REASONS FOR INTERPRETATION

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What kinds of reasons should matter in choosing an approach to constitutional or legal interpretation? Scholars offer different types of reasons for their theories of interpretation: conceptual, linguistic, normative, legal, institutional, and reasons based on theories of law. This Article argues that normative reasons, and only normative reasons, can justify interpretive choice. This is the "normative choice thesis." This Article formulates the normative choice thesis and offers a systematic analysis of the different kinds of reasons usually canvassed to defend theories of interpretation, showing why each type of non-normative reason cannot justify interpretive choice. In doing this, this Article also offers an account of interpretive choice and its relation to theories of interpretation. All the ways of determining the meaning of a legal source—and all the actions that could be undertaken instead—are alternatives for interpretive choice, regardless of what counts as "interpretation."

If interpretive choice cannot be grounded in some immutable truth about the idea of interpretation or language, but only on normative reasons, then the proper method of constitutional or statutory interpretation is liable to change with circumstances. This questions some well-established features of our legal culture, such as the common practice of committing to a single method of interpretation ("I'm an originalist," "I'm a living constitutionalist"), the expectation that judges be consistent in their approaches to interpretation, and the assumption that some legal provisions should always be interpreted in the same way.

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INTRODUCTION

How does one choose a theory of interpretation? People confronted with that choice—from judges to legislators to ordinary citizens—face an embarrassment of riches. There is no shortage of theories of legal interpretation, with their corresponding favored methods for reading statutes or the Constitution: in statutory interpretation, pragmatism, textualism, intentionalism, and purposivism; and in constitutional interpretation, originalism in its many variants, moral readings, common law constitutionalism, and common good constitutionalism, just to name a few.[1]

1. See generally Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1997) [hereinafter Dworkin, Freedom's Law] (arguing for a "moral reading" of the Constitution); Richard Ekins, The Nature of Legislative Intent (2012) [hereinafter Ekins, Legislative Intent] (offering a defense of intentionalism based on a theory of legislation); William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994) (defending dynamic statutory interpretation); David A. Strauss, The Living Constitution (2010) (arguing for common law constitutionalism); Adrian Vermeule, Common Good Constitutionalism (2022) (arguing for common good constitutionalism); Conor Casey & Adrian Vermeule, Myths of Common Good Constitutionalism, 45 Harv. J.L. & Pub. Pol'y 103 (2022) (same); Felipe Jiménez, Minimalist Textualism, Seton Hall L. Rev. (forthcoming), https://ssrn.com/abstract=4780572 [https://perma.cc/6NTE-JVSB] [hereinafter Jiménez, Minimalist Textualism] (explaining minimalist textualism); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001) (defending textualism); John F. Manning, What Divides Textualists From Purposivists?, 106 Colum. L. Rev. 70 (2006) (analyzing the nuanced differences between modern textualism and purposivism); Walter Benn Michaels, A Defense of Old Originalism, 31 W. New Eng. L. Rev. 21 (2009) (arguing for original intentions originalism); Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347 (2005) (discussing differences between textualism and intentionalism); Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 Notre Dame L. Rev. 1 (2015) (arguing for the "fixation thesis," a core aspect of originalism); Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243 (2019) (discussing the difference between originalism and other approaches); Lawrence B. Solum, The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning, 101 B.U. L. Rev. 1953 (2021) (describing original public meaning originalism).

Any person tasked with applying a statute or the Constitution[2] has to settle—with more or less deliberation and awareness—on a way of interpreting it. If one is to apply a statute or the Constitution, one will interpret it, and in interpreting it, one will be, in fact, choosing a method of interpretation.[3] Before choice, though, there should be deliberation: a weighing of reasons for and against one method or another. And before weighing the relevant reasons, one needs to know which reasons should count.

Which reasons should count? Debates on interpretation are marred by a disordered pluralism. Authors offer reasons of different kinds for their preferred methods of interpretation, which this Article classifies as conceptual, linguistic, normative, institutional, legal, and theory reasons.[4] Yet, as Professor Mark Greenberg notes, "arguments for particular theories of legal interpretation are typically offered without any account of why these arguments are the relevant ones."[5]

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2. This Article focuses on statutory and constitutional interpretation because these are the main concerns of scholarship on interpretive choice. See infra Part I. This Article can't address the interpretation of other sources. For an exposition of interpretive alternatives on precedent, see generally Craig Green, Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents, 94 N.C. L. Rev. 379 (2016) (explaining how the different methods of interpreting precedents can lead to different interpretive results). On the interpretation of private instruments, see Kent Greenawalt, Legal Interpretation: Perspectives From Other Disciplines and Private Texts 217–328 (2010) [hereinafter Greenawalt, Legal Interpretation] (discussing the law of agency, will interpretation, the law of contracts, and the doctrine of cy pres).

3. See Cass R. Sunstein, How to Interpret the Constitution 21 (2023) [hereinafter Sunstein, How to Interpret the Constitution] ("[T]o understand what the Constitution means, . . . [w]e also need a theory of constitutional interpretation. This is so whether or not we have such a theory explicitly in mind."). Professor Cass Sunstein speaks of interpretive choice as a choice between "theories." This Article refers to "methods" instead, as that word best conveys a proposal for action: a way in which an agent should act ("interpret") in a specific context. A theory may be purely explanatory and entail no proposal for action or may thematize a single aspect of interpretation, thus failing to specify a full alternative for action. In interpretive choice, theories are not assessed for their own sake but as entailing a proposal for the way someone should interpret a legal norm—that is, as proposing a "method." This is probably what Sunstein has in mind when speaking of "theories," so the difference is only terminological.

4. See infra Part I.

5. Mark Greenberg, Legal Interpretation, Stan. Encyc. Phil. (Edward N. Zalta ed., July 7, 2021), https://plato.stanford.edu/entries/legal-interpretation/ [https://perma.cc/2W2W-R9TV] [hereinafter Greenberg, Legal Interpretation]. For Professor Mark Greenberg, "It is unusual for theorists to explicitly address the question of how to choose between competing theories of interpretation." Id. Greenberg notes that his own works, as well as works by Professors Scott Shapiro and Richard H. Fallon Jr. serve as exceptions. See Scott Shapiro, Legality 1–35, 331–88 (2011) (addressing meta-interpretive debates emphasizing the relevance of a system's economy of trust); Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 537–39 (1999) [hereinafter Fallon, How to Choose a Constitutional Theory] ("The written Constitution, by itself, cannot determine the correctness of any particular theory of constitutional interpretation.

This Article offers such an account. It undertakes a systematic assessment of the reasons offered for methods of interpretation. The Article claims that normative reasons and only normative reasons can ultimately justify interpretive choice. This is the "normative choice thesis." This means that debates on interpretation should be settled ultimately by reference to things such as which method of interpretation leads to more just outcomes, is most consistent with the rule of law, leads to better consequences, or best satisfies some other value. It also means that reasons referring to, for example, what counts as interpretation, or to the nature

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Selection must reflect a judgment about which theory would yield the best outcomes, as measured against relevant criteria."); Mark Greenberg, Response, What Makes a Method of Interpretation Correct? Legal Standards vs. Fundamental Determinants, 130 Harv. L. Rev. Forum 105, 105–07 (2017), https://harvardlawreview.org/wp-content/uploads/2017/02/vol130_Greenberg.pdf [https://perma.cc/FT54-KRYS] [hereinafter Greenberg, Legal Standards vs. Fundamental Determinants] ("The more general point is that what makes a method of legal interpretation correct is that it accurately identifies the law. Consequently, . . . answers to questions about legal interpretation depend on how the content of the law is determined at a more fundamental level than legal standards."). For other works addressing that question, see generally Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 352–70 (2009) [hereinafter Raz, Authority and Interpretation] (arguing that constitutional interpretation weighs reasons for continuity with reasons for change in the law); Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 1 (2006) [hereinafter Vermeule, Judging Under Uncertainty] ("[J]udges should (1) follow the clear and specific meaning of legal texts, where those texts have clear and specific meanings; and (2) defer to the interpretations offered by legislatures and agencies, where legal texts lack clear and specific meanings."); Evan D. Bernick, Eliminating Constitutional Law, 67 San Diego L. Rev. 1, 5 (2022) (discussing positivist arguments for originalism); Andrew Coan, The Foundations of Constitutional Theory, 2017 Wis. L. Rev. 833, 835–36 (considering varieties of constitutional interpretation and their foundations); Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1238–39 (2015) [hereinafter Fallon, Meaning of Legal Meaning] (addressing interpretive choice in terms of a choice of legal meaning); Mark Greenberg, Legal Interpretation and Natural Law, 89 Fordham L. Rev. 109, 109–10 (2020) [hereinafter Greenberg, Natural Law] ("Behind the familiar question of what method of interpretation is the right one lies a more fundamental question: what does legal interpretation, by its nature, seek? . . . [R]oughly speaking, legal interpretation seeks the contribution that statutory and constitutional provisions make to the content of the law."); Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 78 (2000) [hereinafter Vermeule, Interpretive Choice] (analyzing how "[v]arious techniques and strategies for reasoning under uncertainty, strategies that are well known in decision theory, political science, philosophy, and rhetoric, can fruitfully be applied to the judicial choice of statutory interpretation doctrine" (footnote omitted)); Greenberg, Legal Interpretation, supra ("But there is a more fundamental question that has to be addressed in order to make progress on the question of which method of legal interpretation is correct."). Sunstein has contributed many writings to this literature. See infra note 93. Other works address this choice in terms of constitutional decisionmaking rather than interpretive choice. See generally Andrew Jordan, Constitutional Anti-Theory, 107 Geo. L.J. 1515, 1517 (2019) [hereinafter Jordan, Constitutional Anti-Theory] ("[C]onstitutional decisionmaking is just a species of practical reasoning."); Richard A. Primus, When Should Original Meanings Matter?, 107 Mich. L. Rev. 165, 167–68 (2008) ("Different methods of decisionmaking have different virtues, and decisionmakers should always ask whether the virtues of a given technique have purchase in the particular case to be decided.").

of interpretation or of law, can neither constrain nor justify interpretive choice. This entails an account of interpretive choice. On this account, interpretive choice is not constrained by what counts as interpretation or by any other non-normative consideration.

The normative choice thesis has practical implications. One of them is that interpretive choice is *contingent*. Interpretive choice should track the balance of normative reasons, which can always change as circumstances change—from case to case, jurisdiction to jurisdiction, institution to institution, area of law to area of law, etc. As a result, it is not reasonable to commit to a single method of interpretation for all situations and institutional roles.[6] Thus, the normative choice thesis supports arguments for a limited, context-dependent, and perhaps sometimes even case-by-case[7] determination of interpretive approach.[8] By the same token, interpretation is *unstable*: Nothing guarantees that a legal provision should always be interpreted in the same way.[9] This challenges some well-established features of our legal and political discourse. It should unsettle the practice of judges, lawyers, and academics of self-identifying according to their views on constitutional or statutory interpretation ("I'm an originalist", "I'm a living constitutionalist").[10] The normative choice thesis vindicates the "faint-hearted,"[11] as well as judicial inconsistency in interpretation[12]—a

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6. For views that different circumstances may require different methods of interpretation, see Fallon, Meaning of Legal Meaning, supra note 5, at 1303 (defending "a relatively case-by-case approach to selecting among otherwise legally and linguistically plausible referents for claims of legal meaning"); Jordan, Constitutional Anti-Theory, supra note 5, at 1534–38 (offering a comprehensive account of how constitutional decisionmaking is context-dependent); Primus, supra note 5, at 221 (arguing that "[c]onstitutional decisionmakers should evaluate the propriety of decisionmaking methods with attention to the differences between different kinds of cases, not for the enterprise of constitutional law as a whole"); Bill Watson, What Are We Debating When We Debate Legal Interpretation?, B.U. L. Rev. (forthcoming) (manuscript at 46–47) (on file with the *Columbia Law Review*) (arguing against "monolithic theories that claim to apply across the board" based on the Hartian Positivistic idea that interpretation is "remedial"—it takes place when the law "runs out"). Part III draws on these views to offer a focused engagement with the practice of committing to a method of interpretation in light of the account of interpretive choice defended here and draws some implications to assess the relevance of a method's origins in its justification, in light of debates on originalism. It also articulates the burdens that this entails for arguments for and against methods of interpretation. See infra section III.C.

7. Though not necessarily case by case. See infra section III.C.1.

8. See infra section III.C.

9. See infra section III.D.

10. See infra section III.C.3.

11. The term is taken from Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989) [hereinafter Scalia, Originalism: The Lesser Evil] ("I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

12. See infra section III.C.3.

behavior usually criticized.[13] Awareness of the contingency of interpretive choice creates a burden for arguments for methods of interpretation: they must either make explicit the (contingent) circumstances under which the method is expected to apply (which institution, under what circumstances, etc.) or offer an argument for the universal application of the method.[14]

This is an uncompromising view. While rarely the main focus of attention, the idea that normative reasons play a crucial role in justifying methods of interpretation resonates with many theorists.[15] But works on interpretation usually don't explain whether non-normative reasons—which also often feature in arguments for theories of interpretation[16]—play a role in interpretive choice. It's legitimate for writings on interpretation to bracket the question of what reasons ultimately matter for interpretive choice. Addressing this question is the task of a theory of interpretive choice. But the normative choice thesis seems, if anything, more controversial when read in contrast with prominent works on interpretive choice. Some authors flatly deny that there is such a thing as

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13. E.g., Randy E. Barnett, Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism, 75 U. Cin. L. Rev. 7, 13 (2006) [hereinafter Barnett, Critique of "Faint-Hearted" Originalism].

14. See infra section III.C; Conclusion. Contingency and instability aren't the only consequences that this Article explores. See infra Part III.

15. See, e.g., Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const. Comment. 93, 112 (1995) (affirming that "[o]ur choice among interpretations as well as interpretive methods is, then, a normative one"); Randy E. Barnett, The Gravitational Force of Originalism, 82 Fordham L. Rev. 411, 417 (2013) (explaining that while "original public meaning is an empirically objective fact, . . . the New Originalism does *also* make a *normative* claim, and it is this: the original meaning of the text provides the law that legal decisionmakers are bound by or *ought* to follow"); Tara Leigh Grove, Foreword: Testing Textualism's "Ordinary Meaning", 90 Geo. Wash. L. Rev. 1053, 1073 (2022) [hereinafter Grove, Testing Textualism] ("[D]ebates over interpretive method . . . depend largely on normative considerations, not an empirical investigation."); Walter Benn Michaels, Using a Firearm, Using a Word: What Interpretation Just Is, 23 J. Contemp. Legal Issues 143, 144, 149 (2021) [hereinafter Michaels, Using a Firearm] (arguing that "intentionalism is just what interpretation is" but also that "questions like whether we should produce and then follow constructs like the original public meaning are entirely normative"); Jeffrey A. Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L. J. 97, 98 (2016) [hereinafter Pojanowski & Walsh, Enduring Originalism] (holding that "a positive-law argument for constitutional originalism must also have firm conceptual and normative grounds"). Note that in all the cited texts (but the first), either the role of normative reasons is qualified or the acknowledgment of their role comes accompanied by an assertion suggesting some role for non-normative reasons. This is not to suggest that there is a contradiction in any of these texts, but only that there is a need for clarifying the role of normative and non-normative reasons in interpretive choice, as this Article does.

16. See infra sections I.A–.B, .D–.F; see also Jiménez, Minimalist Textualism, supra note 1, at 55 (arguing that "many textualists" acknowledge that "theories of statutory interpretation . . . need to be defended on normative grounds," but that "non-normative theories of statutory interpretation . . . play an important role").

interpretive choice[17] or that normative reasons play a role in it.[18] And even the groundbreaking theories of Professors Cass Sunstein and Richard Fallon[19]—which make the strongest cases for the role of normative reasons in interpretive choice—allow for some independent role for non-normative reasons, such as those concerning the concept of interpretation and the nature of language.[20] They should make no such concession.[21]

Authors such as Sunstein, Fallon, and Vermeule made crucial contributions in reframing debates on interpretation as concerning not what true interpretation is, but rather a choice: the choice of a method of interpretation by a particular agent (typically a judge) in engaging in a specific task.[22] The normative choice thesis entails an account of this choice—interpretive choice. If only normative reasons justify alternatives for interpretive choice, then interpretive choice can't be constrained by non-normative reasons, including by reasons regarding what counts as interpretation. But the view defended here doesn't entail that theories of interpretation don't matter, or that it's impossible to draw the line between what is and what isn't interpretation. It does entail, though, something about the significance of this line-drawing: It has *none* for the *practical* choices of actual judges, legislators, administrators, or citizens

17. See, e.g., Richard Ekins, Interpretive Choice in Statutory Interpretation, 59 Am. J. Juris. 1, 2 (2014) ("[W]hile there is scope for reasonable statutory interpretation to vary from system to system, the scope of variation is sharply limited.").

