the legislature.

## 2. Intended meaning.

A number of prominent theories of statutory interpretation hold that courts should interpret statutes in accordance with the intent of the legislature,<sup>124</sup> though, as acknowledged above, they may use the term “intent” in different senses.<sup>125</sup> At first blush, any approach to legal interpretation that emphasizes legislative intent might appear to equate statutory meaning with the speaker’s intended meaning as gauged by the standards of ordinary conversation. As noted above, however, and for reasons that border on the self-evident, this would be a wholly infeasible position if the notion of “a speaker’s intended meaning,” as applied to legislation, referred to the range of psychological facts that might ground claims about meaning in ordinary conversation. The

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<sup>122</sup> Although Soames maintains that “[l]egal content is determined in essentially the same way that the asserted or stipulated contents of ordinary texts are,” he acknowledges the need for a number of variations that the legal context makes necessary, including reliance on “[a] law’s rationale”—defined as “the chief reasons publicly offered to justify and explain the law’s adoption”—to determine how to make vague terms more precise. Soames, 82 *Fordham L Rev* at 604–05 (cited in note 6).

<sup>123</sup> Apparently recognizing that the model of conversational interpretation depends heavily on assumptions about the speaker’s intent, yet acknowledging that a statute’s meaning cannot depend on the actual psychological states of those who voted for it, textualists often substitute what they call an “objectified intent.” Caleb Nelson, *What Is Textualism?*, 91 *Va L Rev* 347, 353–57 (2005). As Professor Caleb Nelson points out, however, efforts to give content to this notion can generate major practical and conceptual difficulties. See *id.*

<sup>124</sup> See, for example, Posner, 50 *U Chi L Rev* at 817 (cited in note 43) (“The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”); Alexander, 82 *Fordham L Rev* at 540 (cited in note 50). See also generally, for example, Fish, 42 *San Diego L Rev* 629 (cited in note 43); Fish, 29 *Cardozo L Rev* 1109 (cited in note 43).

<sup>125</sup> See notes 44–49 and accompanying text.



legislature is a multimember body, not a single person, and its members' psychological states may vary enormously.

In so saying, I do not mean to preclude the possibility that reliance on some notion of legislative intent to determine legal meaning may be possible, desirable, or even necessary in some cases.<sup>126</sup> Philosophers have developed imaginative conceptions of group agency and group intention.<sup>127</sup> Moreover, even textualists acknowledge that ascribing content to statutes requires attributing at least an objective intent or purpose to the enacting legislature.<sup>128</sup> If we analogize the legislature to a speaker at all, we need to ascribe aims, values, or purposes that would make it comprehensible why the legislature enacted the provision that it did. In light of the seemingly universal agreement on this point, the phrase "legislative intent" might refer to an ascribed purpose that helps to explain why a rational legislature would have produced a statute such as the one the actual legislature enacted.<sup>129</sup> Alternatively, the phrase might refer to articulations of statutory goals or purposes, or to assertions about statutory meaning advanced by the sponsors of legislation or the committees that drafted it.<sup>130</sup> Although much more might be said about both of these possibilities, I shall attempt no further appraisal here. Suffice it to say that anyone who adopted one of these usages in speaking about legislative intent could not plausibly

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<sup>126</sup> For example, Soames's theory of legal interpretation depends heavily on legislative intent, but he takes care to specify that the relevant intentions are typically illocutionary, involving what the lawmakers intended to say, rather than perlocutionary, involving the results that the lawmakers intended to bring about. See Soames, 6 NYU J L & Liberty at 241–43 (cited in note 4). When perlocutionary intentions are relevant at all, Soames believes that the focus should be on what he calls a law's "rationale," as measured by "the chief reasons publicly offered to justify and explain the law's adoption." Soames, 82 Fordham L Rev at 605 (cited in note 6).

<sup>127</sup> See generally, for example, Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford 2011); Michael E. Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge 1999).

<sup>128</sup> See, for example, Scalia, *Common-Law Courts* at 17 (cited in note 8) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.") (emphasis omitted); Nelson, 91 Va L Rev at 353–57 (cited in note 123) (discussing textualists' search for statutes' "'objectified' intent").

<sup>129</sup> See Hart and Sacks, *The Legal Process* at 1374–78 (cited in note 51) (urging interpreters to "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved," on the assumption that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably," and to "[i]nterpret the words of the statute immediately in question so as to carry out the purpose" as well as possible).

<sup>130</sup> See Soames, 82 Fordham L Rev at 605 (cited in note 6).

claim to apply prelegal, purely linguistic standards when equating statutory meaning with what the legislature, as determined pursuant to some gauge of legislative intent, intended to establish. The construct of “the intent of the legislature” must find an independent meaning in law and legal interpretation.

### 3. Reasonable meaning.

In determinations of what reasonable legislators would have sought to accomplish and the means by which they would have sought to do so, distinctively legal concerns, values, and norms necessarily come into play. Many of the canons of statutory interpretation that purportedly embody norms of reasonableness—such as those prescribing that statutes of limitation are subject to equitable tolling<sup>131</sup> and that impositions of criminal liability incorporate mens rea requirements<sup>132</sup>—so illustrate. I know of no context other than one involving legal liability or sanctions in which a question about the tolling of a statute of limitations could even arise.

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Ultimately, a comparison of legal meaning with conversational meaning yields three striking conclusions. First, recognition that there are multiple senses of meaning in ordinary conversation helps to dispel any notion that legal arguments that invoke diverse referents for claims of legal meaning reflect any simple conceptual or linguistic mistake. An important challenge for legal interpretation is to resolve puzzlement, uncertainty, or disagreement about claims of legal meaning. Conceptual and linguistic analyses may clarify the challenges that legal interpreters face in choosing among competing referents for claims of legal meaning, but such analysis will frequently fall far short of resolving such challenges. Second, important differences between legal and conversational meaning will often preclude reliance on norms of conversational interpretation to identify the contextually understood, intended, and reasonable meanings of statutory and constitutional provisions.

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<sup>131</sup> See *Young v United States*, 535 US 43, 49–50 (2002), citing *Irwin v Department of Veterans Affairs*, 498 US 89, 95 (1990).

<sup>132</sup> See *Brogan v United States*, 522 US 398, 406 (1998). See also Scalia and Garner, *Reading Law* at 303 (cited in note 4).

From these two conclusions, a third follows. To a greater or lesser extent, standards for the ascertainment of legal meaning are necessarily internal to law.<sup>133</sup> Legal norms can and sometimes do distinctively govern legal interpretation. Nevertheless, an undeniable phenomenon of American legal practice involves interpretive disagreement.<sup>134</sup> Absent agreed legal standards for choosing among linguistically eligible senses of or potential referents for claims of legal meaning, participants in legal interpretation and surrounding debates must therefore make normatively inflected judgments or choices—judgments or choices that are structured, but not wholly determined, by settled legal norms.<sup>135</sup> Indeed, it is the need for choice that gives point to interpretive theories such as textualism and purposivism, originalism and living constitutionalism. I shall discuss such theories in Parts III and IV. For now, suffice it to say that when there is a diversity of legally and linguistically plausible candidates to furnish a provision’s legal meaning—as Part I suggested will sometimes be the case—debates about interpretive methodologies should be regarded as legal and partly normative, not as disagreements about the best tools for discovering a meaning that exists as a prelegal matter of linguistic fact.

### III. APPRAISING SOME LEADING THEORIES OF LEGAL INTERPRETATION IN LIGHT OF THE COMPLEXITIES OF LEGAL MEANING

Before proceeding further, I should pause to summarize the ground covered thus far. Taken together, Parts I and II have framed an agenda for law and legal theory. Part I identified a roster of possible senses of meaning that provide alternative

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<sup>133</sup> As I have explained elsewhere, this conclusion depends on a premise that law is a “practice” constituted by the shared or overlapping understandings of a relevant community of participants. See Richard H. Fallon Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 NC L Rev 1107, 1118–46 (2008). Although I make no effort to defend that premise here, it constitutes common ground for the “positivist” jurisprudential theory of H.L.A. Hart and the rival theory that Ronald Dworkin advanced. See *id.* (discussing the practice-based foundations of Hartian positivism); Dworkin, *Law’s Empire* at 45–53 (cited in note 3) (discussing law as a practice and the interpretation of social practices).

<sup>134</sup> Dworkin emphasized this concept. See Dworkin, *Law’s Empire* at 6 (cited in note 3) (introducing a critique of rival theories by observing that, “[i]ncredibly, our jurisprudence has no plausible theory of theoretical disagreement in law”).

<sup>135</sup> See H.L.A. Hart, *The Concept of Law* 250–54 (Oxford 3d ed 2012) (embracing the view that the “rule of recognition” might call for judges to resolve uncertainty by engaging in morally guided reasoning).

possible referents for claims of legal meaning in disputed cases. Part II established that the variety of candidates to constitute legal meaning closely approximates a parallel set of possible referents for claims of meaning in ordinary conversation, but it also explained why linguistic and conversational norms cannot furnish the determinate resolutions that law requires. Neither of the preceding Parts purported to prescribe grounds for legal selection.

I shall approach that challenge in two steps. This Part takes the first by testing the capacity of the most widely debated theories of statutory and constitutional interpretation to pick out and give determinate content to one or another of the possible senses of or referents for claims of legal meaning that Parts I and II identified. With respect to theories of statutory interpretation, I examine the resolving power of textualism, legislative intentionalism, and purposivism. Among constitutional theories, I discuss originalism and, briefly, some versions of living constitutionalism. I also take note of Professor Dworkin's theory of "law as integrity"<sup>136</sup> and Judge Posner's "pragmatism,"<sup>137</sup> both of which apply to statutory and constitutional adjudication alike. Against the background of this examination of theories of statutory and constitutional interpretation, Part IV offers prescriptions for choice.