18. See Donald Drakeman, Consequentialism and the Limits of Interpretation, 9 Jurisprudence 300 (2017) (criticizing Sunstein's view that interpretation is not settled by the meaning of interpretation); Richard Ekins, Objects of Interpretation, 32 Const. Comment. 1 (2017) [hereinafter Ekins, Objects of Interpretation] (same); see also infra section II.B.1.i.

19. E.g., Sunstein, How to Interpret the Constitution, supra note 3; Fallon, Meaning of Legal Meaning, supra note 5.

20. See infra section II.B.1.

21. Professor Andrew Jordan's important work offers an uncompromisingly normative account of "constitutional decisionmaking" at the level of theory, building on the work of Richard Primus. Jordan, Constitutional Anti-Theory, supra note 5; Primus, supra note 5. It also derives relevant consequences from the normative nature of legal decisionmaking, such as its context-dependency. See supra note 6 and accompanying text; infra note 294 and accompanying text. While drawing from these illuminating works, this Article departs from them in framing the issue as one concerning interpretation rather than (constitutional) "decisionmaking," and thus addresses a range of questions concerning interpretation proper, including the nature of interpretive choice and the role of non-normative reasons for interpretive choice. Section II.D.2 explores these differences.

22. See infra section II.B.1. Professor Adrian Vermeule's early work frames debates on interpretation as a matter of choice, the object of that choice being a different one than that of subsequent literature: strategies for implementing an approach to interpretation rather than the approaches themselves (originalism, textualism, etc.). See infra note 78. This Article focuses on Sunstein and Fallon's work for the reasons explained infra note 92 and accompanying text, and it engages with Vermeule's important work infra sections I.E and II.C.4.

regarding how they engage with the law.[23] The defense of the normative choice thesis explains why this should be so.[24]

It may be useful to offer some working definitions here.[25] "Interpretation" here means the activity of determining the legal content of legal materials (for example, a statute or a constitution).[26] This broad definition is intended to include different theories of interpretation.[27] What matters in practice are the alternatives for choice and action, not how they are categorized. "Methods of interpretation" are precisely such alternatives regarding what agents could do in determining the meaning of legal materials. Methods of interpretation may go beyond what counts as "interpretation" for a given theory, or for any theory for that matter.[28] "Interpretive choice" is a choice of methods of interpretation.

The Article proceeds as follows: Part I surveys the different kinds of reasons that feature in debates about methods of interpretation: conceptual, linguistic, normative, institutional, legal, and theory reasons. It also

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23. See infra section II.C.1.b.

24. See infra sections II.A–.C. At the same time, even for a normative theory of interpretive choice, there are good reasons to frame the inquiry in terms of "interpretation" and "interpretive choice." See infra sections II.D.1–.2.

25. Below they will be justified in greater detail. See infra section II.D.1.

26. Referring to "the" legal content does not rule out the possibility of multiple meanings. See Ryan D. Doerfler, Can a Statute Have More Than One Meaning?, 94 N.Y.U. L. Rev. 213, 228–42 (2019) (defending the possibility of multiple meanings of a single provision). Multiple meanings could also be a function of the contingency and instability of interpretive choice. See infra sections III.C–.D.

27. Other authors use a similarly broad notion. See Greenawalt, Legal Interpretation, supra note 2, at 13 (employing "a broad sense of interpretation that includes all efforts to discern meaning and to determine particular applications that depend on that meaning"); Kent Greenawalt, Constitutional and Statutory Interpretation, *in* Oxford Handbook of Jurisprudence & Philosophy of Law 268, 269 (Jules L. Coleman, Kenneth Einar Himmas & Scott J. Shapiro eds., 2004) (taking an "inclusive approach" to legal interpretation); William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1082 (2017) [hereinafter Baude & Sachs, The Law of Interpretation] ("'[I]nterpretation' determines what a particular instrument 'means' in our legal system."). For other academic or practical purposes, it may be useful to have a narrower concept of interpretation. See, e.g., Timothy Endicott, Legal Interpretation, *in* The Routledge Companion to the Philosophy of Law 109, 109 (Andrei Marmor ed., 2012) [hereinafter Endicott, Legal Interpretation] ("[N]o need for interpretation arises if no question arises as to the meaning of an object."); Watson, supra note 6, at 32–42 (defending a "remedial" account of interpretation); infra section II.D.3 (discussing writings on the interpretation–construction distinction).

28. Then why call them methods of "interpretation"? Because they are all alternatives in the same choice, one which—on account of including as typical and prominent alternatives what are usually understood as forms of interpretation—can be rightly characterized as concerning interpretation. An alternative would be to say that alternatives for interpretive choice include things that are methods of interpretation and things that aren't, and thus use a narrower concept of methods of interpretation. The latter terminology is more cumbersome and, more importantly, it would obscure what this Article aims to underscore: that all these alternatives—whether they count as forms of "interpretation" or not—are alternatives for the same choice, regardless of conceptual line drawing. See infra sections II.D.1–.2.

introduces the distinction between "independent" and "subordinate" reasons. Section II.A introduces the normative choice thesis. The normative choice thesis entails a positive thesis (that normative reasons matter for interpretive choice) and a negative thesis (that non-normative reasons don't matter for interpretive choice). Section II.B then makes the case for the positive thesis.

Authors who defend the role of normative reasons in interpretive choice adopt a "residual" approach: The role of normative reasons is a function of other reasons (e.g., conceptual or linguistic) not fully determining interpretive choice. This Article instead defends another approach: Normative reasons matter to interpretive choice because of the practical nature of interpretive choice. It's not that non-normative reasons don't fully determine interpretive choice—it's that they aren't pertinent to interpretive choice. Section II.C develops this negative thesis through a systematic assessment of the kinds of reasons surveyed in Part I, showing why each kind of non-normative reason can't justify or constrain interpretive choice, and how they could feature in other ways in deliberation on interpretive choice. This justifies the normative choice thesis. The normative choice thesis entails an account of interpretive choice. Section II.D articulates this account and explains how theories of interpretation and interpretive choice interact.

Part III explains the consequences of the normative choice thesis: that normative reasons are sufficient to justify and challenge interpretive choice (III.A), that interpretive choice depends on a variety of normative reasons (III.B), that it is always contingent (III.C), and that interpretation is unstable (III.D).

I. REASONS FOR METHODS OF INTERPRETATION

There are several methods of interpretation on offer.[29] These methods of interpretation are not churned out mindlessly by legal scholars and practitioners. There are arguments for each of them. In reflecting critically on choosing a method, one should assess these arguments.

Before assessing the relative strengths of these arguments, however, one should know if they provide reasons that matter: reasons that actually count in favor of a method of interpretation. What kinds of reasons are appropriate for justifying the choice of a method of interpretation?

There are several candidates. Authors offer different arguments for their preferred methods of interpretation, and these arguments put forward reasons of different kinds.[30] This Article identifies the following

29. See supra note 1.

30. Because arguments offer reasons, this Article works with the more fundamental concept of reasons rather than arguments.

kinds of reasons that feature in debates on interpretation[31]: conceptual, linguistic, normative, legal, institutional, and theory reasons.[32]

An important distinction is whether these reasons are "independent" or "subordinate." Independent reasons count by themselves in deliberation on interpretive choice. For a reason to count "by itself," the reason counts in favor of a given method of interpretation regardless of whether any other reason calls for its consideration. It's important to clarify this because reasons can still feature in deliberation on interpretive choice, even if they do not count "by themselves." This is the case with "subordinate" reasons, which count to the extent that their consideration is called for by reasons of a different kind. For example, assume the following: (i) that linguistic reasons have no independent weight in interpretive choice, (ii) that only conceptual reasons do, and (iii) that the true or best concept of interpretation is one according to which interpretation is defined by conformity with certain rules of language. If this were the case, then linguistic reasons (about the content of those rules, the best way to fulfill them, etc.) would count in favor (or against) a method of interpretation. But they would count only to the extent determined by conceptual reasons. If one realized that the best concept of interpretation is actually one that doesn't refer to facts about language, then linguistic reasons wouldn't count for interpretive choice.

The rest of this Part explains the different kinds of reasons that are discussed with regard to interpretive choice. It does so by giving examples of academic works offering these reasons, both as independent and as subordinate reasons. This will set up the problem that will occupy the rest

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31. If ultimately only normative reasons can justify interpretive choice, why refer to non-normative reasons as "reasons"? Isn't the point that they are not really reasons for interpretive choice? If this were so, it would still be legitimate to refer to them as "reasons," as shorthand for "proposed as, and thought by many to be, reasons." There is nothing odd in this. A bad argument is not really an argument, just as a bad friend is not really a friend, but one can still legitimately call them "argument" and "friend." Furthermore, non-normative reasons can also be reasons, just not normative ones (they can be theoretical reasons); and, in this Article's terminology, they can be subordinate reasons for interpretive choice.

32. The list of reasons is not meant to be exhaustive, but it includes the reasons usually mentioned in scholarly writings and at least covers the reasons identified by authors who have listed reasons for approaches to interpretation. Greenberg refers to the first three reasons mentioned here, and then adds his own, included here as the fifth. See Greenberg, Legal Interpretation, supra note 5, § 5.1 ("Such arguments for particular theories of legal interpretation are typically offered without any account of why these arguments are the relevant ones and often without consideration of other kinds of arguments."). Professor Andrew Coan groups reasons for "approach[es] to constitutional decision-making" into four categories: metaphysical, procedural, substantive, and positivist. See Coan, supra note 5, at 836. Coan's list doesn't include theory reasons, and it doesn't include linguistic reasons as a separate category. There are differences in categorization as well. For example, his metaphysical reasons include conceptual reasons, but also other reasons; his substantive reasons only include normative reasons related to outcomes. See id. at 840–45, 859–63. This Part has greatly benefited from these works.

of the paper: Which of these reasons should count in deliberation on interpretive choice?

A. *Conceptual Reasons*

Conceptual reasons are facts about the concept or idea of interpretation that are taken to count for or against a particular method of interpretation.[33]

At least some of the debate over legal interpretation is articulated in terms of what methods really qualify as "interpretation." Professor Larry Alexander notes that an aspect of the debate between originalists and non-originalists "has to do with what interpreting a text is. Originalists . . . argue that when one is interpreting a text, as opposed to doing other things with it, one is necessarily seeking its author's or authors' intended meaning."[34] For Professor Stephen Sachs, "[M]ost defenses of originalism fall into two camps, which we can call 'normative' and 'conceptual.'"[35] Professor William Baude writes that "current debates [on originalism] are generally either conceptual or normative,"[36] following Professor Mitchell Berman, for whom some arguments for

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33. This is narrower than Greenberg's "conceptual arguments," which "claim that a particular approach to legal interpretation follows from the concept of interpretation, the concept of law, the concept of authority, or some other relevant concept." See Greenberg, Legal Interpretation, supra note 5, § 5.1; supra text accompanying note 31. This Article focuses on the concept of interpretation because these kinds of reasons are distinctive in offering reasons that truly rely on the boundaries of a concept or an idea. Some of Greenberg's "conceptual arguments" are not conceptual reasons in this Article's terminology. For example, reasons based on authority here are normative reasons. On authority, see infra sections III.B.2 and III.C.2.1.

34. Larry Alexander, Telepathic Law, 27 Const. Comment. 139, 139 (2010) [hereinafter Alexander, Telepathic Law]; see also Stanley Fish, Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law, 29 Cardozo L. Rev. 1109, 1122, 1127 (2008) ("An interpreter cannot disregard [the author's] intention and still be said to be interpreting . . . . Interpretation is the act of trying to figure out what the author, not the dictionary, meant by his or her (or their) words."). Though some of this debate may be formulated in conceptual terms, it may ultimately be about linguistic reasons: about the best way to understand communication given certain facts about language and communication. See infra section I.B.

35. Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 819 (2015) [hereinafter Sachs, Originalism as a Theory of Legal Change].

36. William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2351 (2015) [hereinafter Baude, Is Originalism Our Law?]. It is unclear, though, if all the arguments referred to by Baude and Sachs are conceptual in the sense identified here. Some seem linguistic (see infra section I.B.), such as arguments based on "conceptual truths about the right way to read legal documents . . . . If, for example, written texts always mean whatever their authors intended them to mean . . . ." Sachs, Originalism as a Theory of Legal Change, supra note 35, at 823. That proposition could be defended on conceptual or linguistic grounds. See id. at 828–35. For the argument of this Article, nothing depends on whether these arguments offer linguistic or conceptual reasons.

originalism are about "the nature of interpretation."[37] Professor Ronald Dworkin's proposal of a method of interpretation constituted by the dimensions of "fit" and "justification"—one of the most influential in legal philosophy—relies on his own concept of interpretation.[38]

Beyond explicit assertions, conceptual reasons are a brooding presence in debates on interpretation. Sunstein's influential argument that "there is nothing that interpretation 'just is'"[39] attempts to contain them. For Sunstein, "The idea of interpretation is capacious, and a range of approaches fit within it."[40] Sunstein opposes those[41] who "insist *that the very idea of interpretation* requires judges to adopt their own preferred method of construing the founding document."[42] In other words, his argument challenges those who believe that conceptual reasons fully vindicate their approach to interpretation. This view is not without critics.[43]

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37. Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 37–38 (2009). Other arguments are about "the *nature of constitutional authority*" and about the consequences of originalism. See id. at 38.

38. See Ronald Dworkin, Law's Empire 239 (1986) [hereinafter Dworkin, Law's Empire] ("The judge's decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible."). Sunstein attributes to Dworkin the view that his approach to interpretation is vindicated by conceptual reasons: "On the basis of Dworkin's argument, we might be tempted to think (as Dworkin does) that there is one thing that legal interpretation just is: an attempt to ensure both fit and justification." Sunstein, How to Interpret the Constitution, supra note 3, at 83–84.

39. Cass R. Sunstein, There Is Nothing that Interpretation Just Is, 30 Const. Comment. 193, 193 (2015) [hereinafter Sunstein, There Is Nothing that Interpretation Just Is].

40. Sunstein, How to Interpret the Constitution, supra note 3, at 91; see also id. at 68 (arguing that original public meaning originalism "cannot be ruled out of bounds by the very idea of interpretation"); id. at 67 ("If some intelligent originalists call for attention to intentions, and other intelligent originalists call for attention to the public meaning, it would seem unlikely that the abstract idea of interpretation . . . requires one rather than the other."); id. at 84 ("Reasonable people can and do understand interpretation in different ways. Radically different approaches can fairly count as interpretive."); id. at 82 ("Different answers to [what the requirement of 'fit' means] are admissible within the general concept of interpretation.").

41. Sunstein says that "many people believe" that he is wrong in thinking that "there is nothing that interpretation 'just is[]'" and that the view that interpretation corresponds to only one theory "is especially pervasive among originalists, though some version of it can be found among nonoriginalists as well." Sunstein, How to Interpret the Constitution, supra note 3, at 61, 63. Sunstein attributes this view to original intention originalists broadly, and to Professor Walter Benn Michaels, Justice Antonin Scalia, Professors Randy Barnett and Evan Bernick, Professor Lawrence Solum, and Professor Ronald Dworkin. Id. at 27, 62, 67–73, 83–84, 86; see also Donald L. Drakeman, The Hollow Core of Constitutional Theory 19–20, 178–84 (2020) (criticizing Sunstein and claiming that "the concept of 'interpretation' has had fixed boundaries for centuries"); Coan, supra note 5, at 841 ("[A] number of prominent constitutional theorists have argued that only originalism is consistent with the nature of interpretation."). But Sunstein also acknowledges that sophisticated originalists provide normative reasons for their arguments. See Sunstein, How to Interpret the Constitution, supra note 3, at 68 n.8.

42. Sunstein, How to Interpret the Constitution, supra note 3, at 61 (emphasis added).

43. See supra note 18 and accompanying text.

And yet, even Sunstein accepts that the concept of interpretation sets some boundaries to interpretive choice.[44]

B. *Linguistic Reasons*

As Greenberg says, "Typical linguistic arguments defend a particular approach to legal interpretation by appealing to claims about how language or communication works."[45]

Linguistic reasons play an important role in Professors Larry Alexander and Saikrishna Prakash's defense of intentionalist interpretation. In their view, authorial intent is necessary to attribute any meaning to a text,[46] and, indeed, to identify something as a text,[47] as well as to determine what is to be interpreted as a text in a conjunction of symbols.[48] Professor Scott Soames's approach, centered on what a speaker asserts or conveys, similarly appeals to facts about language and communication.[49] For Soames, "[w]hat textualists" and, presumably, all interpreters "should be seeking is fidelity to what the legislature asserts or stipulates, not what the sentences used to do so mean," which includes taking into account

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44. See infra section II.B.1.a.

45. Greenberg, Legal Interpretation, supra note 5, § 5.1.

46. See Larry Alexander & Saikrishna Prakash, "Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 975 (2004) ("Our claim is that we must posit the existence of some author if we are to attribute meaning to these statements."); see also the discussion of "'mindless' 'texts.'" Id. at 977 ("Without an author who intends a meaning, such marks are meaningless.").

47. Id. at 969 (positing that "texts can only be identified as texts by reference to authorial intent").

48. Id. at 976 ("[O]ne cannot look at the marks on a page and understand those marks to be a text . . . without assuming that an author made those marks intending to convey a meaning by them."); see also Larry Alexander, Simple-Minded Originalism, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 87, 87–88 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter Alexander, Simple-Minded Originalism]; Alexander, Telepathic Law, supra note 34, at 139–40 ("[O]ne can only successfully interpret a text by determining what code it is, which itself is determined by authorial intent.").

49. For Soames, one should focus on "what a text says, or has been used to say." Scott Soames, Philosophical Essays, Volume 1: Natural Language: What It Means and How We Use It 422 (2009) [hereinafter Soames, Philosophical Essays]. This calls for attending not only to the meaning of words in a text, but also to "other information present in contexts of utterance." Id. "This pragmatic information interacts with the semantic content of the sentence to add content to the discourse," and "pragmatic determinants of this content are not minor add-ons to semantic content." Id. at 404 (emphasis omitted). There is a gap between the meaning of the words in a text and its content or "what is asserted by uttering it." Id. at 410. This is evident in some nonlegal contexts, as when a "doctor examining a gunshot wound says to the patient, 'You aren't going to die,' thereby asserting that the patient isn't going to die yet, or from this, not that death will never come." Id. at 410 (emphasis omitted). The same applies in law. See id. at 412 (referring to Smith v. United States, 508 U.S. 223 (1993), concerning the question whether trading a gun for drugs constitutes "using" it in relation to drug trafficking).

legislative intention.[50] Soames distinguishes his approach from theories that do without legislative intention (like Justice Scalia's[51]), as well as from moral readings[52] (such as Ronald Dworkin's[53]). Soames's arguments rely on the relevance of certain truths about language, which are offered as reasons to interpret in the way that he proposes.[54] Hence, for him, "The first, and most important, step in legal interpretation is not moral, social, or political, but linguistic."[55]

Similarly, Professor Richard Ekins appeals to linguistic reasons in defending his influential theory of intentionalist interpretation.[56] Ekins's arguments are complex and sophisticated, and they allude to reasons of different kinds. Yet linguistic reasons feature prominently in his account. For example, in challenging Sunstein's idea that "there is nothing that interpretation just is,"[57] Ekins argues that interpretation has a well-defined object and point. He writes:

> Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try to recognize. The

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50. Scott Soames, Toward a Theory of Legal Interpretation, 6 N.Y.U. J.L. & Liberty 231, 239 (2011) [hereinafter Soames, Toward a Theory]; see also id. at 239–59 ("[T]he intentions of lawmakers are directly relevant to the contents of the laws they enact.").

51. See Antonin Scalia, A Matter of Interpretation 16–18 (1997) [hereinafter Scalia, A Matter of Interpretation] ("[I]t is simply incompatible with democratic government . . . to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated."). For Soames's critique of Scalia's position, see Soames, Toward a Theory, supra note 50, at 239–41.

52. See Soames, Philosophical Essays, supra note 49, at 422 ("[A] judge's view of the legitimate social, moral, and political purposes of the law is not the crucial ingredient added by interpretation." (emphasis omitted)).

53. See generally Dworkin, Freedom's Law, supra note 1, at 2 ("[W]hen some novel or controversial constitutional issue arises . . . people who form an opinion must decide how an abstract moral principle is best understood.").

54. See Soames, Philosophical Essays, supra note 49, at 422 ("The first and most important task of interpretation is to discern what a text says, or has been used to say. . . . [S]peakers assert or commit themselves to . . . a function not only of the meanings of their words, but also of other information present in contexts of utterance."). In other works, Soames premises his analysis on a postulated "traditional norm of legal interpretation," the existence of which is a legal matter. See Soames, Toward a Theory, supra note 50, at 236.

55. Soames, Philosophical Essays, supra note 49, at 422. Soames argues that:

> 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. . . . [I]t is the third—asserted or stipulated—content that is required by any defensible form of textualism.

Soames, Toward a Theory, supra note 50, at 236–37 (emphasis omitted).

56. For Greenberg, Ekins's work provides an "example of intentionalism motivated by appeal to a proper understanding of language." Greenberg, Legal Interpretation, supra note 5, at n.22.

57. See Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 193. See infra section II.B.1.a.

> speaker's intended meaning is the intelligible object of the hearer's process of inference, such that there is good reason to term these inferences "interpretations" and to withhold the label from other modes of engagement with the speaker's choice of words.[58]

This fact about "language use" is taken to count in favor of intentionalist interpretation.[59]

C. *Normative Reasons*

"A normative reason is a reason (for someone) to act—in T.M. Scanlon's phrase, 'a consideration that counts in favour of' someone's acting in a certain way."[60] Moral and prudential reasons are normative reasons. There are a great variety of normative reasons. Many normative reasons have been given in support of different methods of interpretation. Examples are that the method realizes values "such as democracy, fairness and the rule of law,"[61] (good) social aims of the law,[62] justice,[63] integrity,[64] arrives at (good) consequences,[65] fulfills duties (such as those arising from oaths or promises[66]), or improves institutional legitimacy,[67] among many others. Some are related to outcomes (say, fulfilling rights, achieving good

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58. Ekins, Objects of Interpretation, supra note 18, at 4 (footnote omitted).

59. It is also a reason against other forms of interpretation. See id. at 12 (arguing that Justice Breyer's democracy-protective approach is "problematic" as "it licenses 'interpreters' to invent meanings that cannot be squared with the act of language use in question").

60. Maria Alvarez, Reasons for Action: Justification, Motivation, Explanation, Stan. Encyc. Phil. (Edward N. Zalta ed., Apr. 24, 2016), https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/ [https://perma.cc/S4CB-2G6A] (quoting T.M. Scanlon, What We Owe to Each Other 17 (1998); T.M. Scanlon, Reasons: A Puzzling Duality, *in* Reason and Value: Themes From the Moral Philosophy of Joseph Raz (R. Jay Walker, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004)); see also infra section II.B.2.

61. Greenberg, Legal Interpretation, supra note 5, § 5.1.

62. Aharon Barak, Purposive Interpretation in Law 223–24 (2005).

63. See, e.g., Michel Rosenfeld, Just Interpretations: Law Between Ethics and Politics 2 (1998) ("For justice to be achieved and for a legal system to qualify as legitimate requires just interpretations of applicable laws . . . .").

64. See Dworkin, Law's Empire, supra note 38, at 225 ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.").

65. See Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 207–09 (focusing on decision costs and error costs); see also infra section III.C.2.c.

66. See Randy E. Barnett & Evan Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 6 (2018) (arguing that "the oath imposes a moral and legal duty upon judges to engage in good-faith interpretation and construction"); Richard M. Re, Promising the Constitution, 110 Nw. U. L. Rev. 299, 304 (2016) ("In general, officials have a promissory obligation to adhere to the public meaning of 'the Constitution' that existed at the time they took their oaths.").

67. See, e.g., Tara Leigh Grove, Which Textualism? 134 Harv. L. Rev. 265, 270 (2020) (proposing protecting the legitimacy of the judiciary as a reason for textualism).

consequences, or promoting justice) and others aren't (such as procedural fairness, the rule of law, or democratic legitimacy, among others).[68]

Subsequent sections explore in more detail some normative reasons applicable to interpretive choice in law.[69] For now, it's important to note that normative reasons stand in sharp contrast with the other kinds of reasons mentioned in arguments for methods of interpretation. Unlike non-normative reasons, they are not about what something is—be it a concept, or language and communication, or the nature of law—but about how one should act.

D. *Legal Reasons*

When a legal norm counts in favor of a particular approach to interpretation, it is a legal reason. One can treat legal reasons as a specific kind of reason. This doesn't entail that they are irreducible to some other kind of reason.[70] Because they feature in debates on interpretive choice as a distinctive type of reason, this Article singles them out for separate treatment.

Legal reasons rose to prominence with the "positive turn" in originalism and the works of Stephen Sachs and William Baude.[71] They

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68. See Lawrence B. Solum, Outcome Reasons and Process Reasons in Normative Constitutional Theory, 172 U. Pa. L. Rev. 913, 931 (2024) (explaining the distinction between outcome- and process-related reasons, and the dangers of exclusive focus on outcomes); see also Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1376–95 (2006).

69. See infra Part III.

70. See infra section II.C.3.a.

71. See William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1457–58 (2019) [hereinafter Baude & Sachs, Grounding Originalism] (presenting the three "core claims" of their approach); see also Baude, Is Originalism Our Law?, supra note 36, at 2351 (introducing positive law as the third way to assess originalism); Baude & Sachs, The Law of Interpretation, supra note 27, at 1096–97 (offering an account of legal interpretive rules); William Baude & Stephen E. Sachs, Originalism and the Law of the Past, 37 Law & Hist. Rev. 809, 809–20 (2019) (explaining the role of history in originalism according to the "positive turn"); Sachs, Originalism as a Theory of Legal Change, supra note 35 (arguing that originalism is primarily a theory of U.S. law and legal change). These works have generated a debate within originalism and beyond. See Charles L. Barzun, The Positive U-Turn, 69 Stan. L. Rev. 1323, 1379 (2017) (arguing that the "positive turn" fails under the main positivist approaches); Greenberg, Legal Standards vs. Fundamental Determinants, supra note 5, at 106 (arguing that "answers to questions about legal interpretation depend on how the content of the law is determined at a more fundamental level than legal standards"); Pojanowski & Walsh, Enduring Originalism, supra note 15, at 99 (offering "positive-law-based arguments for constitutional originalism" but doing so "by confronting, rather than by claiming, legal positivism"). Other works explore what the law of interpretation is or should be. See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, The Constitutional Law of Interpretation, 98 Notre Dame L. Rev. 519, 521–22 (2022) (arguing that rules governing transfer of sovereign rights are part of the Constitution and govern its interpretation); Richard M. Re, Permissive Interpretation, 171 U. Pa. L. Rev. 1651, 1659 (2023) (proposing permissive interpretation).

observe that "the legal system frequently chooses artificial rules of interpretation, and once chosen they're the law, whether or not they reflect what a given text *really meant*."[72] The resulting positive "law of interpretation," on this view, affects the meaning of legal provisions as much as language.[73] Hence, "[a]rguments about the approaches used in our legal system should be conducted as legal arguments, based on legal materials and not (or not primarily) on pure interpretive theory."[74]

For Baude and Sachs, the law of interpretation espouses originalism.[75] But, as Professor Charles Barzun notes, their main point is methodological: "that we should resolve interpretive debates by reference to what 'our law' is, whether or not they happen to be right that originalism is our law."[76]

E. *Institutional Reasons*

Institutional reasons concern the characteristics, operations, and effects of institutions, such as their capacities, the likely motivations of those who run them, and the effects of their actions.[77] For example, a method of interpretation may require attention to legislative intentions—as manifested in legislative records—from courts that are ill-suited to process that kind of data.[78] This fact is a reason for courts not to adopt

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72. Baude & Sachs, The Law of Interpretation, supra note 27, at 1095. Their argument relies on doctrinal analysis as well as on their own understanding of legal positivism. For critiques of Baude and Sachs's reliance on legal positivism, see Emad Atiq & Jud Matthews, The Uncertain Foundations of Public Law Theory, 31 Cornell J. L. Pub. Pol'y 389, 397–418 (2022); Barzun, supra note 71.

73. See Baude & Sachs, The Law of Interpretation, supra note 27, at 1093 ("If language alone can't finish the job, as we agree it often can't, then something else must. We suggest that this something else is law.")

74. Id. at 1116.

75. Id. at 1135 ("This way of looking at interpretation is particularly compatible with certain forms of originalism."); see also Baude & Sachs, Grounding Originalism, supra note 71, at 1457 ("As it turns out, the particular rules of our legal system happen to endorse a form of originalism."). In their individually authored works, they also adopt the view that U.S. law is originalist. See Baude, Is Originalism Our Law?, supra note 36, at 2352 ("Having framed the question, this Essay argues that a version of originalism is indeed our law."); Sachs, Originalism as a Theory of Legal Change, supra note 35, at 838 ("[O]riginalism is actually our law.").

76. Barzun, supra note 71, at 1327.

77. See Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 886 (2003) (calling for theories of interpretation to address institutional capacities and dynamic effects); Vermeule, Judging Under Uncertainty, supra note 5, at 68–70 (arguing that conclusions about what judges should do at the operational level require consideration of institutional capacities, motivations, and systemic effects).

78. See Vermeule, Interpretive Choice, supra note 5, at 84 ("[W]ill judges of limited competence do better at identifying legislative intent with legislative history or without it?"); Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*, 50 Stan. L Rev. 1833, 1837 (1998) (revisiting the case to note the Court's misreading of the legislative history). Vermeule focuses on the choice of

such a method. In this sense, facts about institutions can be reasons for or against a method of interpretation.

Institutional reasons serve an indispensable mediating role. As Vermeule explains, "It is impossible to move directly from high-level commitments—about democracy, language, or the nature of law—to the operational level of interpretive rules judges use."[79] To move to the "operational level," one needs to take into account what judges (or other interpreters) can do well, given their institutional role and capacities.[80] Institutional reasons are explicitly presented as subordinate reasons, a point this Article will return to below.[81]

F. *Theory Reasons*

Theory reasons are based on a theory of law. They concern general claims about the law and its "nature," claims which are taken to count for or against a method of interpretation. They are not about the specific rules or doctrines that have been adopted in a specific legal system (those are legal reasons).

Greenberg's theory offers a paradigmatic example. Greenberg deserves special attention not only as the author of a sophisticated and important general theory of law but also as one of the few authors who explicitly addresses the question of which reasons are apt to justify a method of interpretation.[82]

For Greenberg, "Behind the familiar question of what method of interpretation is the right one lies a more fundamental question: what does legal interpretation, by its nature, seek?"[83] This is so "because which method is correct depends on what legal interpretation seeks."[84] Greenberg states that "legal interpretation seeks legal provisions'

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doctrines that implement methods of interpretation rather than on the methods themselves. See Vermeule, Interpretive Choice, supra note 5, at 76, 82 (referring to "the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation" and noting that interpretive choice focuses on "low-level questions of doctrine"). There is choice regarding higher-level theories (of the kind Fallon, Sunstein, and others write about) and a choice of lower-level implementing doctrines relative to a higher-level theory. This Article addresses only the former.

79. Vermeule, Judging Under Uncertainty, supra note 5, at 71. The insight applies beyond judges to all interpreters.

80. See id. at 2 ("[I]ntermediate premises about the capacities and interaction of legal institutions are necessary to translate principles into operational conclusions.").

81. See infra section II.C.4.

82. Greenberg, Natural Law, supra note 5, at 109–10.

83. Id.

84. Id. at 126 (emphasis omitted); see also Greenberg, Legal Interpretation, supra note 5, § 5.1 ("To a first approximation, whether a method of legal interpretation is correct depends on whether it reliably yields what legal interpretation seeks.").

contributions to the content of the law."[85] If so, "a method cannot be a good one unless it reliably yields the content of the law."[86] In interpreting a legal provision, "the crucial question is how to figure out the impact of the enactment of a provision on the content of the law."[87] This, Greenberg holds, "is the province of . . . a theory of law."[88]

For Greenberg, a "theory of law" is "an account of how the more basic, determining facts determine the legal facts, i.e., make those facts what they are."[89] The crucial point is that "any kind of argument for a method of interpretation will be apt only to the extent that it bears on how to ascertain what the law is. So, any argument for a method of legal interpretation will have to proceed via claims about how the content of the law is determined"[90]—that is, via the kinds of claims articulated by theories of law. Thus, normative reasons (such as fairness[91]) are relevant only to the extent that they are made relevant by the (best, true) theory of the law. The same could be said of other reasons. On this view, a theory of the law provides the only independently relevant reasons for interpretive choice—other reasons are admissible only as determined by, and thus subordinate to, theory reasons.