The work of Part I in precisely delineating possible referents for claims of legal meaning not only sharpens the questions that interpretive theories must address and resolve, but also enables the conclusion—which this Part reaches—that textualism, legislative intentionalism, purposivism, originalism, and some versions of living constitutionalism are almost stunningly inadequate to perform the most basic function that one might expect them to fulfill. None marks any of the disparate senses of meaning that Part I identified (such as semantic meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, intended meaning, reasonable meaning, or interpreted meaning) as the consistently and uniquely correct referent for claims of legal meaning. Moreover, none has the resources to make the requisite

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<sup>136</sup> Dworkin, *Law's Empire* at 225, 254–58 (cited in note 3).

<sup>137</sup> Posner, *Law, Pragmatism, and Democracy* at 57–96 (cited in note 16). See also Posner, *Overcoming Law* at 531–51 (cited in note 16); Posner, *The Problems of Jurisprudence* at 454–69 (cited in note 16).

selection on an ad hoc basis without an additional exercise of explicitly normative judgment.

This Part also develops two further points, both of which will inform my conclusions in Part IV about how best to choose among theories of statutory and constitutional interpretation. First, although textualism and originalism fail one of the most important tests that they appear to set for themselves—that of identifying a consistently correct referent for claims of legal meaning from among the set of possible senses of meaning that Part I articulated—legislative intentionalism, purposivism, and some versions of living constitutionalism do not even aspire to satisfy such a test. Legislative intentionalism and purposivism, in particular, are not so much self-sufficient theories of interpretation as theories maintaining the occasional significance of particular considerations—namely, evidence of legislative purpose or intent and a presumption of legislative reasonableness—to statutory and constitutional adjudication. Second, Dworkin’s theory of law as integrity, Posner’s pragmatism, and some other versions of living constitutionalism actually do purport to direct uniquely correct legal outcomes in disputed cases, but they do so without prescribing categorical choices among the alternative senses of meaning that Parts I and II identified. In other words, these theories allow the possibility that different senses of legal meaning might be apt in different cases, and they call for resolution of conflicting claims of legal correctness based on a determination of which sense would be best in particular circumstances.

#### A. Theories of Statutory Interpretation

On the surface, textualism, legislative intentionalism, and purposivism might appear to identify statutory meaning with one, and only one, of the possible senses of meaning that Part I laid out. Textualists, for example, sometimes suggest that a statute’s meaning is its semantic meaning.<sup>138</sup> Theories that emphasize legislative intent might appear to equate statutory

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<sup>138</sup> See, for example, Manning, 106 Colum L Rev at 91 (cited in note 27) (maintaining that although modern textualists accept that statutes must be read in context, they “give primacy to [ ] semantic context” rather than “policy context” in ascertaining statutes’ meanings) (emphasis omitted).

meaning with intended meaning.<sup>139</sup> Purposivist theories, which maintain that interpreters should treat legislation as the product of reasonable legislators seeking to pursue reasonable goals through reasonable means,<sup>140</sup> look as though they pick out reasonable meaning as uniquely determining what a statute means. In fact, none of these equations holds. Neither textualists, nor legislative intentionalists, nor purposivists consistently embrace the same sense of or referent for claims of legal meaning. So recognizing will help to illuminate the diverse natures of these theories, which vary considerably in the extent to which they even aspire to consistency and determinacy. Further illumination will emerge from a comparison of textualism, legislative intentionalism, and purposivism with the theories of Dworkin and Posner. Although the latter two theories diverge dramatically from one another in some respects, they are importantly similar in others: beyond eschewing categorical preferences among alternative senses of meaning, both furnish explicit criteria for choosing on a case-by-case basis. In sum, although all the theories canvassed in this Part ultimately require judgments about which referents for claims of legal meaning to adopt in particular cases, only the theories of Dworkin and Posner both acknowledge the need for choice and offer frameworks for making selections in individual cases.

### 1. Textualism.

Textualist theories of statutory interpretation emphasize that legislatures enact texts, not the intentions or purposes of the texts' authors.<sup>141</sup> According to textualists, an important interpretive implication follows from this proposition: the meaning of a legal text is the meaning that a competent speaker of the language would understand it to have in its semantic context.<sup>142</sup>

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<sup>139</sup> See, for example, Posner, 50 U Chi L Rev at 817 (cited in note 43) ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

<sup>140</sup> See Hart and Sacks, *The Legal Process* at 1378 (cited in note 51).

<sup>141</sup> See, for example, Fallon, et al, *Hart and Weschler's* at 624 (cited in note 1) (summarizing the tenets of "[t]he [n]ew [t]extualism"); Manning, 91 Va L Rev at 431 (cited in note 45) (denying that legislatures have a collective intent beyond the text that they enact); Scalia, *Common-Law Courts* at 22 (cited in note 8) ("The text is the law, and it is the text that must be observed.").

<sup>142</sup> See Manning, 106 Colum L Rev at 91 (cited in note 27) (emphasizing textualists' reliance on "semantic context") (emphasis omitted); Randy E. Barnett, *Interpretation and Construction*, 34 Harv J L & Pub Pol 65, 66 (2011) ("*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context.").

But matters are a good deal more complicated than that formulation—which might appear to associate statutory meaning with semantic meaning—implies. Although textualists frequently aver that the meaning of a legal text is its semantic meaning,<sup>143</sup> very few actually maintain such an equation.<sup>144</sup> To the contrary, proponents of textualist theories say with equal frequency that the semantic meaning of legal texts must be understood “in context.”<sup>145</sup> At this point, any neat equation of textualism with a single referent for claims of legal meaning begins to break down. The key question becomes: How does one ascertain a legal provision’s meaning in context? In light of the distinctions developed in Parts I and II, should “meaning in context” be equated with meaning as defined and limited by the shared presuppositions of reasonable legislators and reasonable readers, including their anticipated applications and nonapplications? Is that notion capacious enough sometimes to embrace real conceptual meaning, reasonable meaning, or intended meaning? Or, as Professors Soames and Solum appear to contemplate, is meaning in context some function or amalgamation of all of these—and, it should be added, a function or amalgamation that will frequently prove vague, sparse, or indeterminate in its application to particular cases?

Although it is surely correct that meaning depends on context, reasonable people commonly disagree about what statutory and constitutional provisions mean, in part because the bounds of context are far from self-defining.<sup>146</sup> For example, is legislative

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<sup>143</sup> See, for example, Manning, 98 Cal L Rev at 1288 (cited in note 24) (“Textualism maintains that judges should seek statutory meaning in the semantic import of the enacted text.”); Manning, 74 Fordham L Rev at 2010 (cited in note 24) (defining textualism as “a philosophy that gives precedence to a statute’s semantic meaning, when clear, and eschews reliance on legislative history or other indicia of background purpose to vary the conventional meaning of the text”).

<sup>144</sup> In this respect, modern textualists disassociate themselves from an earlier “plain meaning” school of statutory interpretation. Manning, 116 Harv L Rev at 2456 (cited in note 23) (“In contrast with their literalist predecessors in the ‘plain meaning’ school, modern textualists reject the idea that interpretation can occur ‘within the four corners’ of a statute.”). See also Manning, 106 Colum L Rev at 79 & n 28 (cited in note 27).

<sup>145</sup> Barnett, 34 Harv J L & Pub Pol at 66 (cited in note 142) (equating meaning with “semantic meaning . . . in context”); Manning, 106 Colum L Rev at 73, 79–80 (cited in note 27) (discussing the importance of context for textualism and purposivism). See also Scalia and Garner, *Reading Law* at 16, 32–33 (cited in note 4).

<sup>146</sup> See Fallon, 99 Cornell L Rev at 693–95 (cited in note 93) (observing that “contexts can be defined either relatively broadly or relatively narrowly”); Abner S. Greene, *The Missing Step of Textualism*, 74 Fordham L Rev 1913, 1923 (2006) (characterizing the absence of a principled method for distinguishing relevant from irrelevant aspects of background knowledge as “the missing step of textualism”).

history part of the context?<sup>147</sup> Are there prevailing societal norms that might help to distinguish reasonable from unreasonable legislative directives (even if one acknowledges the legislature's prerogative to act unreasonably in some respects)?<sup>148</sup> As the latter of these questions may suggest, the pertinence of particular elements of context to the ascription of meaning may sometimes be unclear, even after the bounds are drawn. To return to an example that I have used in prior writing,<sup>149</sup> 42 USC § 1983, a Reconstruction-era statute, creates a cause of action for both damages and injunctive relief against all state officials who violate federal statutory or constitutional rights.<sup>150</sup> The statute's text includes no express exceptions. Yet virtually no one believes that it should be interpreted literally. In interpreting and applying § 1983, reasonable judges and justices have recurrently divided over whether, and if so to what extent, the historical context justifies implied limitations on the statute's literal meaning. Among the limitations that the Supreme Court has recognized, often with the concurrence of the purportedly textualist Justices Antonin Scalia and Clarence Thomas,<sup>151</sup> are ones that:

- authorize federal courts to refuse to enjoin state judicial proceedings alleged to violate federal constitutional rights;<sup>152</sup>

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<sup>147</sup> See, for example, Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L Rev 1125, 1125–26 (1983) (arguing in the affirmative).

<sup>148</sup> See, for example, Eric A. Posner, *Standards, Rules, and Social Norms*, 21 Harv J L & Pub Pol 101, 101–13 (1997) (discussing the impact of social norms on legislative decisionmaking).

<sup>149</sup> See Fallon, 99 Cornell L Rev at 691–92, 718–22 (cited in note 93).

<sup>150</sup> The text of § 1983 provides:

[E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC § 1983.

<sup>151</sup> See Fallon, 99 Cornell L Rev at 719–20 (cited in note 93).

<sup>152</sup> Contrast Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L J 71, 74–75 (1984) (answering in the negative), with David L. Shapiro, *Jurisdiction and Discretion*, 60 NYU L Rev 543, 584 (1985) (arguing that § 1983 did not displace the traditional discretion of federal courts to decline to exercise jurisdiction conferred on them).



- endow state officials who violate constitutional rights with either an absolute or qualified immunity against suits for damages relief;<sup>153</sup>
- preclude relitigation in federal court of issues or claims that were previously fully and fairly litigated in state court actions;<sup>154</sup> and
- limit those seeking relief from the consequences of state criminal convictions to bringing their claims under applicable habeas corpus statutes.<sup>155</sup>

Insofar as contextual meaning depends on a well-informed person’s expected statutory applications and nonapplications, it appears unlikely that those who proposed or voted in favor of § 1983 had specifically anticipated how it would apply to the cases that have divided modern courts and commentators. And ascription of a contextual meaning that is not defined or limited by anticipated applications and nonapplications must therefore depend—as Professor Soames appears to contemplate—on the judgment of an imagined “reasonable” person.<sup>156</sup> If this conclusion is correct, as I believe that it is, then textualism leaves a place for the adoption of a conception of reasonable meaning as the ultimate legal meaning in at least some cases. In short, a number of the distinctive senses of meaning identified in Parts I and II remain available within a textualist framework that relies on the construct of a reasonable speaker or listener (unless a reasonable person would quickly adjudge a statute to be relevantly vague, ambiguous, or indeterminate and, having done so, would thrust onto judges a responsibility to make overtly normative judgments about how to resolve the indeterminacies in particular cases).

To take another example, consider whether a statute limiting admission to “people of good character only,” if enacted in the Jim Crow South, should be held to exclude all non-Caucasians. If this example seems too fraught, imagine a statute forbidding attendance at school by anyone with a

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<sup>153</sup> For an overview of debates surrounding the official immunity doctrine, see Fallon, et al, *Hart and Weschler’s* at 994–1011 (cited in note 1).

<sup>154</sup> Contrast *Allen v McCurry*, 449 US 90, 97–101 (1980) (Stewart), with id at 105–11 (Blackmun dissenting).

<sup>155</sup> Contrast *Heck v Humphrey*, 512 US 477, 483–87 (1994) (Scalia), with id at 492–502 (Souter concurring).

<sup>156</sup> Soames, 82 *Fordham L Rev* at 598 (cited in note 6).

“contagious disease.”<sup>157</sup> Imagine further that at the time of the statute’s enactment, both the enacting legislature and most reasonable people in the jurisdiction believed psoriasis to be a contagious disease and thus expected that the statute would apply to those with psoriasis, but that subsequent medical research has established definitively that psoriasis is not a contagious disease. Does the statute apply to those with psoriasis? To resolve the hypothetical case that I have framed, textualists would need to make a choice between what Part I labeled contextual meaning as framed by the shared presuppositions of speakers and listeners—including anticipated applications and nonapplications—on the one hand, and semantic or real conceptual meaning, on the other.

A further issue for textualists involves the significance of interpreted meanings. Nearly all textualists agree that *stare decisis* does and should play a large role in statutory cases.<sup>158</sup> As I have emphasized, moreover, it is plausible to regard prescriptive utterances as having acquired an interpreted meaning that diverges from original semantic or contextually defined meaning in a sense familiar even in ordinary conversation. But many textualists seem uncomfortable with the idea that the meaning of a legal text could change over time, perhaps because they regard the idea of law as requiring a capacity in lawmakers to bind future decisionmakers.<sup>159</sup> Caught on the horns of a dilemma, some textualists say that although their theory equates legal meaning with semantic meaning (by which they typically mean some relatively unspecified notion of “contextual meaning”), they must grudgingly accept a place for *stare decisis* as an exception to their theories because the values or purposes of legal practice—including those of creating and then protecting stable expectations—so require.<sup>160</sup>

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<sup>157</sup> This example is adapted from one offered in Greenberg and Litman, 86 *Georgetown L J* at 585–86, 592 (cited in note 42).

<sup>158</sup> See, for example, Scalia and Garner, *Reading Law* at 411–14 (cited in note 4) (asserting that “[s]tare decisis has been a part of our law from time immemorial, and we must bow to it”).

<sup>159</sup> Perhaps most notable among such textualists is Justice Scalia. See, for example, Reva B. Siegel, Heller and *Originalism’s Dead Hand—in Theory and Practice*, 56 *UCLA L Rev* 1399, 1408 (2009) (noting that in “many speeches” Scalia has called for a “dead constitution”).

<sup>160</sup> See Scalia and Garner, *Reading Law* at 412–14 (cited in note 4). Compare *id.* with Paulsen, 22 *Const Comm’n* at 289–90 (cited in note 60) (arguing that regardless of the criteria that a theory might uphold as properly determinative of constitutional meaning,

Embracing this position, Justice Scalia proposes that judges should decide whether to accord stare decisis effect to prior interpretations that deviate from a statute's original contextual meaning based on multiple factors that, he acknowledges, different reasonable people "will weigh . . . in different ways."<sup>161</sup> Although he and a coauthor offer some examples of how they would resolve particular cases, they make no pretense of advancing a determinate formula for adjudicating the competing claims of semantic (or of contextual—and, I would further say, of real conceptual or reasonable) and interpreted meanings.<sup>162</sup>

Overall, insofar as textualists suggest that legal meaning in disputed cases depends on a linguistic fact of the matter, they obscure the challenge that arises when multiple linguistically pertinent facts would support alternative conclusions concerning a statute's meaning or application. Indeed, the numerous opportunities for textualists to make case-by-case normative judgments in identifying the sense of meaning relevant to legal decisionmaking may help to explain why textualist Supreme Court justices who are also conservatives tend to reach substantively conservative conclusions in so many statutory interpretation cases.<sup>163</sup> I do not, however, mean to rely on that disputable point. What should be less disputable is that textualism fails the test of relative determinacy in fixing legal meaning that many versions of textualism appear to set for themselves. As Professor Marmor has concluded, if textualism is defined simply as a theory insisting that "statutory law consists in what the law says," it will prove "not all that helpful" as a theory of statutory interpretation due to its indeterminacy at just the point at which a court must find or supply a resolution.<sup>164</sup>

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only corruption can result from requiring an otherwise justified theory to accommodate precedents that the theory marks as mistaken).

<sup>161</sup> Scalia and Garner, *Reading Law* at 412–13 (cited in note 4).

<sup>162</sup> See *id.*

<sup>163</sup> In a study of Supreme Court decisions reviewing the interpretation of statutes by federal administrative agencies, Professor William N. Eskridge Jr and Lauren E. Baer found that Justice Scalia, a textualist and a conservative, affirmed agency decisions 71.6 percent of the time when they were conservative but only 53.8 percent of the time when they were liberal. William N. Eskridge Jr and Lauren E. Baer, *The Continuum of Difference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *Georgetown L J* 1083, 1154 (2008). Justice Thomas, also a textualist and a conservative, upheld 75.8 percent of the conservative agency rulings that came before the Court, but that figure dropped to 46.8 percent in cases involving liberal agency interpretations. *Id.*

<sup>164</sup> Marmor, *The Language of Law* at 117 (cited in note 4).

## 2. Legislative intentionalism and purposivism.

As I noted above, theories that appear to equate legal meaning with the intent of the legislature differ dramatically in their assumptions about what legislative intent is.<sup>165</sup> At least until recently, however, the leading intent-based theories in debates about statutory interpretation have been those that call for judicial examination of legislative history as a guide to the actual, psychological aims and expectations of those who drafted or enacted a statute. Because theories that rely on other conceptions of intent are complexly diverse, and because some are closely analogous to certain versions of textualism,<sup>166</sup> I shall treat theories that turn to legislative history in search for legislators' psychological intentions as furnishing the central case for discussion.

About these theories I can be brief. Despite frequent portrayals of legislative intentionalism as a theory of statutory interpretation on a par with textualism, few defenders of legislative intent as a guide to statutory meaning claim that it should furnish the exclusive focus of interpretive inquiries.<sup>167</sup> Almost inevitably, other senses of meaning or referents for claims of legal meaning also matter, sometimes decisively. As all or nearly all textualists recognize, people sometimes need to be able to rely on what the legislature said, even if the legislature failed to say what it meant. In addition, virtually all legislative intentionalists embrace the sometimes-controlling authority of precedent. Interpreted charitably, subscribers to legislative intentionalist theories actually claim only that evidence of legislative intent should sometimes inform the resolution of reasonable uncertainties regarding statutory meaning.<sup>168</sup>

Purposivism is a similarly partial theory, defined by the claim that in otherwise doubtful cases, courts and other interpreters should ascribe reasonable intentions to the legislature and, correlatively, reasonable meanings to statutes. Champions of purposivism could not plausibly claim more. It would be

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<sup>165</sup> See notes 44–49 and accompanying text.