II. THE NORMATIVE CHOICE THESIS

Conceptual, linguistic, normative, legal, institutional, and theory reasons—they all feature in arguments for or against methods of interpretation. Are all these reasons pertinent? Should all these kinds of reasons matter for interpretive choice?

No. Only normative reasons ultimately matter. Normative reasons are the only reasons that count by themselves for interpretive choice. Non-normative reasons count only to the extent that they can be connected to normative reasons, as, for example, when they articulate some truth about how to best achieve some goal or fulfill a requirement justified by a normative reason. Ultimately, any argument in favor of a theory of

85. Greenberg, Natural Law, supra note 5, at 127. For Greenberg's reasons for this position, see id. at 127–29. For a different view, see, e.g., Jeffrey A. Pojanowski & Kevin C. Walsh, Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory, 98 Notre Dame L. Rev. 403, 427 (2022) (book review) ("[W]e hold that in the central case the legal interpreter's object qua interpreter is identifying the propositions . . . the lawmaker introduced into the system of law when it exercised its authority.").

86. Greenberg, Legal Interpretation, supra note 5, § 5.1.

87. Greenberg, Natural Law, supra note 5, at 129.

88. Id.

89. Id. Greenberg uses the term "legal facts" to refer to "facts about the content of the law—for example, the fact that, in California, contracts for the sale of land are not valid unless they are in writing." Id.; see also Shapiro, supra note 5, at 25–27 ("[W]henever a law or legal system exists, it does so in virtue of some other facts.").

90. Greenberg, Natural Law, supra note 5, at 130.

91. See id. at 131.

interpretation, and any interpretive choice, must be based on normative reasons. This is the "normative choice thesis."

This Part articulates and defends the "normative choice thesis." It first offers a formulation of the normative choice thesis and the two subtheses that constitute it: the positive thesis and the negative thesis (A). It then proceeds to justify both theses (B–C). In justifying the positive thesis (B), it engages with the seminal works of Sunstein and Fallon—who have done most to elucidate interpretive choice and the importance of normative considerations in it—and suggests an alternative justification for the positive thesis that better illuminates the practical nature of interpretive choice. Then, in its longest section, it justifies the negative thesis dialectically (C), showing that each non-normative reason mentioned in Part I is not an independent reason for interpretive choice (though it may feature in deliberation on interpretive choice as a subordinate reason). Sections A–C articulate and defend the normative choice thesis. Section D draws the implications of the normative choice thesis for a theory of interpretive choice. It does so by addressing three issues: how a theory of interpretive choice relates to a theory of interpretation, why a practical theory of interpretive choice doesn't collapse into a theory of decisionmaking, and how the normative choice thesis bears on the interpretation–construction distinction.

A. *The Normative Choice Thesis*

The normative choice thesis is the following: *Only normative reasons matter independently for interpretive choice.*

The word "matter" is doing a lot of work here. It refers to whether some reason is an independent reason or not. Recall that independent reasons are those that count, by themselves, for interpretive choice—they count in favor of choosing a given method of interpretation regardless of whether any other reason calls for their consideration. The normative choice thesis holds that only normative reasons are independent reasons for interpretive choice.

The normative choice thesis entails a positive thesis and a negative thesis. The positive thesis is the following: *Normative reasons matter independently for interpretive choice.* The negative thesis is the following: *Non-normative reasons do not matter independently for interpretive choice.*

Non-normative reasons do not count by themselves for interpretive choice. They have no independent weight. They will only matter if they are connected to a normative reason, in that, for example, they refer to facts related to the fulfillment of a normative reason in practice.

As seen in Part I, at least some prominent writings on interpretation seem to rely on non-normative reasons as independent reasons for the methods of interpretive choice they defend. Indeed, as shown below, even prominent defenders of the importance of normative reasons seem to grant independent weight to non-normative reasons.

B. *The Positive Thesis*

There are two ways to ground the positive thesis—the thesis that normative reasons matter for interpretive choice. The first is the "residual" approach. This is the approach favored by prominent authors who emphasize the role of normative reasons in interpretive choice. Section II.B.1. explains the residual approach. Section II.B.2. presents an alternative approach, one centered on the nature of interpretive choice. In this approach, normative reasons matter for interpretive choice not because of some limitation of non-normative reasons but because of the practical nature of such choice.

1. *The "Residual" Approach.* — This section discusses the accounts of interpretive choice of Sunstein and Fallon—the authors who have done the most to formulate the role of normative reasons in interpretive choice.[92] Even the theories of Sunstein and Fallon, which explicitly make the case for normative reasons in interpretive choice, grant independent weight to non-normative considerations. This follows from a way of grounding the relevance of normative reasons: the "residual approach." What characterizes the residual approach is that it attempts to carve a space for normative reasons by showing that non-normative reasons can't determine interpretive choice on their own. In this approach, normative reasons matter for interpretive choice because of the limitations of non-normative reasons.

a. *Cass Sunstein's View that "There Is Nothing that Interpretation 'Just Is.'"* — Sunstein's account of interpretive choice is probably the most

92. There are other works that (more or less explicitly and directly) address interpretive choice. See supra note 5. This Article focuses on Fallon's and Sunstein's arguments because they explicitly formulate the problem of justifying a method of interpretation as one concerning a choice between alternatives (unlike, for example, Greenberg, who focuses on arguments for methods of interpretation, and Raz, who is not explicit about interpretive choice; see Raz, Authority and Interpretation, supra note 5; Greenberg, Natural Law, supra note 5, at 124; Greenberg, Legal Interpretation, supra note 5), and because they offer arguments aimed at establishing the role of normative reasons in interpretive choice (which distinguishes these works from, for example, Vermeule's institutional analysis, though this Article addresses Vermeule's work in discussing institutional reasons; see supra section I.E; infra section II.C.4; see also Raz, Authority and Interpretation, supra note 5; Vermeule, Interpretive Choice, supra note 5; Vermeule, Judging Under Uncertainty, supra note 5). Other works discuss normative reasons for interpretive choice in the context of a specific theory of law. See Shapiro, supra note 5, at 331–87; Greenberg, Legal Interpretation, supra note 5, § 3; Greenberg, Natural Law, supra note 5, at 133. This Article engages with Greenberg in discussing theory reasons. See supra section I.F; infra section II.C.5. And yet other theories address interpretive choice in terms of constitutional decisionmaking. See Jordan, Constitutional Anti-Theory, supra note 5, at 1517 (arguing for a positive view of constitutional decisionmaking); Primus, supra note 5, at 167–68 (explaining the competing virtues of different decisionmaking methods); infra section II.D.2 (engaging with this approach).

developed. It has been articulated in several writings over the years.[93] One of its main contributions is presenting the debate over methods of interpretation as one concerning a choice.[94] Sunstein holds that no theory of interpretation "might be 'read off' the Constitution itself, or come from some abstract idea like 'legitimacy' or from the very idea of interpretation."[95] Crucially, he argues that "there is nothing that interpretation 'just is'"—the title of his seminal paper.[96] The idea of interpretation is not boundless, but it's broad enough to include the theories of constitutional interpretation often discussed in the United States. In this sense, no theory of interpretation is "mandatory."[97] If the idea of interpretation does not single out a method (or, in Sunstein's writings, a "theory"[98]) of interpretation, then interpreters need to choose. But how are they to do so?

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93. See Cass R. Sunstein, There Is Nothing that Interpretation Just Is, *in* A Constitution of Many Minds 19, 19–32 (2009) (arguing that the concept of interpretation does not settle interpretive debate, which must be settled on normative grounds); Sunstein, There Is Nothing that Interpretation Just Is, supra note 39 (offering a revised version of the same argument); see also Sunstein, How to Interpret the Constitution, supra note 3 (offering a systematic treatment of the claims advanced in previous works); Cass R. Sunstein, Experiments of Living Constitutionalism, 46 Harv. J.L. & Pub. Pol'y 1177, 1184–85 (2023) (contrasting "Experiments of Living Constitutionalism" with "Common Good Constitutionalism" to suggest criteria for choosing methods of interpretation); Cass R. Sunstein, Formalism in Constitutional Theory, 32 Const. Comment. 27 (2017) (defending his argument from Richard Ekins's objections); Cass R. Sunstein, Originalism, 93 Notre Dame L. Rev. 1671, 1673 (2018) [hereinafter Sunstein, Originalism] (arguing that theories of constitutional interpretation must be considered alongside the risk of judicial fallibility); Cass. R. Sunstein, "Fixed Points" in Constitutional Theory 2 (Harv. Pub. L., Working Paper No. 22-23, 2022), https://papers.ssrn.com/abstract_id=4123343 [https://perma.cc/8FGS-SMDY] (applying the method of reflective equilibrium to interpretive choice); Cass R. Sunstein, How to Choose a Theory of Constitutional Interpretation, Balkinization (Jan. 12, 2023), https://balkin.blogspot.com/2023/01/how-to-choose-theory-of-constitutional.html [https://perma.cc/RY48-556Z] (arguing that one should choose the interpretive theory that would make the constitutional order better rather than worse, applying the method of reflective equilibrium). Though these writings all express a coherent and distinctive view, there are minor differences between them. What follows focuses on Sunstein, How to Interpret the Constitution, supra note 3, as this is the latest and most complete version of Sunstein's position.

94. See Francisco J. Urbina, It Doesn't Matter What "Interpretation" Is, 38 Const. Comment. 335, 336–37 (forthcoming 2024) (book review) (on file with the *Columbia Law Review*) [hereinafter Urbina, It Doesn't Matter What "Interpretation" Is]; see also Vermeule, Interpretive Choice, supra note 5, at 76; supra note 93.

95. Sunstein, How to Interpret the Constitution, supra note 3, at 8–9.

96. Id. at 61; see also Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 193 ("The problem with this view is that in the legal context, there is nothing that interpretation 'just is.' Among the reasonable alternatives, no approach to constitutional interpretation is mandatory." (footnote omitted)).

97. Sunstein, How to Interpret the Consitution, supra note 3, at 61. This idea is repeated several times. See, e.g., id. at 64, 65, 73, 127–28. The claim is prominent in earlier work. See Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 193–94 ("[W]ithout transgressing the legitimate boundaries of interpretation, judges can show fidelity to texts in a variety of ways.").

98. On the difference between choice of a method or of a theory, see supra note 3.

Sunstein believes that "[j]udges (and others) should choose the theory that would make the American constitutional order better rather than worse."[99] In choosing a method of interpretation, one should search for "a kind of 'reflective equilibrium'"[100]—one in which "judgments, at multiple levels of generality, are brought into alignment with one another."[101]

The approach is decidedly normative: There is a choice to be made between different methods of interpretation, and in justifying a choice there is no alternative but to appeal to normative reasons, particularly to what "would make the American constitutional order better rather than worse."[102] Yet why are normative reasons relevant? For Sunstein, this is because conceptual and other non-normative reasons, while bearing on the choice, do not determine a single interpretive choice. Given that other reasons run out, there is space for normative reasons. For example, Sunstein says that "[t]he idea of interpretation is capacious, and a range of approaches fit within it. Among the reasonable alternatives, any particular approach to the Constitution must be defended on the ground that it makes the relevant constitutional order better rather than worse."[103] On this view, there is something crucial at stake in arguing that the idea of interpretation is broad: If the idea of interpretation were not broad enough to include all theories of interpretation, those theories would not be live alternatives for interpretive choice.[104]

In fact, for Sunstein, while the idea of interpretation doesn't determine interpretive choice, it does impose constraints on it:

> It is true that some imaginable practices cannot count as interpretation at all. The text matters. If judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them. . . . Without transgressing the legitimate boundaries of interpretation, judges can show fidelity to a text in a variety of ways. Within those boundaries, the choice among possible approaches depends on a claim about what makes our constitutional system best.[105]

On this view, the idea of interpretation constrains the set of alternatives for choice: Interpretive choice occurs "[w]ithin those boundaries," namely, the "legitimate boundaries of [the idea of] inter-

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99. Sunstein, How to Interpret the Constitution, supra note 3, at 8.

100. Id. at 10. The notion is drawn from John Rawls. See John Rawls, A Theory of Justice 17–19 (1st ed. 1971); John Rawls, Outline of a Decision Procedure for Ethics, *in* Collected Papers 1, 1–19 (Samuel Freeman ed., 1999). For its use in constitutional debates, see Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 142–54 (2018).

101. Sunstein, How to Interpret the Constitution, supra note 3, at 102.

102. Id. at 8.

103. Id. at 91.

104. See supra note 40 and accompanying text.

105. Sunstein, How to Interpret the Constitution, supra note 3, at 62.

pretation."[106] It is *because* the idea of interpretation doesn't "rule out any of the established approaches" that normative reasons are decisive.[107] Sunstein's approach to legal reasons is the same: While the law may bear on interpretive choice, it is not the case that originalism (or any other method of interpretation) is the unique approach sanctioned by law, and thus normative reasons are needed to choose a method of interpretation.[108]

This exemplifies the residual approach to normative reasons. In Sunstein's view, normative reasons are indispensable. But they are indispensable because of the limitations of other reasons. Were originalism the only method consistent with the idea of interpretation, or the law fully committed to originalism, there would be no room for interpretive choice based on which method makes the "constitutional order better rather than worse."[109] It is *because* the idea of interpretation is broader, and the law less committed, that there is room for interpretive choice based on normative reasons. This is why Sunstein takes pains to argue that the concept of interpretation is broad[110] and the law of interpretation is ambivalent.[111] Yet none of this would matter under the rival approach: an approach that grounds the relevance of normative reasons on the practical nature of interpretive choice.

b. *Richard Fallon's Meanings of Meaning*. — Richard Fallon starts from the idea that "meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover."[112] Yet, Fallon observes, there is "an astonishing diversity of senses of meaning," which, for him, are "potential 'referents' for claims of legal meaning."[113] Fallon suggests the following list:

> [I]n 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

106 Id.

107. Id.; see also Urbina, It Doesn't Matter What "Interpretation" Is, supra note 94, at 344–45 (characterizing Sunstein's view as a "two-step" approach to interpretive choice).

108. See Sunstein, How to Interpret the Constitution, supra note 3, at 77–80; see also Sunstein, Originalism, supra note 93, at 1672–73 ("Within the (broad) constraints of the concept of interpretation, and within the constraints of existing law governing that topic, shouldn't judges do whatever they deem best?" (footnote omitted)).

109. Sunstein, How to Interpret the Constitution, supra note 3, at 8.

110. See supra notes 103–104 and accompanying text.

111. See Sunstein, How to Interpret the Constitution, supra note 3, at 77–80.

112. Fallon, Meaning of Legal Meaning, supra note 5, at 1237.

113. Id. at 1239; see also Baude & Sachs, The Law of Interpretation, supra note 27, at 1089–90 ("As decades of interpretive debates have established, there's more than one plausible way to read a text. To put the standard picture into practice, we have to decide which meaning, produced by which theory of meaning, we ought to pick." (emphasis omitted)).

> and listeners, its real conceptual meaning, its intended meaning, its reasonable meaning, or its previously interpreted meaning.[114]

Given this plurality, "Among the foremost challenges for legal interpretation is to determine which of these possible senses constitutes legal meaning."[115] Theories of legal interpretation often presuppose that the object of interpretation is one of these alternative referents for claims of meaning.[116] And yet there is no linguistic fact that determines which of the referents is the relevant one.[117] "Absent a linguistic fact of the matter, selection among alternative possible legal meanings becomes inevitable."[118] Choice is, then, inevitable.