<sup>166</sup> See, for example, Soames, *What Vagueness and Inconsistency Tell Us* at 43 (cited in note 11) (observing that “textualism may well be a plausible theory of legal content,” but only if it “recognize[s] the importance of the illocutionary intentions of law-makers”).

<sup>167</sup> See Solan, 38 *Loyola LA L Rev* at 2028–29 (cited in note 37). Professor Stanley Fish may be an exception. See, for example, Fish, 29 *Cardozo L Rev* at 1143–45 (cited in note 43) (asserting that “the intention of the author [ ] is the answer to everything”).

<sup>168</sup> See, for example, Soames, 82 *Fordham L Rev* at 604–05 (cited in note 6).

untenable to equate legal meaning solely with reasonable meaning, to the exclusion of all other candidates and considerations. Reasonable interpretation of a statute depends partly on its semantic meaning and may depend, too, on its contextual meaning as framed by the shared presuppositions of speakers and listeners, as well as on the identifiable intent of the legislature. Sometimes the legislature may do unreasonable things, as gauged either by a particular judge or by a conception of reasonableness that is widespread outside the jurisdiction. Laws establishing and enforcing slavery furnish historically potent examples.<sup>169</sup> In such cases, it might be possible to say that the reasonable meaning under the circumstances is the semantic, contextually understood, or speaker's intended meaning—but here, as before, I would appeal to the heuristic value of keeping these notions distinct, even if they sometimes overlap in practice.

Precedent introduces a further complication. Nearly all purposivists believe that interpreted meaning has a role in statutory interpretation.<sup>170</sup> If so, then purposivists require standards for choosing a legal meaning in cases of conflict between a statute's interpreted meaning and what they would otherwise regard as its reasonable meaning. Accordingly, ostensibly purposivist theories of statutory interpretation will be significantly indeterminate unless they furnish criteria for choice in cases in which choice matters—and I know of no version of purposivist theory that purports to offer even a reasonably determinate formula.

My point, I should emphasize, involves clarification, not criticism. Absent a linguistic fact of the matter, selection among alternative possible legal meanings becomes inevitable.

### 3. Noncategorical theories.

A theory of statutory interpretation might choose among competing senses of or referents for claims of legal meaning in either of two ways. Such theories might do so on a categorical basis, by equating statutory meaning exclusively with one possible referent, or they might do so on a more nearly case-by-case basis, by furnishing criteria that would permit the selection of one referent (such as contextual meaning as framed by the

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<sup>169</sup> See generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale 1975) (examining the practices of antislavery judges in the United States in applying laws that enforced slavery).

<sup>170</sup> See, for example, Hart and Sacks, *The Legal Process* at 1313–44 (cited in note 51).

shared presuppositions of speakers and listeners) in one case and a different referent (such as interpreted meaning or real conceptual meaning) in another.

Professor Dworkin's theory of law as integrity asks interpreters to resolve otherwise indeterminate cases by adopting the interpretation that emerges from the best "constructive" interpretation of the legal system as a whole.<sup>171</sup> According to Dworkin, candidate interpretations both of the legal system generally and of particular provisions should be judged along two dimensions. One is "fit": a theory must describe a phenomenon sufficiently well to count as an interpretation of it, rather than as a proposal for wholesale reform.<sup>172</sup> The other dimension involves a theory's or an interpretation's normative attractiveness.<sup>173</sup> Nowhere has Dworkin suggested that the best legal theory will adopt a single sense of linguistic meaning as furnishing the best interpretation of every disputed statutory and constitutional provision.

Judge Posner's pragmatism similarly calls for judges to make case-by-case judgments about which interpretation would be best, all things considered, and not to make advance, categorical selections among semantic meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, and so forth.<sup>174</sup> Significantly, however, Posner argues that judges should determine what would be best pursuant to very different criteria from those that Dworkin championed. According to Dworkin, the correct interpretation of many legal provisions depends on considerations of deontological principle.<sup>175</sup> According to Posner, pragmatic judges would apply pervasively consequentialist standards of appraisal.<sup>176</sup>

## B. Theories of Constitutional Interpretation

A number of leading theories of constitutional interpretation, notably including originalism, are as unable as their counterparts involving statutory interpretation to rely on a single,

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<sup>171</sup> Dworkin, *Law's Empire* at 51–53 (cited in note 3).

<sup>172</sup> *Id.* at 254–58.

<sup>173</sup> See *id.*

<sup>174</sup> See Posner, *Overcoming Law* at 387–405 (cited in note 16); Posner, *Pragmatic Adjudication* at 3–4 (cited in note 16).

<sup>175</sup> See Ronald Dworkin, *A Matter of Principle* 69–71 (Harvard 1985) (characterizing the Supreme Court as "the forum of principle").

<sup>176</sup> See, for example, Posner, *Overcoming Law* at 387–405 (cited in note 16); Posner, *Pragmatic Adjudication* at 3–4 (cited in note 16).

unvarying sense of meaning as their referent for claims about the meaning of constitutional provisions. Nor can such theories claim to establish constitutional meaning by direct appeal to matters of prelegal, linguistic fact. For these and other reasons, originalism, in particular, is far more prone to indeterminacy than its champions frequently acknowledge.<sup>177</sup>

Nonoriginalist theories exhibit a good deal of diversity. Though the leading theories fail to identify any single referent as correctly defining constitutional meaning in all cases, some aspire to furnish criteria for making optimal or “right” determinations.<sup>178</sup>

### 1. Originalism.

The core originalist tenet holds that the meanings of constitutional provisions are fixed at the time of their enactment.<sup>179</sup> As should now be clear, however, that thesis poses rather than answers the question: Which among the multiple candidates to define legal meaning identified in Part I constitutes the original constitutional meaning? Originalists divide in their answers. Early incarnations of originalism tended to equate constitutional meaning with the intent of the Framers.<sup>180</sup> This formulation appears to refer to speakers’ intended meanings. But this version of originalism—insofar as it links intentions with psychologically anticipated applications—encounters well-known difficulties similar to those that confront comparably intent-based theories of statutory interpretation.<sup>181</sup> Indeed, the difficulties are even more severe. For one thing, it is harder to identify whose intentions count—those of the constitutional provisions’ drafters, those of the ratifiers in state conventions or legislatures, or both? Other difficulties arise in applying constitutional language

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<sup>177</sup> See Colby and Smith, 59 Duke L J at 244–45 (cited in note 2) (arguing that originalists’ work consists of a “smorgasbord of distinct constitutional theories” that are frequently indeterminate and “rapidly evolving”).

<sup>178</sup> Dworkin, *A Matter of Principle* at 143–45 (cited in note 175) (defending the thesis that hard legal cases normally have uniquely correct answers).

<sup>179</sup> See Solum, 82 Fordham L Rev at 456 (cited in note 2).

<sup>180</sup> See, for example, Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 403–05 (Liberty Fund 2d ed 1997); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L Rev 823, 823 (1986).

<sup>181</sup> See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L Rev 204 (1980) (exposing difficulties in trying to conceptualize and discover the intent of the Framers).

to phenomena that the drafters and ratifiers could not have foreseen.

Today, although a few originalists continue to call for fidelity to the Framers' intent,<sup>182</sup> more mainstream originalists equate the meaning of constitutional provisions with their "original public meaning."<sup>183</sup> As Parts I and II have shown, however, this phrase has no unique, obvious referent. If we seek to identify its meaning by employing ordinary modes of conversational interpretation, those modes, as I have emphasized, often fail to determine a unique selection from among semantic meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, speakers' intended meaning, reasonable meaning, and interpreted meaning. In short, an appeal to the original public meaning will frequently leave open the very ambiguity or indeterminacy that some rely on that notion to resolve.

In describing how originalists respond to ambiguities or indeterminacies involving the original public meaning of constitutional language, and in critically assessing those responses, I confront a challenge that I must confess I cannot meet wholly satisfactorily. This challenge arises from the diversity of positions that self-described originalists have adopted and the reasons that they have given for adopting them.<sup>184</sup> Any generalization will fail to reflect all nuanced differences among originalists and their theories. Given the arguments that different public-meaning originalists make and the standards that they set for themselves, some are vulnerable to criticisms to which others are not—although I believe that all are subject to one or another of the criticisms that I shall advance. In any event, although I shall strive for a happy medium between too much and too little differentiation and detail, I freely acknowledge that no perfect balance exists.

In confronting potential ambiguity or vagueness in the idea of an original public meaning, one route open to originalists would be to stipulate that the original public meaning is the

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<sup>182</sup> See, for example, Kay, 103 *Nw U L Rev* at 718–26 (cited in note 14); Alexander, 82 *Fordham L Rev* at 540 (cited in note 50).

<sup>183</sup> Solum, 89 *Notre Dame L Rev* at 498 (cited in note 6). See also, for example, Vasani Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Georgetown L J* 1113, 1132–33 (2003).