What are the relevant criteria for making this choice? For Fallon, the "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."[119] More precisely, he recalls "three normative criteria" that apply in choosing a prescriptive constitutional theory,[120] suggesting that "similar considerations should come into play in selecting a theory of statutory interpretation."[121] The criteria are: "promoting rule of law values," "facilitating political democracy," and "defining a morally defensible set of individual rights."[122] Fallon admits that these criteria are contestable.[123] What matters for our purposes is not which specific normative criteria are the relevant ones but rather that the relevant criteria are normative.[124]

Fallon's study of the role of "potential 'referents' for claims of legal meaning" (hereinafter, "meaning") offered a new way of understanding interpretive choice by focusing primarily on alternative meanings rather than on alternative methods of interpretation. Choosing a method of interpretation entails determining which meaning is the relevant one. Normative reasons matter in choosing the relevant meaning.

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114. Fallon, Meaning of Legal Meaning, supra note 5, at 1239.

115. Id.

116. Fallon says that "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." Id. at 1240.

117. See infra note 125 and accompanying text.

118. Fallon, Meaning of Legal Meaning, supra note 5, at 1287.

119. Id. at 1243.

120. Id. at 1300; see also Fallon, How to Choose a Constitutional Theory, supra note 5, at 558–59.

121. Fallon, Meaning of Legal Meaning, supra note 5, at 1300.

122. Id (citing Fallon, How to Choose a Constitutional Theory, supra note 5, at 558–59).

123. Id.

124. A separate question that Fallon raises is whether choice of meaning should be undertaken categorically or on a case-by-case basis. Fallon favors the latter. See id. at 1242–43, 1303–05; see also infra section III.C.

Why? Here the residual approach kicks in, as the answer seems to lie in the limitations of linguistic reasons. While several meanings are linguistically possible, linguistics does not determine a single one. Thus, Fallon explains that

> 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*.[125]

On this account, there are two relevant linguistic facts that shape interpretive choice. First, there is a plurality of linguistically possible meanings. Second, none of these meanings is controlling as a matter of linguistic necessity. Hence normative reasons are needed to settle the issue. Linguistic reasons run out.[126] This is the residual approach at work.

2. *The Practical Nature of Interpretive Choice*. — The main reason why normative reasons matter for interpretive choice is not that other reasons run out. Normative reasons matter for interpretive choice because interpretive choice is practical[127] and, as such, is governed by normative reasons.

This presupposes a distinction between the theoretical and the practical. "[T]here is a difference between theoretical reasoning and practical reasoning and a corresponding difference between theoretical reasons and practical reasons."[128] The basic premise of the normative choice thesis is that legal interpretation is the action of someone for a practical purpose, be it deciding a case, declaring what the law is, passing legislation coherent with other norms, or something else. Interpretation is part of this practical enterprise (of deciding a case, declaring the law, passing legislation harmonious with other norms, etc.). In this sense, interpretive choice in law is always situated and practical. It is not a choice in the abstract but rather the choice of someone, in some specific role, and for some practical purpose.

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125. Fallon, Meaning of Legal Meaning, supra note 5, at 1272 (emphasis added); see also id. at 1241 ("As a result, linguistic analysis and the philosophy of language lack the tools to settle controversies in legally disputable cases."); id. at 1273 ("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.").

126. It would seem as if, for Fallon, legal reasons also constrain interpretive choice. See supra note 119 and accompanying text.

127. See Jordan, Constitutional Anti-Theory, supra note 5, at 1550–59 (emphasizing the practical character of "constitutional reasoning"); infra section II.D.2.

128. Gilbert Harman, Practical Aspects of Theoretical Reasoning, *in* The Oxford Handbook of Rationality 45, 46 (Alfred R. Mele & Piers Rawling eds., 2004).

The enterprise, then, falls under the domain of practical reason. Practical reason concerns itself with "the question of what one is to do,"[129] rather than with what to believe or what is the case.[130] The question presupposes that there are alternatives as to what to do (including doing nothing), and thus practical reason includes reasoning as to what one should choose to do.[131] It concerns itself, thus, with reasons for choice and action—practical reasons[132] or (used synonymously here) normative reasons.[133] That an action is good (or bad), virtuous (or vicious), or has good (or bad) consequences, is each a practical reason in favor of (or

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129. R. Jay Wallace & Benjamin Kiesewetter, Practical Reason, Stan. Encyc. Phil. (Edward N. Zalta & Uri Nodelman eds., Oct. 13, 2003), https://plato.stanford.edu/entries/practical-reason/ [https://perma.cc/XY69-AVP2] (last updated July 31, 2024). This is enough of a characterization here. The literature on practical reason is vast and accounts of practical reasoning differ on specific aspects. For example, is the conclusion of practical reasoning properly an action, an intention, or a deontic statement? See Joseph Raz, Introduction, *in* Practical Reasoning 1, 5 (Joseph Raz ed., 1978) [hereinafter Raz, Practical Reasoning] (posing this question and presenting the alternatives). Yet the characterization of practical reason as concerned with deciding what to do seems general enough to capture the core of the idea for different traditions. See, e.g., Onora O'Neill, Kant: Rationality as Practical Reason, *in* The Oxford Handbook of Rationality 93, 94 (Alfred R. Mele & Piers Rawling eds., 2004) (writing in the Kantian tradition that "[a]gents use practical reasoning to shape or guide their future action"); Thomas Osborne, Practical Reasoning, *in* The Oxford Handbook of Aquinas 276, 276 (Brian Davies ed., 2012) (writing in the Aristotelian-Thomistic tradition that "[p]ractical reason is distinct from speculative reason because it is ordered to some work or end"); see also infra note 130.

130. The distinction is a common one. See G.E.M. Anscombe, Intention 60 (2d ed. 1963) ("There is a difference of form between reasoning leading to action and reasoning for the truth of a conclusion."); Gilbert Harman, Practical Reasoning, 29 Rev. Metaphysics 431, 431 (1976) ("Let us distinguish practical reasoning from theoretical reasoning in the traditional way: practical reasoning is concerned with what to intend, whereas theoretical reasoning is concerned with what to believe."). The distinction doesn't entail that there is no relation or similarity between the two. See, e.g., Anscombe, supra, at 60 ("Aristotle however liked to stress the similarity between the kinds of reasoning . . . .").

131. For characterizations of practical reason in terms of choice see, e.g., John Finnis, Foundations of Practical Reason Revisited, 50 Am. J. Juris. 109, 109 (2005) [hereinafter Finnis, Foundations of Practical Reason Revisited] ("Doing law immerses one both in practical reason's activities, thinking about what to choose and do . . . ."); John Finnis, On Reason and Authority in *Law's Empire*, 6 Law & Phil. 357, 358 (1987) (referring to "practical reasoning" as "reasoning towards choice and action").

132. For a characterization of the relation between practical reasons and practical reasoning, see Raz, Practical Reasoning, supra note 129, at 5; see also Finnis, Foundations of Practical Reason Revisited, supra note 131, at 110 (referring to "practical" reasons as "reasons for action").

133. See, e.g., Robert Audi, Reasons for Action, *in* The Routledge Companion to Ethics 275, 277 (John Skorupski ed., 2010) ("In ethical theory, a main focus of analysis is normative reasons for action. These are also called *practical reasons* . . . ."). On some accounts, normative reasons are one kind of "practical reasons." Practical reasons would include both "reasons that explain why someone did something ('motivating reasons'), and the reasons why she should (or should not) have done it ('normative reasons')." David McNaughton & Piers Rawling, Motivating Reasons and Normative Reasons, *in* The Oxford Handbook of Reasons and Normativity 171, 171 (Daniel Star ed., 2018) (footnote omitted). Here, practical reasons refer to normative reasons in this strict sense.

against) that action.[134] If engaging with some legal text is part of the enterprise we are undertaking, and if there are, in fact, several ways we could go about carrying out that enterprise, then we will inevitably face a choice. We need to choose what we will do: how we will engage with that legal text in the context of this particular enterprise. This is interpretive choice.

The point is so simple that it can be easily missed. The rationale for why normative reasons play a role in interpretive choice is not that non-normative reasons leave a gap and can't do all the work alone; rather it's the nature of the enterprise. Normative reasons matter for interpretive choice not because everything else fails, but because interpretive choice is practical.

Does this view contradict theories that hold that the activity of interpretation is not practical?[135] Theories that say, for example, that the point of interpretation is to "seek[] legal provisions' contributions to the content of the law"[136] or determine the linguistic meaning of a text?[137] No. The normative choice thesis is about interpretive choice, not about interpretation.[138] It is agnostic as to what interpretation is and whether it is a practical or theoretical ("empirical") activity.[139] Even if interpretation (on the best theory) were not practical—not about what to do but about what the case is regarding a particular text or fact—interpretive choice always is. The practical nature of the latter doesn't entail the practical nature of the former, and the nonpractical nature of the former wouldn't entail the nonpractical nature of the latter.[140] Interpretive choice concerns the choice of a method of interpretation, but it's not interpretation itself. This makes the relation between a theory of interpretation and a theory of interpretive choice more complex than it would seem.[141]

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134. Debates at the level of moral and political theory on what are truly relevant normative reasons span over millennia and are too vast to mention here. For a survey, see Alan Donagan, The Theory of Morality 75–209 (1977) (considering how views of normative considerations in political and moral philosophy have changed over time).

135. Thank you to Bill Watson for raising this question.

136. Greenberg, Natural Law, supra note 5, at 127.

137. As is often conceived regarding the interpretation–construction distinction. See infra notes 256–259 and accompanying text.

138. See infra section II.D.1.

139. For an example of the contrast between normative and theoretical (or empirical) accounts of interpretation, see Grove, Testing Textualism, supra note 15, at 1073 (contrasting empirical and normative accounts of textualism to determine ordinary meaning).

140. See infra section II.D.3.

141. See infra section II.D.1.

C. *The Negative Thesis*

The conclusion of the previous sections is that normative reasons matter. How about non-normative reasons? They do not count by themselves for interpretive choice. This is the negative thesis.

This section surveys each of the non-normative reasons explained in Part I. For each, it explains why it has no independent weight in deliberation on interpretive choice.

1. *Conceptual Reasons*

a. *Why Conceptual Reasons Don't Matter.* — Imagine that in our society debates on constitutional interpretation are about just three methods of interpretation: methods X, Y, and Z. Each method is supported by one normative reason in the form of a single value realized by each method. Method X realizes the value of substantive justice. Method Y realizes formal values associated with the rule of law, such as legal certainty. Method Z realizes the value of democracy.[142] An influential theory holds that the "true" concept of interpretation only includes X and Y. On this theory, while X and Y are methods of interpretation, Z isn't. Z is only a "so-called" method of interpretation. Does that make any difference for interpretive choice?

No. Conceptual delimitation shouldn't affect choice.[143] This becomes clear if we situate the decision. As mentioned above, these methods of interpretation are not proposed as mere academic exercises but as proposals for choice and action in the practice of law. Assume that a judge, Judge A, has to decide a constitutional case, and thus has to choose whether to adopt X, Y, or Z to interpret the Constitution. If method Z would not fall under the "true" concept of interpretation, would this

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142. Assuming that these are all distinctive values and thus are not conflated in a way that makes them indistinguishable, as they often are. See Isaiah Berlin, Liberty 172 (Henry Hardy ed., 2d ed. 2002) ("Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience."); John Tasioulas, The Rule of Law, *in* The Cambridge Companion to the Philosophy of Law 117, 117–19 (John Tasioulas ed., 2020) (explaining that a broad definition of "rule of law" ignores the distinct elements that constitute it as well as conflicts between those elements); John Tasioulas, The Inflation of Concepts, Aeon (Jan. 29, 2021), https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason [https://perma.cc/U3VC-BUGC] (introducing the notion of "conceptual overreach" and arguing that it leads to obscuring the distinctness of each value and the possibility of conflicts between values).

143. See Kent Greenawalt, Realms of Legal Interpretation: Core Elements and Critical Variations 95 (2018) (claiming that "the central focus should be on the question of what judges *should* do rather than on what arguably counts as the edges of 'legal interpretation'"); see also id. at 2, 3, 80, 83, 85–86, 90 (insisting on this claim); Greenberg, Natural Law, supra note 5, at 130 ("It is beside the point whether interpretation properly so-called must seek to identify the speaker's intentions; if legal interpretation is not a form of interpretation by this criterion—just as starfish are not fish and computer viruses are not viruses—then so be it."); Primus, supra note 5, at 181 ("Assuming that the content of the decisionmaking process is the same no matter what label we put on it, the fact that we say 'interpretation' as opposed to 'shmerpretation' will have no impact on constitutional decisions.").

change the alternatives available to Judge A, or the reasons bearing on Judge A's choice? Surely not. The reason for choosing Z is that it realizes the value of democracy; Z will realize that value whether it is a method of interpretation or only a "so-called" method of interpretation. To the extent that the value of democracy is relevant for interpretive choice, the choice that A faces and the reasons that bear on that choice are the same, regardless of whether Z is a method of interpretation or only a "so-called" method of interpretation. If Judge A's concept of interpretation were more capacious and included Z, the choice and the reasons bearing on that choice would be the same as if it were less capacious and excluded Z. It would be unreasonable for A to restrict deliberation to X and Y only because Z is a "so-called" method of interpretation.

The next two subsections answer two objections to this view. The first is that this view does away with the idea of interpretation. The second is that this view confuses a theory of interpretation with a theory of adjudication.

b. *Doing Away With Interpretation.* — On the normative choice thesis, conceptual reasons do not constrain interpretive choice. It's not only that interpretation isn't one thing (Sunstein's "there is nothing that interpretation 'just is'" argument[144]), but that it simply doesn't matter what interpretation is.

This thesis clashes with two intuitions. The first is that interpretation surely includes some things and not others. Bouncing a ball and the color blue are not interpretation. The second intuition is that this must somehow matter, because we do in fact rely on the idea of interpretation when we deliberate as to what to do. So, for example, you can choose whether to interpret an unjust law, or, instead, simply not apply it or disobey it. Isn't that distinction important?

The first intuition is compatible with the normative choice thesis. The normative choice thesis is not a thesis about the meaning of interpretation. It claims neither that the idea of interpretation is boundless, nor that it is restricted to some methods of interpretation. It can accept that some things fall under the (best) concept of interpretation, and some don't. It simply claims that this categorizing has no significance for interpretive choice.

This brings us to the second intuition. The second intuition does seem opposed to the normative choice thesis. The intuition is that "what interpretation is" does play a role in deliberation on interpretive choice. For a judge, the fact that some course of action is not a form of interpretation should count against it. If in Judge A's choice, alternative X is "interpretation," and alternatives Y and Z are "reading into the law whatever I want," this should be a reason for choosing X. If so, conceptual reasons do play a role in interpretive choice.

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144. See supra notes 96–97 and accompanying text.

There is something to this objection, but it ultimately fails. This becomes clear if we ask why the fact that one form of action is "interpretation" and the other "reading into the law whatever I want" makes a difference in deliberation. The reason is that we assume that Judge A has some reason to follow the law in a particular way that is incompatible with "reading into the law whatever I want." That reason can be, for example, the value in respecting the democratic authority of whoever passed that law,[145] or the injustice of submitting a person to the "arbitrary will" of an official,[146] or the wrongness of violating the oath of office.[147] But all these are normative reasons. They are not about any truth about the concept of interpretation, but about values to be realized and fulfilled.[148]

Here, the idea of interpretation seems to be playing some role, but it is not the role of an independent conceptual reason for interpretive choice. The role is parasitic on normative considerations, and it is the following: The concept of "interpretation" is highlighting some features of certain courses of action—features that purely *normative* reasons make relevant to interpretive choice.[149] For example, a concept of "interpretation" centered on authorial intent can guide interpreters toward ways of engaging with a statute that would track the will of the lawmaker and so promote the values associated with democratic authority. Other ways of engaging with that statute—including ones that fall under

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145. See Scalia, A Matter of Interpretation, supra note 51, at 17 (arguing against intentionalism and for textualism on the basis that it is "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").

146. See Endicott, Legal Interpretation, supra note 27, at 110 (referring to the "best feature of a concern for the rule of law: the determination not to subject parties and the community to the arbitrary will of an official").

147. See supra note 66 and accompanying text.

148. As suggested in Primus, supra note 5, at 181 ("[W]hy might the meaning of 'interpretation' matter? One possibility is that our constitutional culture's use of that word provides a clue about its underlying values.").

149. Below, this Article refers to this as a "practical" concept of interpretation. See infra section II.D.1. The normative choice thesis, while opposing the idea that conceptual reasons have any independent weight in normative choice, doesn't oppose all uses of the concept of interpretation—neither theoretical nor practical. For example, description of a course of action deemed valuable can play an important role in law in, for instance, coordinating action. See Urbina, It Doesn't Matter What "Interpretation" Is, supra note 94, at 355 (explaining the same). On the role of law in coordinating judicial approaches to, for example, ways of engaging with sources or applying rights, see Francisco J. Urbina, How Legislation Aids Human Rights Adjudication, *in* Legislated Rights: Securing Human Rights Through Legislation 153, 153–56 (Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller & Francisco J. Urbina eds., 2018) [hereinafter Urbina, Human Rights Adjudication]. On law as coordination, see generally Maris Köpcke, Legal Validity: The Fabric of Justice 69–88 (2019) (explaining how law and legal validity allow for "convergence"); John Finnis, Law as Coordination, *in* Philosophy of Law: Collected Essays Volume IV 66, 66 (2011) (explaining how law achieves coordination).

the description of "reading into the law whatever I want"—might undermine that value and therefore be unappealing.

Thus, that something is or is not a method of "interpretation" may feature in an agent's deliberation about interpretive choice, ostensibly providing reasons for and against a method of interpretation. But this reference to "interpretation" could respond to two different kinds of reasons. First, it could respond to conceptual reasons, if what is doing the work is a concept of interpretation arrived at through speculative or theoretical reasoning concerning what is the nature or idea of interpretation. Second, it could respond to normative reasons, which include singling out normatively significant characteristics of a given course of action in the way explained in the previous paragraph. The second intuition is plausible because it trades on this ambiguity, but it is also this ambiguity that makes it fail as an objection to the normative choice thesis: On one reading, the intuition is mistaken, and on the other, it is consistent with the normative choice thesis.

c. *Confusing a Theory of Interpretation With a Theory of Adjudication.* — Another challenge to the view that conceptual reasons don't have independent weight in interpretive choice draws on a familiar distinction between a theory of interpretation and a theory of adjudication.[150] The challenge would go along the following lines: A theory of interpretation tells us what interpretation is; a theory of adjudication tells us what judges should do in deciding cases.[151] The normative choice thesis confuses the two.[152]

The challenge relies on a distinction between a theory of what is (say, the nature of interpretation, or what interpretation really is) and a theory

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150. Note that the objection is too narrow. The normative choice thesis extends to all interpretive choices in law, not only to judicial ones.

151. A classic statement of this distinction is Gary Lawson's. See, e.g., Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823, 1823 (1997) ("In large measure, the backwardness of much modern constitutional theory rests on a failure to distinguish theories of interpretation from theories of adjudication." (emphasis omitted)). Different authors seem to express a similar idea through different distinctions. See J. Joel Alicea, Liberalism and Disagreement in American Constitutional Theory, 107 Va. L. Rev. 1711, 1773–74 (2021) ("The most plausible arguments in favor of interpretation-just-is-originalism acknowledge something like this distinction between the linguistically correct interpretation of the text and the application of the text to cases and controversies."). This subsection works with a thin version of the distinction. A thicker version would claim that "interpretation" in the distinction (either in theory or activity) is just some specific form of originalism. But then the distinction wouldn't pose a challenge to anything, because it would be question-begging. See Michael C. Dorf, Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory, 85 Geo. L.J. 1857, 1857 (1997) (arguing that "our failure to distinguish between interpretation and adjudication reflects a fundamental disagreement between Lawson and us mainstream scholars, rather than mere sloppiness on our part").

152. See Ekins, Objects of Interpretation, supra note 18, at 20 (arguing that "Sunstein confuses a theory of adjudication with a theory of constitutional meaning and interpretation").

of what ought to be (what judges should do).[153] The normative choice thesis takes this distinction seriously. If the distinction entails that "what judges should do" doesn't affect the "best" philosophical understanding of the true nature of interpretation, then the latter should also not affect the former. The normative choice thesis is about the former. As explained in the previous subsection, the normative choice thesis does not oppose any conceptual (theoretical) understanding as to what is "interpretation." It only holds that that enterprise has no inherent significance for interpretive choice. This position is, if anything, more consistent with a distinction between a theory of interpretation and a theory of adjudication than any alternative.

Perhaps the challenge is not about distinguishing "theories," but different activities: the *activity* of determining the meaning of the law and the *activity* of determining what to do with the law once its content is determined.[154] Does this distinction pose a challenge to the normative choice thesis? No. The normative choice thesis counsels against a possible mistake that this distinction—or a distorted understanding of it—might invite. The mistake is to isolate an element of the enterprise of legal decisionmaking (namely, interpretive choice) from practical deliberation and subject it to some other consideration (such as a conceptual consideration of what interpretation really is). The mistake is in the inability to see that adjudication entails more than one moment of (practical, normative) choice. Just as there is a choice at the level of "adjudication" regarding what to do with the law (once its content has been determined), there is a choice at the level of "interpretation" regarding how to go about determining the meaning of the law. To put it in the terms of a distinction recently formulated by Sachs: It's not only that there is a choice in how to act *given* the law, but there is also an inescapable choice in how to determine the meaning of law so as to act *according* to law.[155] Both choices are real and practical.[156] Being able to draw a distinction between interpretation and adjudication is no grounds for confining all the practical reasoning to the latter category.

Nothing said here denies that theories of interpretation are legitimate or important, even if they are theoretical rather than practical. The intellectual enterprise ("theory") aimed at understanding things such as

153. The locus classicus for this distinction is 1 David Hume, A Treatise of Human Nature 302 (David Fate Norton & Mary J. Norton eds., Oxford Uni. Press 2007) (1740); see also G.E. Moore, Principia Ethica 62 (Thomas Baldwin ed., rev. ed. 1993) (1903). For a critical discussion, see Alasdair MacIntyre, After Virtue: A Study in Moral Theory 57–59 (3d ed. 2007).

154. Note also that there may be different activities bearing on the determination of legal content, as in the interpretation–construction distinction. See infra section II.D.3.

155. See Stephen E. Sachs, According to Law, 46 Harv. J.L. & Pub. Pol'y 1271, 1272 (2023) [hereinafter Sachs, According to Law] (distinguishing between "what we ought to do according to a legal system" and "what we ought to do given the existence of that legal system" (emphasis omitted)).

156. See infra sections II.D.1–.2.

the nature of the knowledge derived from interpretation, or the kind of truth at which it aims, or the different activities it may involve,[157] is theoretical—and legitimate and important. Furthermore, the view defended here is compatible with theories holding that some aspect—or all of the *activity* one refers to as "interpretation"—is not practical but theoretical (for example, that "interpretation" is only about determining linguistic meaning.)[158] This Article is agnostic as to the definition of legal interpretation, whether it is a practical or a theoretical intellectual activity, and the proper role of a theory of interpretation. But, as explained below, interpretation—whatever it is—is different from interpretive choice. Interpretive choice is about choosing what one should do, how one should engage with a particular legal text; therefore, it is inescapably practical.[159] A theory of interpretive choice needs to capture this. Theorists who wish to advocate for the adoption of a particular approach to interpretation by practitioners are participating in the practical enterprise of deliberating on how someone should choose.[160]

2. *Linguistic Reasons*

a. *Linguistic Reasons Don't Determine Interpretive Choice.* — Linguistic reasons also don't count by themselves for interpretive choice. Of the different alternative meanings that interpretive choice could pick, there is no linguistically controlling alternative independent of normative reasons. What makes a meaning salient is that it is the most appropriate given the applicable normative reasons.[161]

Consider the following observation from Baude and Sachs:

> [T]he right way to read a text, in a given circumstance, depends on our reasons for reading it in the first place. To use Alexander's example, one spouse following the other's shopping list might care only about author's intent—knowing, say, that "cherries" really means "cherry tomatoes." But an FDA bureaucrat reviewing a nutrition label ("Ingredients: Cherries") would put aside any special knowledge of the author's past intentions, caring only about what the likely future reader would

157. See infra section II.D.3 (on the interpretation–construction distinction).

158. As conceived in the interpretation–construction distinction. See infra section II.D.3.

159. See infra section II.D.1.

160. Though note that, while only normative reasons can justify the advice the theorist is giving to a practitioner, theoretical reasoning may aid in the exposition of these reasons and of the practical reasoning of which they are part. See John Finnis, Reason in Action: Collected Essays 1, 8 (2011) (holding, in the context of explaining the relation between theoretical and practical reasoning, that "practical reason's activities in directing this or any other activity are subjects for reflective scrutiny and philosophical contextualization").

161. This Article draws from Fallon in framing interpretive choice as a choice between possible "meanings." See supra section II.B.1.b (discussing Fallon's view).

> understand. . . . We need to know which aspects of the text *the law* cares about, whether or not they truly qualify as "meaning."[162]

Baude and Sachs focus on the reasons that "the law cares about,"[163] but the insight applies to normative reasons generally.[164] Assume there is a bureaucrat charged with determining whether the ingredients label on a product accurately represents its contents. The bureaucrat has reasons to care about the public's understanding, for reasons related to fulfilling her function ("ensuring that ingredient labels reflect their products' content"), which in turn is justified by further reasons ("this promotes public health"). These are normative reasons. The meaning that matters for this bureaucrat is one that tracks public understanding—not because of some truth about language, but because this is the meaning most supported by normative reasons.

The bureaucrat's interpretive choice seems unproblematic. Baude and Sachs present it as intuitive, and it is. But why? Because there are normative reasons to attend to a meaning that tracks the public's understanding, and there seems to be no normative reason to do otherwise. Note, though, that it is not intuitive that there are no linguistic, conceptual, or theory reasons to do otherwise. If anything, the intuition should be the opposite, given that some of those reasons (say, linguistic reasons) are usually canvassed to defend methods of interpretation that don't track the public's understanding, such as intentionalism.[165] If our intuition is that this is an easy interpretive choice, then that intuition suggests that non-normative reasons do not matter for interpretive choice.

Consider what would happen if there *were* opposing normative considerations. A legislature committed to intentionalism passed a law prescribing that bureaucrats should consider intended meaning exclusively. The label says "ingredients: cherries," but this is a product from Xodonia, where people say "cherry" when they mean "wheat." The law, then, requires the bureaucrat to read "cherry" as meaning "wheat." Here, the bureaucrat would face a dilemma: Either follow the law and deem the label accurate (since the meaning of "wheat" on the label coincides with the actual ingredient in the product, namely, wheat) or reject it, thus better fulfilling other normative considerations (say, protecting celiacs, who may consume the product on the mistaken belief

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162. Baude & Sachs, The Law of Interpretation, supra note 27, at 1090 (footnotes omitted) (citing Larry Alexander, The Objectivity of Morality, Rules, and Law: A Conceptual Map, 65 Ala. L. Rev. 501, 506 (2013)).

163. Id. (emphasis omitted); see also supra section I.D.

164. See Dorf, supra note 151, at 1858 ("Whether we equate meaning with original public meaning, or with speaker's meaning, or with a dynamic conception of meaning, or with something else, depends on why we care about the meaning of whatever it is we are interpreting.")

165. In fact, Alexander's hypothetical of cherry tomatoes is a linguistic argument in defense of intentionalist interpretation. See Larry Alexander, The Objectivity of Morality, Rules, and Law: A Conceptual Map, 65 Ala. L. Rev. 501, 506 (2013).

that it doesn't contain wheat). Note that now the example went from easy to hard. This is because suddenly this is not a conflict of normative against non-normative reasons, but a conflict between different normative reasons: following the law (and whatever values are realized through that)[166] and protecting health. The point here is not that sometimes one may disobey the law.[167] What the hypothetical is meant to illustrate is that normative reasons make a difference to interpretive choice, and non-normative reasons (including linguistic reasons) don't. Only normative reasons can make linguistic facts relevant for interpretive choice.[168]

b. *Linguistic Reasons Don't Constrain Interpretive Choice*. — The point of the example above was to show that linguistic reasons can't make a meaning salient: only normative reasons can. It could be argued that linguistic reasons perform a different role: constraining interpretive

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166. On law as a normative reason, see infra section II.C.3.a. On the variable authority of law, see infra section III.C.2.a.

167. For a discussion of civil disobedience, see John Rawls, The Justification of Civil Disobedience, *in* Collected Papers 176, 176 (Samuel Freeman ed., 1999) [hereinafter Rawls, The Justification of Civil Disobedience].

168. Some prominent arguments for intentionalism seem to implicitly acknowledge this. See Alexander, Simple-Minded Originalism, supra note 48, at 87 ("*[G]iven what we accept as legally authoritative*, the proper way to interpret the Constitution . . . is to seek its authors' intended meanings . . . ." (emphasis added)); see also Alexander, Telepathic Law, supra note 34, at 144 ("[Originalism's] position is that whoever has lawmaking authority, it is their intended meaning that governs." (emphasis omitted)). True, Alexander offers several linguistic reasons in defense of intentionalism. See Alexander & Prakash, supra note 46 and accompanying text. But, despite all linguistic reasons in favor of intentionalism, one must accept that there are other possible meanings "besides the intended meaning of its author. There is its meaning in, say, standard English . . . . There is its 'original public meaning.' And so on." Alexander, Simple-Minded Originalism, supra note 48, at 88 (footnote omitted). His reaction to this is that, in adopting any of these other meanings, "[O]ne has not so much departed from the original, authorially intended meaning as merely substituted hypothetical authors for the real ones." Id. That last point presses the question of why privilege "real authors" for "hypothetical ones." The answer is in the normative premise: authority.

This is clearer in Ekins's theory of legislative intention, which ultimately relies on his seminal theory of legislation. See Ekins, Legislative Intent, supra note 1. In his critique of Sunstein, Ekins offers linguistic reasons for intentionalism that seem to ultimately rely on normative reasons such as authority. He says:

> [I]t bears mentioning that the grounding for a theory of interpretation need not be either the nature of interpretation or the consequences of adopting the theory. The grounding might instead be the relationship of authority between lawmaker and subjects, taken together with insight into the nature of language use, which the lawmaker employs to exercise authority.

Ekins, Objects of Interpretation, supra note 18, at 10–11. This presents things in a way consistent with the normative choice thesis: If authority is a relevant normative reason, linguistic reasons matter to the extent that they bear on how to best fulfill that normative reason.

choice.[169] In the previous example, both alternatives (reading "cherries" to mean "cherries" or to mean "wheat") are linguistically possible. Perhaps none determines choice, but choice is about these linguistically available meanings, and so they constrain choice.[170]

Not so. Linguistically available meanings don't constrain interpretive choice. Our bureaucrat is now tasked with applying a statute that allows her to deny entry "only" to "cherries." A shipment with poisoned avocados comes in, and it turns out that because of some public emergency, no other agency or individual is capable of stopping its entry. Once it enters the country, there is no way to stop their distribution and consumption. Our bureaucrat is the last line of defense. Can she stop the entry of the poisoned avocados? There are a range of alternatives. She could: (a) read "cherries" in the statute to mean cherries, and not avocados, and on that reading she doesn't have the power to deny entry to the poisoned avocados. In these circumstances she would face other choices: (a') illegally and overtly (given her determination of the meaning of the law) deny entry to the avocados anyway; or (a'') comply with the law and allow entry to the avocados. But she could also (b) (perhaps implausibly, creatively, flexibly, unfaithfully, etc.) read "cherries" to include "avocados;" or (c) read "only" in the statute as "not only"; and she could also (d) draw from the legal power to deny entry to "cherries" a general principle to deny entry to other fruits.[171]

Some of these alternatives are linguistically plausible readings of the statute, and others aren't ("cherries" are not avocados). But all are alternatives for action: They are practically available to our bureaucrat. Crucially, it's not the case that only (a) (and the subsequent options of (a') and (a'')) are available. The bureaucrat may have strong reasons not to engage in the Humpty Dumptyism of (b) and (c)—what would legal practice become if everyone did! But under some circumstances, that may be the preferable choice. Preserving lives may be an overriding consideration (so, alternative (a)+(a'')) would be out of the picture); overtly challenging the law ((a)+(a')) would lead to judicial review and it would put courts in the position of either sanctioning illegality or endangering the population; drawing a general principle from the statute (alternative (d)) may permanently expand the discretion of the bureaucrat—but our bureaucrat knows that some of her colleagues may use that power arbitrarily. "Misinterpreting" the law (as in (b) and (c)), may be the least bad option—it would allow the bureaucrat to uphold

169. As seen above, Fallon seems to conceive of interpretive choice as constrained in this way. See supra note 125 and accompanying text; see also Dorf, supra note 151, at 1860 ("When our linguistic practices leave an open space, something else must help us decide whether to prefer originalism or some other interpretive methodology to fill it.").