<sup>184</sup> See, for example, Colby and Smith, 59 *Duke L J* at 241–47 (cited in note 2); Richard H. Fallon Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 *Harv J L & Pub Pol* 5, 14–20 (2011).



original contextual meaning as framed by the shared presuppositions of speakers and listeners, including its anticipated applications and nonapplications. In an apparent exemplification of this position, Justice Scalia, in interpreting “cruel” in the Eighth Amendment’s prohibition against cruel and unusual punishments, equates the original and controlling meaning with “the existing [that is, ‘enacting’] society’s assessment of what is cruel.”<sup>185</sup>

Many originalists, however, understandably decline to bind themselves in this way. Much constitutional language guarantees rights that correspond closely to moral rights.<sup>186</sup> When contemporary understandings of moral rights diverge from those prevailing at the time of a provision’s enactment, originalists may feel a strain about whether to adhere to original contextual meaning—as framed by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications—or instead to adopt either original semantic meaning or real conceptual meaning as the sense appropriate to the determination of legal meaning. Indeed, when interpreting the First Amendment, Scalia largely ignores evidence that the Founding generation held a narrow view of the freedom of speech<sup>187</sup> and maintains that the Amendment’s language mandates protection absent specific proof of a “tradition” allowing a particular category of speech to be regulated.<sup>188</sup> Other originalists insist that the meaning of the Equal Protection Clause requires nondiscriminatory treatment of women or racial minorities, even if most people did not so understand it at the time of its ratification in 1868.<sup>189</sup>

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<sup>185</sup> Scalia, *Common-Law Courts* at 145 (cited in note 8).

<sup>186</sup> See Dworkin, *Freedom’s Law* at 7–10 (cited in note 40).

<sup>187</sup> See generally, for example, Leonard W. Levy, *Emergence of a Free Press* (Oxford 1985) (expressing doubt that the Founding generation understood the First Amendment’s protection for free speech as doing more than barring systems of administrative censorship or prior restraints).

<sup>188</sup> See, for example, *Brown v Entertainment Merchants Association*, 131 S Ct 2729, 2734 (2011) (Scalia) (asserting that “without persuasive evidence that a novel restriction on [speech] is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment [of] the American people . . . that the benefits of its restrictions . . . outweigh the costs”) (quotation marks omitted); *Citizens United v Federal Election Commission*, 558 US 310, 385–88 (2010) (Scalia concurring) (finding no evidence that “‘the freedom of speech’ that was the right of [the Founders] did not include the freedom to speak in association with other individuals, including association in the corporate form”).

<sup>189</sup> See, for example, Calabresi and Rickert, 90 *Tex L Rev* at 2–15 (cited in note 41) (distinguishing between the original meaning of the Equal Protection Clause and

For originalists who more rigorously insist that the shared presuppositions of the Founding generation, including widely expected applications and nonapplications, frame and limit constitutional meaning, a similar need for choice arises when historical inquiry discloses disagreement concerning a provision's proper applications. To cite just a few particularly well-known examples, Thomas Jefferson and Alexander Hamilton (and their respective followers) disagreed about whether Article I authorized Congress to create a Bank of the United States;<sup>190</sup> the justices of the Supreme Court divided in an early case about whether Article III had divested the states of the sovereign immunity that they might otherwise have claimed when sued in federal court by the citizens of another state;<sup>191</sup> and, in a dispute with partisan overtones, Federalists and Republicans differed in their judgments concerning whether the Alien and Sedition Acts,<sup>192</sup> which forbade criticism of the president, violated the First Amendment.<sup>193</sup>

Alert to this problem, Professors John McGinnis and Michael Rappaport have proposed to resolve indeterminacies by applying the interpretive methods that reasonable, well-informed judges and lawyers would have employed to gauge the meaning of a constitutional provision at the time of its enactment.<sup>194</sup> But this move only postpones the problem if, as others have argued, reasonable people of the Founding era disagreed about matters of interpretive methodology.<sup>195</sup>

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original expectations concerning its application, and arguing that its original public meaning forbade sex-based discrimination that tended to subordinate women even if most of the public did not so apprehend in 1868).

<sup>190</sup> See Joseph M. Lynch, *The Federalists and the Federalist: A Forgotten History*, 31 *Seton Hall L Rev* 18, 21–23 (2000).

<sup>191</sup> See generally *Chisholm v Georgia*, 2 US 419 (1793).

<sup>192</sup> Act of June 18, 1798 (“The Naturalization Act”), 1 Stat 566, repealed by Act of April 14, 1802 (“The Naturalization Law of 1802”) § 5, 2 Stat 153, 155; Act of June 25, 1798 (“The Alien Act”), 1 Stat 570 (expired 1800); Act of July 6, 1798 (“The Alien Enemies Act”), 1 Stat 577, codified as amended at 50 USC §§ 21–24; Act of July 14, 1798 (“The Sedition Act”), 1 Stat 596 (expired 1801).

<sup>193</sup> See James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* 49–76 (Simon & Schuster 2002).

<sup>194</sup> See John O. McGinnis and Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 *Nw U L Rev* 751, 751–65 (2009).

<sup>195</sup> Among other difficulties, McGinnis and Rappaport believe that Founding-era interpretive rules required interpreters “to select the interpretation of ambiguous and vague terms that had the stronger evidence in its favor,” but they do not purport to establish what would count as “the stronger evidence.” *Id.* at 774. This is a significant gap, due to both the possibility of there being different senses of meaning and the disagreement

Acknowledging that purely historical and linguistic inquiries cannot make determinate what was historically and linguistically indeterminate, an increasing number of originalists embrace a distinction—which I have discussed in connection with Professor Solum’s account of the relationship between linguistic and legal meanings—between constitutional interpretation, on the one hand, and construction, on the other.<sup>196</sup> When linguistic meaning is vague, originalists of this stripe acknowledge the need for contestable judgments in constructing a determinate doctrinal framework. This seems to me the most cogent and honest position for a public-meaning originalist to adopt, though it threatens to strip originalism of much of the determinacy that other originalists trumpet as among the central virtues of their theory and to introduce a reliance on normative judgment that originalists have often disdained.

In a further retreat from pretensions to determinacy, many originalists also seem grudgingly to accept that interpreted meaning, rather than the original public meaning, can define legal meaning, at least in some cases—though they often equivocate about their grounds for doing so. To cite just two examples, many originalists appeal to precedent, rather than original semantic or contextually defined and limited meaning, as their basis for accepting that the Due Process Clause of the Fourteenth Amendment<sup>197</sup> incorporates nearly all of the Bill of Rights<sup>198</sup> and that the due process guarantee of the Fifth Amendment<sup>199</sup>

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among the Founding generation about appropriate interpretive methodologies. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *Fordham L Rev* 721, 736 (2013) (“McGinnis and Rappaport . . . treat Founding-era legal culture in an anachronistic manner and assume the existence of a consensus on issues that were actually deeply contested in 1788.”). See also Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 *BYU J Pub L* 283, 304 (2014) (maintaining that “interpretation during the founding era and subsequent decades was eclectic”).

<sup>196</sup> See generally, for example, Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton 2004); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard 1999); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas 1999). See also Solum, 82 *Fordham L Rev* at 455–56 (cited in note 2) (claiming that “[b]oth courts and legal theorists mark a general distinction between ‘interpretation’ (discovering meaning) and ‘construction’ (determining legal effect)”); Barnett, 34 *Harv J L & Pub Pol* at 65 (cited in note 142).

<sup>197</sup> US Const Amend XIV, § 1.

<sup>198</sup> See, for example, Scalia and Garner, *Reading Law* at 413 (cited in note 4).

<sup>199</sup> US Const Amend V.

forbids race discrimination by the federal government.<sup>200</sup> Once again, originalism of the kind that accepts the authority of interpreted meaning in some cases, but not in others, requires selections among candidates to define constitutional meaning for which purely linguistic standards—and many if not most versions of originalism—offer little guidance.

At the end, four points about originalism deserve emphasis. First, although many discussions assume that originalism denotes a single, well-defined, and relatively determinate theory, there are many actual and possible versions of originalism, the differences among which even the theories' proponents have often failed to work out. And, of particular pertinence for my purposes, unless the content of an originalist theory is very clearly specified, the increasingly familiar equation of the meaning of constitutional provisions with their original public meaning may frequently prove consistent with, or may fail decisively to rule out, the selection of literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, and reasonable meaning.

Second, as a purely linguistic matter, the idea of an original public meaning is more nearly a variable than a constant. Any originalist who contends otherwise has misunderstood the nature of the challenge that legal interpreters frequently confront.

Third, as history demonstrates, even judgments of contextual meaning as framed by the shared presuppositions of speakers and listeners—which many originalists appear to embrace as their presumed or default measure of original public meaning—are often reasonably disputable. As a result, even if original public meaning were equated exclusively with original contextual meaning as framed by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications, legal meaning frequently could not be determined by a prelegal, purely linguistic fact of the matter. Ascription of an original public meaning to constitutional provisions would depend on normatively suffused standards for resolving linguistic and legal disagreements in the best or most reasonable way.

Fourth, openness to acceptance of interpreted meaning as the appropriate referent for claims of legal meaning introduces a further element of indeterminacy into many versions of originalist

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<sup>200</sup> The originalist justices Scalia and Thomas joined part of a precedent-based opinion interpreting the Fifth Amendment in this way in *Adarand Constructors, Inc v Peña*, 515 US 200, 215–18 (1995) (O'Connor).

theory, as does some originalists’ willingness to credit real conceptual meanings as constitutional meanings in some cases.

In sum, insofar as originalist theories aspire to pick out uniquely correct referents for claims of legal meaning without resort to case-by-case exercises of normative judgment, most current versions fall far short of their goal.<sup>201</sup> Originalists appear to disagree sharply among themselves about whether to acknowledge this indeterminacy, and whether to define their goals accordingly, as is manifested most clearly in debates among originalists about whether to embrace a distinction between constitutional meanings, on the one hand, and judicial constructions, on the other.

## 2. Living constitutionalism.

There are multiple forms of living constitutionalism, most of which I shall make no effort to identify, much less scrutinize.<sup>202</sup> It would serve no good purpose to trace all surface similarities, and the equally important dissimilarities, among various non-originalist methods for ascribing constitutional meaning. Three points should suffice for present purposes. First, living constitutionalists, at least as much as originalists, frequently need to make choices among semantic, contextually defined and limited, real conceptual, intended, reasonable, and interpreted meanings.

Second, many if not most living constitutionalist theories—in contrast with many versions of originalism—reject rather than embrace the proposition that a good constitutional theory should reflect categorical judgments about the legally proper sense of meaning or about the corresponding, appropriate referents for claims of constitutional meaning. For example, Professor Philip Bobbitt has identified a number of modalities through which constitutional interpreters ascribe meaning to constitutional provisions, including those of historical, textual, structural,

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<sup>201</sup> For a discussion of the development of more-determinate versions of originalism than those that are now most prominently offered, see generally Fallon, 34 *Harv J L & Pub Pol* 5 (cited in note 184).

<sup>202</sup> For an example of a version that describes multiple alternative modalities of constitutional interpretation, see Bobbitt, *Constitutional Fate* at 9–119 (cited in note 3). For an example of a version that defends a pragmatic, democracy-promoting interpretation, see Breyer, *Active Liberty* at 3–12 (cited in note 3). For an example of a version that defends interpretation that seeks to put recognized authorities in the best moral light, see Dworkin, *Law’s Empire* at 355–99 (cited in note 3).

prudential, and doctrinal argumentation.<sup>203</sup> But he does not maintain that any one of these modalities supplies the uniquely correct referent for claims of constitutional meaning in all cases.<sup>204</sup> When different modalities of constitutional argument point toward different conclusions, Bobbitt believes that interpreters must choose a preferred modality—and thus a referent for an asserted claim of constitutional meaning—based on conscience.<sup>205</sup> In making such a choice, norms of conversational interpretation obviously furnish no help.

Professor David Strauss's common-law model of constitutional interpretation exhibits a similar openness to multiple and varied senses of meaning as potential referents for claims of constitutional meaning.<sup>206</sup> He emphasizes the importance of interpreted meaning but contemplates the pertinence of other senses—including contextual meaning as framed by the shared presuppositions of speakers and listeners—when no moral or practical exigency militates in favor of a rival sense of meaning.<sup>207</sup> In an earlier article, I defended a multifaceted theory of constitutional interpretation that recognizes multiple potential sources of meaning, including history, constitutional structure, precedent, and moral and political values.<sup>208</sup>

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<sup>203</sup> See Bobbitt, *Constitutional Fate* at 9–119 (cited in note 3); Philip Bobbitt, *Constitutional Interpretation* 12–13 (Blackwell 1991).

<sup>204</sup> See Bobbitt, *Constitutional Interpretation* at 170 (cited in note 203).

<sup>205</sup> See *id.*

<sup>206</sup> See Strauss, *The Living Constitution* at 3 (cited in note 3) (maintaining that our constitutional system has become “a common law system”). The Supreme Court occasionally reasons in originalist terms, but it does not do so consistently. See *id.* at 33–34. Sometimes it prefers original contextual meaning as framed by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications, to original semantic meaning—as, for example, when it says that obscene utterances do not come within the First Amendment's protection for freedom of speech. See, for example, *Roth v United States*, 354 US 476, 482–85 (1957). But sometimes the Court adopts semantic meanings or real conceptual meanings in preference to original contextual meanings (as defined by expected applications), as it appears to have done in holding that the Equal Protection Clause requires demanding judicial scrutiny of gender-based classifications—even though such classifications were not at all widely regarded as suspect at the time of the Fourteenth Amendment's ratification in 1868. See *United States v Virginia*, 518 US 515, 531 (1996); *id.* at 566–70 (Scalia dissenting). And sometimes the Court relies on interpreted meanings, with little or no attention to original semantic or contextual meanings. It did so, for example, when it held that the Due Process Clause of the Fifth Amendment forbids the federal government from discriminating on the basis of race or gender. See *Adarand Constructors*, 515 US at 215–18.

<sup>207</sup> See Strauss, *The Living Constitution* at 103–05 (cited in note 3).

<sup>208</sup> See Fallon, 100 Harv L Rev at 1237–48 (cited in note 4).

Third, a version of living constitutionalism could seek to furnish the specific moral criteria that judges should apply in rendering legally determinate what otherwise would be indeterminate. Professor Dworkin and Judge Posner both purport to do so, albeit by offering normative standards that would require considerable case-by-case judgment in application.<sup>209</sup> Most other living constitutionalist theories are more normatively open-ended, up to a point. But none of the leading living constitutionalist theories of which I am aware insists that judges should make categorical choices among semantic, contextually defined and limited, real conceptual, intended, reasonable, and interpreted meanings. In short, although one might expect that living constitutionalist theories would, like originalism and textualism, aspire to pick out preferred and excluded senses of meaning as referents for claims of legal meaning, none in fact does so.

#### IV. HOW TO RESOLVE DISPUTED ISSUES OF LEGAL MEANING: IN DEFENSE OF AN ECLECTIC APPROACH

If my arguments to this point have succeeded, participants in debates about legal meaning should recognize that there are multiple possible senses of meaning and, accordingly, should reconceptualize the challenge of ascribing legal meaning to statutory and constitutional provisions. Theories of legal interpretation offer decisionmaking structures or protocols for selection from among the array. Informed by the analysis that has gone before, we now confront the question of how to choose among such theories.

Continuing with the step-by-step approach that Part III began, I believe we can best go forward by deploying the striking distinction that emerged in Part III between interpretive theories that seek to resolve disputes about the sense of meaning to which claims of legal meaning should properly refer on a categorical basis—by privileging some and excluding others—and those that call for case-by-case judgments. This Part argues for the latter strategy.

Before proceeding to overtly normative discussion, however, I should clarify the relationship between my arguments in this Part and those of Parts I, II, and III. The arguments of Parts I, II, and III were descriptive and analytical. They stand on their own. Some readers will undoubtedly reject the normative

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<sup>209</sup> See notes 171–76 and accompanying text.

arguments that I am about to offer. But any perceived deficiencies in the prescriptions that follow—whether real or imagined—furnish no ground for rejecting my prior arguments that: (1) there are multiple possible senses of or referents for claims of legal meaning (as is also the case with respect to conversational meaning); (2) in legally disputed cases, there frequently is no prelegal, linguistic fact of the matter capable of determining what a statutory or constitutional provision means or how it applies; (3) a central challenge for any prescriptive theory of legal interpretation is to acknowledge linguistic indeterminacy and to offer a mechanism for resolving it; and (4) many currently leading theories of statutory and constitutional interpretation fail to reckon adequately—often by standards that they set for themselves—with the necessity for choice among a variety of possible senses of or referents for claims of legal meaning. Possible objections to my prescriptive suggestions will do nothing to dissolve the problem or challenge that earlier parts of this Article have identified.

#### A. The Context for Choice

Most Americans lead their entire lives without ever becoming enmeshed in a dispute about legal meaning that requires judicial resolution. They stop at stop signs, comprehend that they must pay their taxes by April 15th, recognize that the First Amendment forbids censorship of the press, and so forth. The vast majority of cases in the federal courts of appeals elicit no dissent.<sup>210</sup> Even in the Supreme Court, which has a central mission of resolving cases that have divided lower courts,<sup>211</sup> the justices decide many cases unanimously. In the Court's 2013 term, the unanimity rate reached 64 percent.<sup>212</sup>

When one takes a broad-lens view of American legal practice, it is hard not to conclude that debates about competing

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<sup>210</sup> See Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U Pa L Rev 1319, 1331 (2009) (noting that “the proportion of federal appellate decisions containing dissents is quite low—around 10%”).

<sup>211</sup> See US S Ct Rule 10 (identifying conflicts among decisions of lower courts as among the central considerations bearing on the Court's decision to grant a writ of certiorari).

<sup>212</sup> See *The Supreme Court 2013 Term: The Statistics*, 128 Harv L Rev 401, 406 (2014) (recording that, of seventy-two decided cases, the justices issued unanimous opinions in thirty-five cases and achieved unanimity as to the correct judgment in eleven more).



interpretive methodologies have less practical significance than participants often imagine. In my view, the best explanation for the breadth of agreement that exists concerning most questions of legal meaning may be that we ordinarily grasp or “understand” the meaning of statutory and constitutional provisions without needing to employ such theories at all.<sup>213</sup> On this view, interpretation occurs as a response to puzzlement or uncertainty. Typically, however, no puzzlement exists. We simply understand what the law requires.

If this picture is correct, we can understand the interpretive theories that Part III canvassed as having alternative versions. In their less robust forms, those theories would challenge relatively little that now seems settled by convergent understanding—partly through their acceptance of the doctrine of stare decisis—and would operate mostly at the margins of a broad core of agreement. In their more robust versions, however, at least some—notably textualism and originalism, and possibly Dworkinian theories that accord little significance to “fit”—could potentially unsettle current understanding a great deal more.<sup>214</sup>

Having so observed, I return to the point with which I began this Section: even without an agreed interpretive theory, current practice is far from a free-form exercise in which judges recurrently pick the outcome that best conforms to their ideological preferences. If we should want to introduce new, extralinguistic, legal constraints, it is not because the only alternative is a legal Tower of Babel or an Alice in Wonderland world in which legal provisions can mean whatever judges want them to mean. Our current practice—in which no categorical exclusion of linguistically eligible senses of meaning applies—attests otherwise.