170. Thank you to Lawrence Solum for pointing this out.

171. Alternative (d) would entail the elaboration of doctrine going beyond the legal meaning of the text. That is part of the choice too: to settle for the elaboration of legal meaning of a text or go beyond that and elaborate legal doctrine. See infra note 263.

some sense of legality (avoiding overt disobedience of the law) and restrict whatever legal deficiency is in this alternative to this particular situation (or to a narrow set of circumstances involving avocados), all while still protecting lives.

Now, all this depends on circumstances.[172] The point is not to make a case for the best choice here but rather to illustrate how the alternatives actually and practically available to the bureaucrat go beyond linguistically available meanings.[173]

In fact, meaning can follow normative reasons, just as normative reasons can follow meaning. If no linguistically available meaning is satisfactory, creating a new, normatively appealing meaning is always a possibility and thus an alternative in interpretive choice. Baude and Sachs anticipate this in replying to Fallon:

> If the courts are allowed to produce new meanings for normative reasons by using the traditional rules, then why can't they produce other, normatively better meanings using other, normatively better rules? If the canons are descriptively false as accounts of legislative practice, then the courts' continued use of them seems to license other descriptively false approaches, too—with only normative preferences to guide which falsehoods the courts tell.[174]

Baude and Sachs are right in drawing this implication of Fallon's views, but wrong in seeing in it a deficiency.[175] The invention of a new meaning is not only possible but can be normatively justified.

In fact, at least on some accounts, the history of originalism and textualism seems to be the history of the invention of a new meaning (and a corresponding interpretive method) for normative reasons. The next Part touches on the history of originalism, so let's focus here on textualism.[176] Take Baude's lauded Scalia Lecture.[177] Baude claimed that "textualism has won, and we have Justice Scalia to thank for it."[178] Justice Scalia and others reacted to a status quo characterized by "open and notorious anti-textualist opinions."[179] Baude acknowledged that "it is

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172. See infra section III.C.1.

173. The example also illustrates that there is a choice additional to following or disobeying the law. See supra section II.C.1.c; see also infra section II.D.1–.2.

174. Baude & Sachs, The Law of Interpretation, supra note 27, at 1093.

175. The talk of "falsehoods" here is likely excessive. It depends on how transparent the court (or other interpreters) is regarding what they are doing. But this Article doesn't pursue this argument.

176. See infra section III.C.3.

177. William Baude, The 2023 Scalia Lecture: Beyond Textualism?, 46 Harv. J.L. & Pub. Pol'y 1331 (2023) [hereinafter Baude, Beyond Textualism]. For a longer history of textualism, stressing commonalities between modern and previous versions of textualism, see Tara Leigh Grove, The Misunderstood History of Textualism, 117 Nw. U. L. Rev. 1033, 1137–39 (2023).

178. Baude, Beyond Textualism, supra note 177, at 1332.

179. Id.

possible that to get us to this place, Justice Scalia sometimes made textualist claims that were a *bit* overbroad," such as "[coming] close to insisting that the use of legislative history was completely illegitimate."[180] But there was a point to this exaggeration: "[T]hat overstatement may have been the best way to make the point, practically speaking, in the world Justice Scalia confronted."[181] Baude spoke of the "textualist revolution,"[182] and the term is apt: Revolution entails both a break with the past and success in bringing about a new status quo.[183] The new dominant approach, while "correct and salutary,"[184] entailed some undesirable consequences. Textualism, on Baude's telling, is a strong purge that removes the good with the bad. Its excessive focus on text risks ignoring considerations of unwritten law that were ordinarily taken into account before the advent of textualism—including a law of interpretation and background principles.[185] The "art" of deciding cases "that are not governed by statute . . . has been lost," and, for all its virtues, "[t]extualism has helped it become lost, and we need to help recover it."[186]

The story seems to highlight something artificial about textualism. Its admitted narrowness was meant to respond to perceived deficiencies: a lax approach to legal materials, judicial aggrandizement, etc. To address these problems, people like Justice Scalia put forward—one could say—an idea of legal meaning that was unprecedented in its exclusive focus on textual meaning. Until then, the "meaning" of statutes had never been exclusively that meaning. And yet it was necessary for Justice Scalia and others to put forward such a meaning of statutes, one intentionally stunted, because only then it was possible to correct some vices of legal practice.

Perhaps not everybody will agree with this reconstruction of the story. But it's at least plausible. And if it's plausible, it's possible, which is all that is needed to illustrate how legal meaning (and methods of interpretation) can follow (and not only precede) normative considerations. In the absence of an alternative meaning (and a corresponding interpretive method) in the existing legal practice that could sufficiently limit judicial discretion, those who saw in such discretion a deficiency (a normative judgment) had (normative) reasons to come up with an alternative. Thus, a new and, in some sense, artificial form of meaning can be born to satisfy practical needs.

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180. Id. at 1334 (citing Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

181. Id.

182. Id.

183. See Hanna Arendt, On Revolution 35 (1963) (referring to revolutions as bringing about a "new beginning").

184. Baude, Beyond Textualism, supra note 177, at 1332.

185. Id. at 1336 ("We need to supplement textualism with this unwritten law, law that governs both interpretation and background principles against which interpretation takes place.").

186. Id. at 1344.

3. *Legal Reasons.*

a. *Legal Reasons Are Normative Reasons.* — What kinds of reasons are legal reasons? Greenberg lists them in their own category, separate from conceptual, linguistic, and normative reasons.[187] Professor Michael Ramsey, in a blog post, contrasts legal reasons with normative reasons in referring to Stephen Sachs's work.[188] Ultimately, though, legal reasons are best understood as a type of normative reason.[189] From the point of view

187. See Greenberg, Legal Interpretation, supra note 5, § 5.1. After explaining conceptual, linguistic, and normative reasons, Greenberg adds the following: "Much less common is an argument that a particular method of interpretation is required by substantive legal standards." Id. § 5.1 n.31.

188. See Michael Ramsey, Stephen Sachs: Originalism as a Theory of Legal Change, Originalism Blog (Sept. 23, 2014), https://originalismblog.typepad.com/the-originalism-blog/2014/09/stephen-sachs-originalism-as-a-theory-of-legal-change-michael-ramsey.html [https://perma.cc/PA6K-LSKW] ("It's a very ambitious attempt to justify originalism by reference to legal practices, not (as I'm inclined to do) by reference to normative claims."); see also Sachs, Originalism as a Theory of Legal Change, supra note 35, at 865 ("Our legal practices care about history. Whether a rule has the right historical pedigree does a great deal to show that it's part of our law. Indeed, this is often where originalist arguments derive their rhetorical force.").

189. Three clarifications are in order. First, in a formal sense legal reasons are normative reasons: They generate criteria of correctness, regardless of whether they truly provide reasons for action. See David Enoch, Is General Jurisprudence Interesting?, *in* Dimensions of Normativity: New Essays on Metaethics and Jurisprudence 69 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019) (explaining "formal normativity"); see also Andrew Jordan, The (Ir)relevance of Positivist Arguments for Originalism, 56 Loy. L.A. L. Rev. 937, 952–54 (2023) (applying Enoch's notion of "formal normativity" to legal reasons for interpretation). This is not the sense used here. Here, normative reasons justify action.

Second, if one treats the law as a reason for action because one has reasons to follow the law, then why not treat legal reasons as subordinate reasons? Perhaps one should, and one could do the same with other alleged normative reasons. One treats democracy as a normative reason because democracy promotes some valuable things, such as good government, and one treats good government as a normative reason because it achieves things such as development, security, respect for rights, and so on. One may go all the way down the chain, until one finds something foundational—here it's not relevant what the foundations are. The point is that this chain-like structure is characteristic of practical reasoning. When something is already a link in the chain, it can bring other things into the chain. Because one has reasons not to get ill, one has reasons not to get wet in the rain, and that makes the (otherwise normatively inert) fact that covering keeps people dry a reason for one to cover.

This is why there isn't much at stake here in thinking of the law as a subordinate or independent normative reason. What matters is that the law is (or normally is) part of the chain of practical reasoning. To say that legal reasons are normative reasons simply entails that law is already part of the chain of practical reasoning and, as such, it's capable of bringing other things into the chain as subordinate reasons. To say that legal reasons are subordinate reasons is to be agnostic as to whether law is part of the chain. Talk of "independent" and "subordinate" reasons helps us highlight this in the context of debates on interpretation. The normative choice thesis holds either way, since it is not a thesis about the normativity of law.

This takes us to the third clarification. The claim is not that all law provides reasons for action, but that only law that provides reasons for action can bear on interpretive choice.

of those subject to the law (the internal viewpoint),[190] the law provides reasons for action.[191] The fact that the law commands stopping at a red light is a reason for stopping at red rather than green. There are (normative) reasons for having law.[192] An example is coordination, which is indispensable for the realization of many social goods. Given the important benefits of legal coordination in many areas, one has good reasons to have law that brings about coordination, and, if that law exists, one has good reasons to comply with it[193]—it thus provides reasons for action.[194] These may be strong reasons.[195] But they are defeasible reasons: Sometimes one may have more reasons to disobey the law than to obey it.[196]

Law can and normally does provide reasons for action, though it may not always do so.[197] But law generally does so, in many areas of life, from motorized transportation to contracts to administrative law. There is no reason to think that legal interpretation should be different. As Baude and Sachs say, "The same reasons why we have law in general are reasons to have a law of interpretation in particular."[198]

Ultimately, what matters is whether something normative follows from the law of interpretation.[199] For legal reasons to matter in interpretive

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It's unnecessary to explore further the complex issue of the normativity of law. For a thorough study, see Alma Diamond, Shadows or Forgeries? Explaining Legal Normativity, 37 Can. J.L. & Juris. 47 (2024) (distinguishing between different ways to account for the normativity of law).

190. See H.L.A. Hart, The Concept of Law 89 (3d ed. 2012) (explaining the internal point of view).

191. See Steven J. Burton, Law as Practical Reason, 62 S. Cal. L. Rev. 747, 747 (1989) ("Philosophers of law have treated law as practical reason in this sense intensively since H.L.A. Hart dramatized the importance of the law as a provider of reasons for action . . . .").

192. See, e.g., John Finnis, Natural Law and Natural Rights 3 (2d ed. 2011) [hereinafter Finnis, Natural Law] ("There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy.").

193. For a discussion on law and coordination, see supra note 149.

194. For a philosophical survey of reasons provided by positive law, see John Finnis, On Hart's Ways: Law as Reason and as Fact, 52 Am. J. Juris. 25, 38–39 (2007).

195. As when a law satisfies the focal sense of law. See Finnis, Natural Law, supra note 192, at 276–81 (explaining the "focal meaning" of law).

196. See, e.g., Rawls, The Justification of Civil Disobedience, supra note 167 (articulating conditions in which civil disobedience is justified).

197. There is a debate regarding whether there is a prima facie obligation to obey the law. See M.B.E. Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 Yale L.J. 950, 950 (1973) (arguing that those subject to a government "have no prima facie obligation to obey all its laws").

198. Baude & Sachs, The Law of Interpretation, supra note 27, at 1097.

199. See Baude, Is Originalism Our Law?, supra note 36, at 2392 ("[O]riginalists and their critics are ultimately arguing about how judges *ought* to decide cases. So the question remains how this descriptive account of our legal practice has normative implications."). Some authors note that in their individually authored works, Baude makes normative claims

choice, they must be understood as normative reasons. Thus understood, a law of interpretation is compatible with the normative choice thesis. The normative choice thesis, though, has nothing to say regarding whether a law of interpretation is possible or desirable, or whether there is a law of interpretation in our legal system, or whether one should follow this particular law. If there is a law of interpretation that one should follow,[200] and if such law of interpretation favors one method of interpretation over others, this will provide a (normative) reason in favor of that method.

The normative choice thesis should be liberating for theorists of the "law of interpretation," who also seem to adopt their own "residual" approach. Baude and Sachs say that "[i]f language alone can't finish the job, as we agree it often can't, then something else must. We suggest that this something else is law."[201] But what if ordinary language *can* finish the job? Surely the law can still prescribe a meaning that departs from ordinary language.

b. *The Normative Choice Thesis Doesn't Oppose a Law of Interpretation.* — The debate over the law of interpretation in interpretive choice is premised on the mistaken belief that legal sanction of a method of interpretation is incompatible with interpretive choice, and with the preeminent role that normative reasons play in it. For Baude and Sachs, their view is an alternative to that of "skeptics"—Sunstein and Fallon—who believe there is no fixed meaning of texts and hence that there is need for normative reasons to determine the appropriate method of interpretation.[202] Sunstein replies that U.S. law doesn't determine a single method of interpretation.[203]

But there is no incompatibility. A law of interpretation operates on two levels concerning interpretive choice. There is the deliberation of the judge, for whom this law provides reasons for a method of interpretive choice. But there is also the deliberation of whoever is putting in place a law of interpretation: Now this person has to choose one from a variety of methods of interpretation. This is an interpretive choice, and thus the

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that Sachs does not. See J. Joel Alicea, Practice-Based Constitutional Theories, 133 Yale L. J. 568, 578 n.62 (2023); Barzun, supra note 71, at 1339 n.96; Bernick, supra note 5, at 5.

200. This does not only depend on whether this particular law actually gives reasons for action and on the relative strengths of those reasons vis-à-vis reasons for not following that law. It may be that the law of interpretation doesn't apply or applies less to some actors than others. For example, not all interpreters are legal officials. The citizenry can, and arguably must, interpret the Constitution in, for example, participating in public debate and voting, but it's not constrained in its interpretive choices by the law—at least not in the same way that legal officials are. And not all legal officials are the same. A superior court may be less bound by some aspects of positive law (say, its own precedents) than lower courts. These distinctions are important for the contingency of interpretive choice. See infra Part III.

201. Baude & Sachs, The Law of Interpretation, supra note 27, at 1093.

202. Id. at 1092–93.

203. See Sunstein, How to Interpret the Constitution, supra note 3, at 76–84; see also id. at 91 ("If the founding document set out the rules for its own interpretation, judges would be bound by those rules . . . . But the Constitution sets out no such rules.").

normative choice thesis applies to it. And so, even if there was a law of interpretation that sanctioned originalism, *that* choice would have to be justified by reference to the relevant normative reasons.

Even if a law of interpretation precluded courts from adopting any method other than originalism, this would not entail that there is no interpretive choice, or that there are no other reasons—beside the law of interpretation—bearing on interpretive choice. It would simply mean that whoever is the lawgiver made an interpretive choice.[204] For that choice, as for every interpretive choice, only normative reasons matter.

4. *Institutional Reasons*. — Institutional reasons mediate between other reasons and a specific choice for a specific institution.[205] This is why they are always subordinate reasons. Institutional reasons presuppose that there is some value or requirement that methods of interpretation should fulfill; in assessing whether such value is best satisfied by one method of interpretation or another, institutional reasons focus deliberation on the institution that is to use that method, its capacities, constitutional role, interaction with other institutions, etc. As Vermeule says, "Institutionalism acknowledges the place of value theories in constructing accounts of interpretation, but insists . . . that such theories are necessarily incomplete without second-best analysis . . . ."[206] This Article returns to the compatibility between the normative choice thesis and institutional analysis below.[207]

5. *Theory Reasons*. — Recall that for Greenberg "any kind of argument for a method of interpretation will be apt only to the extent that it bears on how to ascertain what the law is" and thus needs "to proceed via claims about how the content of the law is determined."[208] For example, "whether fairness is relevant in this way depends on how the content of the law is determined."[209] Theories of law articulate how basic facts determine legal facts,[210] and thus they explain what facts affect the content of the law. In Greenberg's view, whether normative reasons matter would depend on what this Article calls "theory reasons."

For Greenberg, some theories of the law do in fact exclude normative reasons from consideration. Most prominently, for exclusive legal

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204. See infra note 304 and accompanying text.

205. See supra section I.E.

206. Vermeule, Judging Under Uncertainty, supra note 5, at 85; see also id. at 83–84 (criticizing Posner's pragmatism for lacking a value theory). Vermeule also argues that one could "bracket" the question of first-order commitments if the different alternatives converge at the operational level, after taking into account institutional reasons. See id. at 82–83. Here institutional reasons are still subordinated to (and presuppose) whatever are the more fundamental reasons.