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<sup>213</sup> See Marmor, *The Language of Law* at 22 (cited in note 4); Dennis Patterson, *Law and Truth* 86–88 (Oxford 1996) (contrasting “understanding” with “interpretation” and characterizing the former as more fundamental). Avoiding infinite regress is one reason to adopt the view that the “interpretation” (if it should be called that at all) that occurs when one person successfully grasps the communicative content of another’s utterance does not invariably require reliance on a prescriptive theory of interpretation—if we needed an interpretive theory to know that a stop sign means “stop,” we would presumably also need an interpretive theory to interpret that interpretive theory, and so on with respect to every interpretive theory that we relied on thereafter. See Patterson, *Law and Truth* at 88 (cited in note 213); Marmor, *The Language of Law* at 22 (cited in note 4); Ronald Beiner, *Political Judgment* 130–35 (Chicago 1983).

<sup>214</sup> See Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* 9 (Henry Holt 2014) (“Whereas Scalia is originalism’s greatest public advocate, Thomas is its most devoted practitioner, willing to reimagine whole fields of constitutional law from scratch.”).

## B. General Criteria for Theory Selection

In a previous article entitled *How to Choose a Constitutional Theory*, I argued that the choice among prescriptive constitutional theories should reflect three normative criteria: a person should weigh the various candidates' strengths and weaknesses in promoting rule of law values such as predictability and stability, in facilitating political democracy, and in defining a morally defensible set of individual rights.<sup>215</sup> In my view, similar considerations should come into play in selecting a theory of statutory interpretation. Rule of law values matter greatly. The courts should reach interpretive judgments, via the application of interpretive methodologies, that permit the effective exercise of the legislature's lawmaking prerogatives.<sup>216</sup> Finally, no sound approach to legal interpretation can ignore the moral and practical desirability of the outcomes that it would generate.<sup>217</sup>

Although these criteria are of course contestable, I shall apply them here without further defense, except to emphasize their relatively broad, albeit often only implicit, acceptance in the literature.<sup>218</sup> That acceptance should provide some assurance that they incorporate no objectionable bias in favor of one or another kind of theory.

## C. The Defects and Dangers of Categorical Approaches

Of the prominent theories that Part III preliminarily reviewed, only two—textualism and originalism—appear to embrace the aspiration of identifying uniquely correct selections among, or even categorical exclusions of, such possible referents for claims of legal meaning as semantic meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, legislatively intended meaning, reasonable meaning, and interpreted meaning. In defense of their approaches, textualists and originalists frequently argue that their methodologies offer singular advantages in promoting rule of law and democratic values by minimizing judicial value judgments and giving legislatures clear notice of the

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<sup>215</sup> Richard H. Fallon Jr., *How to Choose a Constitutional Theory*, 87 Cal L Rev 535, 558–59 (1999).

<sup>216</sup> See Fallon, 99 Cornell L Rev at 732 (cited in note 93).

<sup>217</sup> See id at 734.

<sup>218</sup> See Fallon, 87 Cal L Rev at 549–57 (cited in note 215).

standards that will govern future interpretation.<sup>219</sup> They argue that consistent adherence to categorical standards set in advance would facilitate democratically accountable lawmaking by empowering legislators to legislate with knowledge of the interpretive consequences.

Part III argued that textualism and originalism do not, in fact, furnish determinate standards for choosing among semantic meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, speakers’ intended meaning, reasonable meaning, and interpreted meaning. For the moment, however, I shall assume for the sake of argument that the current indeterminacies could be patched up so that textualism and originalism—or a combined theory of textualist originalism, such as the one Justice Scalia has advanced<sup>220</sup>—would dictate that the correct referent for claims of legal meaning is always (or never) a provision’s literal or semantic meaning, its contextual meaning as framed by the shared presuppositions of speakers and listeners, its real conceptual meaning, or its reasonable meaning. Such a theory might, though it would not necessarily, include an exception for *stare decisis* in a determinately specified class of cases.

Imagining a much more categorically determinate version of textualism or originalism, we should think carefully about whether adoption of its algorithmic prescriptions would improve interpretive practice. I fear (a term that I use advisedly) that it would not. As an initial matter, we should recall—as Part II demonstrated—that categorical preferences for or exclusions of currently available senses of “meaning” would not aid in recovering a unique linguistic truth concerning what statutory and constitutional provisions mean. There can frequently be a multitude of linguistically pertinent facts. If we assume that judges should act as the faithful agents of past lawmakers, we should

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<sup>219</sup> See, for example, Easterbrook, 66 *Geo Wash L Rev* at 1120–21 (cited in note 8).

<sup>220</sup> See Scalia and Garner, *Reading Law* at 411–15 (cited in note 4) (proposing a general approach to the reading of legal texts). A number of prominent originalists can thus be classified as devotees of “originalist textualism.” See Kesavan and Paulsen, 91 *Georgetown L J* at 1142–43 (cited in note 183); Gary Lawson, *Proving the Law*, 86 *Nw U L Rev* 859, 875 (1992) (defining “originalist textualism” as “a method which searches for the ordinary public meanings that the Constitution’s words, read in linguistic, structural, and historical context, had at the time of those words’ origin”). And a number of textualists in statutory interpretation are constitutional originalists whose methodologies blend seamlessly. See generally, for example, John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 *Colum L Rev* 1648 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum L Rev* 1 (2001).

also understand that faithful agency might mean adopting any of a range of possible senses of the meaning of statutory and constitutional provisions.

Justice Scalia has reportedly said, “I am an originalist, but I am not a nut.”<sup>221</sup> The implied contrast reveals much. A more stringently determinate form of textualist originalism than he practices would risk practically and morally disastrous outcomes. Potential conclusions might be that paper money and Social Security are unconstitutional,<sup>222</sup> the Bill of Rights does not apply to the states,<sup>223</sup> and *Brown v Board of Education of Topeka*<sup>224</sup> was wrongly decided.<sup>225</sup>

If the risk of potentially catastrophic outcomes is intolerable in the selection of a prescriptive theory of legal interpretation—as I believe that it should be—we are left with the question whether textualism and originalism in the less-determinate versions described in Part III nevertheless dominate their competitors. This is a comparative question, not susceptible to resolution through any single knockdown argument. Again, however, a careful delineation of the varieties of linguistically and legally plausible candidates for claims of legal meaning strongly predisposes me to a negative answer. For one thing, the versions of textualism and originalism that dominate public debate—including those practiced by Justices Scalia and Thomas—generate more confusion than clarity in application through their pretense to a determinacy that, as Part III showed, they demonstrably lack. The notions of original public meaning and the meaning of texts in context mask a multitude of indeterminacies. Some originalists in effect consider reasonable meanings in some circumstances, through their assessments of how a reasonable interpreter would have understood language in context.<sup>226</sup> By contrast, others tend to characterize nearly all interpretive strictures as virtues, as a check against judicial lawmaking.<sup>227</sup> For my own part, I would hesitate to occlude the

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<sup>221</sup> Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* 103 (Doubleday 2007).

<sup>222</sup> See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum L Rev* 723, 733, 744–45 (1988).

<sup>223</sup> See Strauss, *The Living Constitution* at 15 (cited in note 3).

<sup>224</sup> 347 US 483 (1954).

<sup>225</sup> See Strauss, *The Living Constitution* at 12 (cited in note 3).

<sup>226</sup> See Fallon, 99 *Cornell L Rev* at 712–24 (cited in note 93).

<sup>227</sup> See, for example, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 *U Pa L Rev* 117, 120–21 (2009) (arguing that the “inexorable” logic of textualism

path to such sensible conclusions as, for example, that “No vehicles in the park” does not encompass rescue vehicles in circumstances of life-threatening emergency—a conclusion that might most plausibly be supported on the ground that it would accord with the purposes of reasonable legislators who wished to pursue reasonable goals in reasonable ways. (It might also be supported, however, on grounds appealing to implied pragmatic restrictions on the domain to which the proscription applies or to the understanding of reasonable readers or listeners.)

#### D. The Virtues of Theories That Permit Case-by-Case Determinations

My arguments for preferring a relatively case-by-case approach to selecting among otherwise legally and linguistically plausible referents for claims of legal meaning are largely implicit in the arguments that I have offered already.<sup>228</sup> To a large extent, they have Burkean foundations.<sup>229</sup> And they begin with the proposition—defended earlier and repeated here solely for emphasis—that cases necessitating selection constitute the exception, not the norm. The choice is not between a practice in which the law means whatever judges prefer and one in which textualist and originalist strictures offer the only refuge against unbounded judicial subjectivity. Beginning with a situated view of the existing, reasonably functional state of affairs, we should recognize that even if more categorical determinacy would increase predictability in a small but important category of cases, making case-by-case judgments of what is legally best is much more suited to judges’ skill sets than appraising (much less

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requires “radicalization” in which “textualist purity must inevitably squeeze out the contrary pragmatic accommodations that textualism has traditionally allowed” and force the adoption of even “absurd” results).

<sup>228</sup> As noted above, I believe that this approach is at least loosely consistent with Professor Greenberg’s argument that “the semantic content and the communicative content”—or, roughly, what I have called the contextual meaning—“of the statutory text are relevant if, and to the extent that, moral considerations, such as considerations of democracy and fairness, make them relevant.” Greenberg, 123 *Yale L J* at 1293 (cited in note 117). Greenberg’s argument is rooted in a general theory of law, which he calls “the Moral Impact Theory.” *Id.* at 1290.

<sup>229</sup> See, for example, Adrian Vermeule, *The System of the Constitution* 135 (Oxford 2011) (describing judges as “more or less Burkean if they weigh precedent especially heavily”).

crafting) categorical theories that would apply with unknowable effects to unforeseen interpretive problems.<sup>230</sup>

This sketch of an argument—for it is admittedly no more than that—invites two predictable objections. The first maintains that a case-by-case approach to the identification of proper referents for claims of legal meaning politicizes adjudicative processes in which a judge's personal views should play no part. But a refutation of this objection inheres in what I have said already: when multiple linguistically possible referents for claims about the meaning of legal provisions exist, there is no value-free way to choose. The only question is whether choice should occur at the categorical level or at the level of individual cases.

A related objection acknowledges the need for value-based choice in the selection of an interpretive theory or methodology, but it insists, nevertheless, that the ideal of the rule of law forbids judges to make ad hoc, case-by-case judgments.<sup>231</sup> As so formulated, however, this objection not only ignores other values bearing on the choice of an interpretative theory but also embodies two fallacies.

First, the conception of the rule of law to which the imagined objection appeals is by no means a necessary one.<sup>232</sup> To take the most obvious counterexample, common-law judges have historically developed the law without embracing rigid methodological constraints.<sup>233</sup>

Second, even if it would be better for all judges to adopt a self-limiting interpretive methodology such as textualism or originalism, it would not follow that individual judges should do so in circumstances in which others do not.<sup>234</sup> The approach by which any one judge would best promote rule of law values—including stability and predictability of outcomes—may depend

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<sup>230</sup> See Cass R. Sunstein, *Legal Reasoning and Political Conflict* 46 (Oxford 1996) (arguing that the “limited capacities of judges” furnish a reason for them to avoid abstract, high-level theories as bases for adjudicative decisions).

<sup>231</sup> According to what I have characterized as a “formalist ideal type,” “the ideal if not necessary form of ‘law’ is that of a ‘rule,’ conceived as a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes.” Richard H. Fallon Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 *Colum L Rev* 1, 14 (1997).

<sup>232</sup> See id at 10–36 (identifying competing conceptions of the rule of law ideal).

<sup>233</sup> See Strauss, *The Living Constitution* at 33–49 (cited in note 3).

<sup>234</sup> See Vermeule, *The System of the Constitution* at 134–35 (cited in note 229) (identifying a fallacy of division in the failure to recognize that “any given judge cannot uncritically assume that it would be best for her to adopt the approach that would be best for all if adopted by all”).

crucially on what other judges have done in the past, do now, and are likely to do in the future. To take a stylized example, even if we assume that it would have maximized stability and predictability if all Supreme Court justices had always adhered to the original contextual meaning of constitutional language as framed and limited by the shared presuppositions of speakers and listeners, including anticipated applications and nonapplications, for any single judge or justice to adopt that approach today would likely contribute to short-term doctrinal instability, with little prospect for future improvement if other judges and justices seem unlikely to accept so uncompromising a brand of originalism. If stability and predictability matter, a judge may better pursue them directly, by invoking those values as grounds for decision in particular cases, than by adopting an across-the-board commitment to originalism.

#### E. Does It Take a Theory to Beat a Theory?

It is sometimes said that it takes a theory to beat a theory.<sup>235</sup> The challenge is a fair one. With respect to legal theories as much as other matters, the devil often inhabits the details (as, indeed, I have tried to show with respect to the indeterminacies of leading versions of textualism and originalism). The case-by-case approaches of Professor Dworkin and Judge Posner have attracted searching criticism.<sup>236</sup> Any particular formula for case-by-case adjudication that I might propose would invite similar objections.

Pressed to articulate a prescriptive theory, I would provisionally offer this: in any case in which there is more than one linguistically and legally plausible referent for claims of legal meaning (in light of the senses of meaning that Parts I and II identified), interpreters should choose the best interpretive outcome as measured against the normative desiderata of substantive desirability, consistency with rule of law principles, and promotion of political democracy, all things considered.

As so formulated, my recommended approach bears important similarities to Dworkin's, but it would allow judges to take a broader array of considerations into account in determining what

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<sup>235</sup> See Barnett, *Restoring the Lost Constitution* at 92 (cited in note 196).

<sup>236</sup> See, for example, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L Rev* 1269, 1270 (1997).

is normatively best. Dworkin—who idealized the Supreme Court as “the forum of principle”<sup>237</sup>—depicted legal reasoning as moralized in a way that appears to exclude consideration of practical impediments to the immediate realization of legal ideals.<sup>238</sup> In my view, judicial decisionmaking often calls for practical, prudential, and cost-sensitive calculations for which Dworkin’s theory leaves little room.<sup>239</sup>

In this respect, my proposed formula manifests a resemblance to the interpretive pragmatism that Richard Posner has long commended,<sup>240</sup> but I differ with him, too, concerning the values that judges should weigh and the goals that they should seek to promote in reaching legal decisions. I do not share his debunking views of moral and political theory in the liberal deontological tradition.<sup>241</sup> Nor, relatedly, do I believe that the only persuasive foundations for claims of rights lie in calculations of individual or social welfare. In my view, judges should sometimes recognize rights that inhere in personhood when making the morally inflected judgments that their role requires.<sup>242</sup>

The comparison of my approach with Dworkin’s and Posner’s leaves no room for doubt about what should have been plain anyway: any interpretive theory that requires normatively based case-by-case judgments cannot escape moral controversy. But once it is recognized that reasonably disputed claims of legal meaning cannot be resolved by appeal to any prelegal, linguistic fact of the matter, there is no alternative to the exercise of legally constrained normative judgment. Suggestions to the contrary are either false or misleading. The only real question, as I have argued, is whether normative choice among disputed referents for claims of legal meaning should occur at the categorical level

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<sup>237</sup> Dworkin, *A Matter of Principle* at 69–71 (cited in note 175).

<sup>238</sup> See *id.* at 33–71.

<sup>239</sup> See Fallon, 111 *Harv L Rev* at 56–61 & n 19 (cited in note 4).

<sup>240</sup> See, for example, Posner, *Law, Pragmatism, and Democracy* at 57–96 (cited in note 16); Posner, *Overcoming Law* at 531–51 (cited in note 16); Posner, *The Problems of Jurisprudence* at 454–69 (cited in note 16); Posner, 18 *Cardozo L Rev* at 1–3 (cited in note 16).

<sup>241</sup> See generally Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *Harv L Rev* 1638 (1998).

<sup>242</sup> My views about political democracy differ from Posner’s in similar ways. According to Posner, the value of democracy lies principally, if not entirely, in its tendency to promote good consequences, including social stability and public welfare. See Posner, *Law, Pragmatism, and Democracy* at 2–3 (cited in note 16) (defining and endorsing minimalist democracy). In my contrasting view, meaningful citizen engagement in political self-governance is an end, not just a means, that law and legal interpretation should strive to promote.



or in individual cases. Although the risk of judicial misjudgment cannot be eliminated, it is minimized when judges decide whether to equate legal meaning with semantic or literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, speakers' intended meaning, reasonable meaning, or interpreted meaning on a case-by-case rather than on a categorical basis.

#### CONCLUSION

Claims of meaning—in law as in ordinary conversation—can sometimes invoke and require a choice among semantic or literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners (including anticipated applications and nonapplications), real conceptual meaning, a speaker's intended meaning, reasonable meaning, and interpreted meaning. To put the point only slightly differently, "meaning" has many possible meanings. By delineating the alternative possible referents for claims of meaning that hard legal cases present, this Article helps to clarify both the challenge that legal interpreters confront and the nature of the choices that they must make. In hard cases, the meaning of statutory and constitutional provisions does not exist as a matter of pre-legal linguistic fact. Contrary to frequent suggestions, legal meaning depends on standards that are largely internal to law. When those standards are indeterminate—as they typically are in disputed cases—legal interpreters must make constrained normative choices. Recognizing that there can be multiple linguistically and legally plausible senses of, and thus referents for, claims of legal meaning—including semantic or literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, a speaker's intended meaning, reasonable meaning, and interpreted meaning—also casts the most frequently debated theories of statutory and constitutional interpretation in a fresh, illuminating perspective. A careful examination of textualism, legislative intentionalism, purposivism, originalism, and leading forms of nonoriginalism unmistakably establishes that none—despite appearances to the contrary—uniquely identifies legal meaning with semantic or literal meaning, contextual meaning as framed by the shared presuppositions of speakers and listeners, real conceptual meaning, intended meaning, reasonable meaning, or interpreted meaning. It is equally important to

recognize that none possesses the resources to determine a consistent, uniquely correct referent for claims of legal meaning without reliance on relatively ad hoc normative judgments.

An understanding of the precise nature of the challenge that legal interpreters confront in hard cases provokes the question whether necessary choices among otherwise plausible senses of or referents for claims of legal meaning are best made on a categorical or a case-by-case basis. In this Article, I have argued for the latter approach. When the complexities of choice are fully appreciated, interpretive eclecticism does not represent a flight from intellectual, legal, or moral responsibility. Instead, it embodies a judgment about how best to exercise intellectual, legal, and moral responsibility—in light of the limits of the human capacity to foresee the consequences of categorical determinations or exclusions—when there is no controlling linguistic fact of the matter concerning what a statutory or constitutional provision means as applied to a particular case. Whatever decisions judges ought to make, mistaken apprehensions of linguistic necessity should not becloud debates about legal interpretation.