207. See infra section III.C.2.b.

208. Greenberg, Natural Law, supra note 5, at 130.

209. Id. at 131.

210. Id. at 129.

positivism[211] "normative arguments have no bearing on whether a theory of interpretation is true,"[212] given that, for this theory, "normative factors can play no role in determining the content of the law at any level."[213]

One problem with this argument is that, as Professor Brian Bix cautions, legal theories do not have such straightforward implications for interpretation, including interpretive choice.[214] There are two different enterprises here, as Professor Evan Bernick explains.[215] One is to provide a general description of law; in doing that, the exclusive legal positivist may conclude that "the existence and content of every law is fully determined by social sources."[216] A different enterprise is that of choosing an approach to interpreting the law, say, as a judge resolving a dispute. A moral agent involved in a practical task is not in the business of providing accurate general descriptions of the law but of choosing and acting in a way consistent with the best reasons available. In this second enterprise, even if one thinks that, say, the law is exclusively determined by social sources, one shouldn't allow this theoretical conviction to restrict one's deliberation to reasons related or expressed in social sources.

This is why it is perfectly possible to hold both the view that law is determined only by social sources *and* the view that in applying the law (whatever that is) we, as moral agents, should be mindful of all relevant moral considerations—including those not captured in social sources. In fact, the leading exclusive legal positivist, Professor Joseph Raz,[217] not only emphasized that no method of interpretation followed from his theory of

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211. See infra note 216.

212. Greenberg, Natural Law, supra note 5, at 133.

213. Id. (emphasis omitted). Similarly, the legal positivism of Hart "does not support an appeal to democratic and other normative arguments in defending theories of legal interpretation." Id. at 133.

214. Bix writes:

> Legal positivism is a theory about the nature of law, by its self-characterization a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted, or how institutions are organized. At most, the theory may have something to say about how certain ways of operating are characterized (is it "law" or is it, for some reason, "not law"?), but not on how they should be evaluated or reformed.

Brian H. Bix, Legal Positivism, *in* The Blackwell Guide to the Philosophy of Law and Legal Theory 29, 31 (Martin P. Golding & William A. Edmundson eds., 2005) (emphasis omitted).

215. See generally Evan D. Bernick, Eliminating Constitutional Law, 67 S.D. L. Rev. 1, 2 (2022) (arguing against giving independent weight to what counts as "law" for a given jurisprudential theory in normative constitutional theories).

216. Joseph Raz, The Authority of Law 46 (1979); see also Joseph Raz, Authority, Law and Morality, 68 The Monist 295 (1985) [hereinafter Raz, Authority, Law and Morality], for a more developed defense of exclusive legal positivism.

217. Greenberg refers to Raz as an exclusive legal positivist in Greenberg, Natural Law, supra note 5, at 130.

legal positivism[218] but also recognized the role of normative reasons in choosing an approach to constitutional interpretation.[219]

Theories of law can't determine interpretive choice. A particular account of how social facts determine legal facts doesn't translate into a view of how a particular agent should choose a method of legal interpretation.

D. *Theories of Interpretation and Theory of Interpretive Choice*

Let's take stock of the argument so far. The normative choice thesis entails two subtheses. The positive thesis is that normative reasons matter for interpretive choice. The reason for this is not that non-normative reasons are incapable of determining interpretive choice but that interpretive choice is practical, and thus the reasons that bear on it are practical. The negative thesis is that only normative reasons matter for interpretive choice. The previous section showed dialectically why none of the non-normative reasons usually mentioned in debates on interpretation bear on interpretive choice.

The normative choice thesis entails an account of interpretive choice and of the theory of interpretive choice. This account is mostly implicit in the previous sections, and so it's worth presenting it explicitly here. The issue is the following: If only normative reasons can justify methods of interpretation, then interpretive choice is neither determined nor constrained by any non-normative consideration. A theory of interpretive choice needs to reflect this. But it also needs to account for the fact that interpretive choice is, in some sense, about interpretation—whatever its precise contours. How does interpretive choice stand to interpretation, and to theories of interpretation, considering that non-normative reasons (including the concept of interpretation) play no practical role in interpretive choice?

This section articulates such an account of interpretive choice. It does so by addressing three questions. First, and most importantly: How does interpretive choice stand to theories (and their concepts) of

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218. See Raz, Authority, Law and Morality, supra note 216, at 317 ("Furthermore, and this is often overlooked, the sources thesis by itself does not dictate any one rule of interpretation. It is compatible with several."). Raz also suggests that the question "which . . . interpretation[] is the right one" depends on the "rules of interpretation," which "var[y] from one legal system to another." Id. at 317–18.

219. Raz, Authority and Interpretation, supra note 5, at 355 (developing "an approach to constitutional interpretation that, for lack of a better word, we may call a moral approach"); id. at 360 ("[C]onstitutional interpretation has to answer to a variety of reasons, some urging fidelity to existing law, others urging its development, change, and adaptation . . . ."); id. at 361 (referring to considerations for conservation and change as "moral considerations" and recalling a central claim in the argument, namely, that "courts are faced with moral issues and should make morally justified decisions").

interpretation?[220] Second: Why frame the issue in terms of interpretive choice and not in terms of (judicial, legal, constitutional) decisionmaking? And third: How does the normative choice thesis relate to the interpretation–construction distinction? All three bear on how interpretive choice relates to the activity, the concept, and the theories of interpretation.

1. *What Is "Interpretive Choice"?* — There is a puzzling feature of the view presented here. While it relies on the notion of "interpretation" ("interpretive choice"), it also somehow dispenses with it. How can this be? Simply put, a choice can be "about interpretation" without being constrained to what counts as interpretation.

To explain this, one must distinguish between two perspectives: that of the theorist and that of the agent.[221] A theory may, based on speculative or practical reasons, come to a concept of interpretation. If the theory is sound, that concept is helpful for describing some aspect of our reality (if the aspiration is theoretical) or distinctive features of an action relevant to determining if that action should be done (if the aspiration is practical). Once the theory arrives at such a concept, there will be things that will fall under the concept of interpretation and things that will not. Now, from the point of view of an agent who must decide how to engage with a legal text, what matters are the alternatives available to that agent and the normative appeal of each alternative. It is immaterial whether some of those alternatives fall under the concept of interpretation of a given theory or not.[222] This is why interpretive choice is broader than interpretation. From the point of view of an agent who subscribes to a theory of interpretation, the decision will always appear as a decision between doing some actions that fully and properly fall under the theory's concept of interpretation (interpreting), or doing some actions that are marginal

220. Thank you to Lawrence Solum and Sherif Girgis for their helpful comments that lead to this section.

221. This doesn't suggest that theory is prior to practice. In a sense, it's the contrary: The object of theory is the activity undertaken in the practice. See John Finnis, Law and What I Truly Should Decide, 48 Am. J. Juris. 107, 114–15 (2003) (discussing these issues). Thank you to Angelo Ryu for pointing this out.

222. See supra section II.C.1. This, or something like this, seems to be Walter Benn Michaels's point in talking about the "irrelevance of the theor[ies] of interpretation" and that "questions like whether we should produce and then follow constructs like the original public meaning are entirely normative," while also defending the view that interpretation is necessarily intentionalist originalist. See Michaels, Using a Firearm, supra note 15, at 144, 145, 148, 149.

instances of the concept,[223] or not interpreting at all.[224] From a practical point of view, those alternatives are on the same level, in the sense that they are all alternatives regarding the same choice.[225]

But one should also bear in mind the practical significance of interpretive choice. From the point of view of the agent, there are often normative reasons to follow the law and thus to determine its meaning according to whatever reasons she has for following the law. An example may clarify. Recall the bureaucrat applying a statute authorizing her to deny entry only to "cherries."[226] The bureaucrat has good reason to act: to let something enter the country or not. There will also be reasons bearing on how to act. These reasons bear not only on the outcome but also on how an agent (a judge, bureaucrat, legislator, etc.) arrives at a decision as to how to act. Here, law enters the picture. In a reasonably just and well-functioning legal system, judges and other officials, as well as private individuals, have reasons to adjudicate and make other decisions by reference to law. There could be, and typically are, reasons for their decisions to be guided in some way or another, to be constrained in some way or another, or even to be fully determined, by law—by an applicable legal source antecedent to the case. Examples of these reasons are commitments to obey the law (having sworn to respect or uphold the law), the rule of law, authority, fairness, democracy, the specific values or goods promoted by the particular legal norm at stake, etc.[227] In the case of the bureaucrat, the same may be true. She will then have reasons to treat the directives contained in the statute regulating her powers as reasons featuring in her own practical reasoning oriented to deciding what to do in a specific situation in which the statute is applicable. But what are the directives contained in the statute? She would need to know this to know if and how they bear on her decision. Because the bureaucrat has good reasons to decide in accordance with the statute, she has good reasons to determine what the directives contained in the statute are.

What has been said of this bureaucrat could be said equally of judges, legislators, other officials, and private parties that have reasons to abide by the law in some way. If they have reasons to follow the law in engaging in

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223. By "marginal instances" this Article means borderline or deficient instantiations of the concept. For example, misinterpretations would fall in this category. See Timothy Endicott, Legal Misinterpretation, 13 Jurisprudence 99, 103–05 (2022) (distinguishing misinterpretation from both interpretation and "judicial abandonment of the law").

224. If the concept of interpretation is practical, then that concept will express some properties of one or more alternatives that are reasons for choosing them. But the fact that those properties are captured by that concept doesn't constrain choice to instances of that concept.

225. Or, put more technically, they are all alternatives in the same choice situation. See Ruth Chang, Comparison and the Justification of Choice, 146 U. Pa. L. Rev. 1569, 1574 (1998) ("[A] choice situation is any actual or possible situation in which an agent must choose only one of a multiple, but finite, number of available alternatives.").

226. See supra section II.C.2.b.

227. See supra section I.C.

some practical activity, then, within their decisionmaking procedure for that activity, there will be normative reasons for that agent to confront a specific choice: how to understand the relevant legal materials (the statute, in the case of the bureaucrat) so as to determine their legal content, or what to do instead. In practice, then, the alternatives for this choice will include everything the agent could do in determining the content of the relevant legal source, or anything she could do instead of that. This was the situation of the bureaucrat in the example above, facing several alternatives ranging from reading the statute as restricting her powers to cherries to interpreting it to include a general principle expanding her discretion. Consider the theorist for a moment. The theorist can offer an account (a theory) of the activity of understanding, say, statutes, so as to determine their content. Such account can be, as said above, theoretical or practical. This is a theory of interpretation. The theory may offer a concept of that activity and recommend a particular way of carrying it about. Returning now to the agent, who may be confronted with different alternatives as to how to determine a statute's content—some of these alternatives will be thematized and recommended by theories of interpretation. In the example of the poisoned avocados,[228] reading "cherries" to mean cherries may be recommended by a textualist theory of interpretation, which may even understand this to be the only thing that qualifies as interpretation (alternative (a)). Other alternatives (reading "cherries" freely, laxly, with little regard for its semantic meaning, to include avocados (alternatives (b) and (c) in the example)) may not qualify as interpretation for that theory, or for any theory. But the bureaucrat will be confronted with those alternatives anyway. All the alternatives available in practice to the agent are on the same level as possible courses of action with regard to this particular choice. *This choice* is the subject of a theory of interpretive choice.

A theory of interpretive choice must be mindful, then, of two things. First, of the great practical significance for law of a specific activity (call it "interpretation"), which, for that reason, deserves to be conceptually demarcated for theoretical focus and also for practical reflection: to communicate and understand its distinctive importance, the way it should operate, etc. Theories of interpretation—among other things—engage in this process of conceptual demarcation, and this is an important task. But where they draw the precise lines is not decisive *for a theory of interpretive choice*. That is because a theory of interpretive choice must be mindful of a second thing: An agent could be faced with many alternatives, only some of which may fall under a given (or even the "best") theory's concept of "interpretation," and yet, from the point of view of the agent, those will be live alternatives for choice and action. Even if the activity conceptualized by theory as "interpretation" is of great practical importance, nothing

228. See section supra II.C.2.b. for both the example and the alternatives.

guarantees that on all the occasions in which one could engage in it, one will actually have most reason to do so.

It is in this sense that "interpretive choice" refers to interpretation: For any theory, interpretive choice will appear as a choice in which at least one of the alternatives supported by sufficiently relevant normative reasons is (on theoretical reflection, may rightly be described as, or appears to many as) to interpret, and thus it will appear as a choice between different ways of interpreting, or between ways of interpreting and something else that is not quite interpreting (interpreting "in a sense," or misinterpreting, or pretending to interpret, etc.) or not interpreting at all. For this reason, from the point of view of theory, it is still a choice that is well characterized in terms of interpretation, even if not all the alternatives are characterized as such by the best (or even any) theory of interpretation.

Here is a more stylized way to put this. A theory T1 elaborates a concept of interpretation. For T1, interpretation is X.[229] On the normative choice thesis, all the following propositions could be true at the same time. First, in circumstances C1 there are most reasons to do X. Second, C1 are the standard circumstances in our society. Third, in circumstances C2, there are most reasons to determine the meaning of the law in a way which is a marginal or borderline instance of X, call it X'. Fourth, in C3 there are most reasons to determine the meaning of the law differently, Y. Fifth, for another theory, T2, interpretation is Y and not X. Sixth, because C2 and C3 are not standard circumstances, T1 is still justified in having a concept of X as "interpretation," and in treating X as the proper, right, main, and perhaps even (with some exaggeration) the only form of "interpretation." Seventh, in circumstances C4 we don't have reasons to determine the meaning of the law at all, but we do have reasons for decisions to have some loose connection with it. Here, Z is the best approach. Eighth, for another theory, T3, interpretation includes X, Y, and Z. Ninth, in circumstances C5 there are no reasons to follow the law whatsoever, and here there are most reasons to do Ω instead of X, Y, Z. Tenth, Ω is not interpretation under any theory.

T1 may be right in treating X as interpretation and not the other alternatives, or treating X as a central instance of interpretation, X' and Y as peripheral ones, Z as interpretation only in appearance, and Ω as not interpretation at all. But it is possible that in circumstances C1–C5, an agent could (in the non-normative sense of "could") do X, X', Y, Z, and Ω, and thus in each of those circumstances the agent has to choose. This choice is not constrained by the terms of T1 and its concept of interpretation (or of any other theory or concept), and thus it is not the case that only X is a live alternative for that agent. It could be that in all

229. "X" is a concept of "interpretation." It may be a theoretical or a practical concept of interpretation, and it may refer to a specific method of interpretation ("intentionalism") or to the activity more broadly.

circumstances, X', Y, Z, and Ω have some normative appeal, and, as stated above, in some circumstances each is the most appealing option and should be chosen. A theory of interpretive choice should be open to the possibility of the practical relevance of interpretation according to T1 and at the same time acknowledge the possibility and appeal of other alternatives. This entails acknowledging that the end result of interpretive choice could be the choice of something that is not interpretation according to the best theory (for T1, all alternatives but X and perhaps X'), or even for any plausible theory (Ω).

A theory of interpretive choice must also be mindful of the fact that, from the point of view of each theory (T1, T2, T3, . . .), the choice appears as one in which the alternatives include ways of "interpreting" (variations of X, for T1; variations of Y, for T2, etc.) and something else (X', Y, Z, and Ω, for T1; X, X', Z, and Ω for T2; etc.). It's reasonable to speak of this choice as "interpretive choice," lest all alternatives be seen as variations of Ω.[230]

Nothing in this denies the importance of theories of interpretation or suggests that they are all equally true. A full theoretical understanding of interpretation and of interpretive choice requires both a theory of interpretive choice and of interpretation. Even for practice, as explained above, a theory of interpretation can be crucial in articulating distinctive features of an activity that is choice-worthy, which in turn can guide and coordinate action as to how exactly to undertake that activity in concrete circumstances. But there is an intellectual division of labor. There is a need for a theory of interpretive choice too. And a theory of interpretive choice doesn't need to be built on a theory of interpretation, or otherwise commit to one, precisely because the choices of agents are not limited to the terms of any theory of interpretation.

With this in mind, we can return to the definitions mentioned in the Introduction:

"Interpretation" here means "legal interpretation," which refers to the activity of determining the legal content of legal materials (for example, a statute or a constitution). This is a broad and noncommittal concept of legal interpretation[231] because for a theory of interpretive

230. This is one of the deficiencies of dispensing with interpretation and framing the choice in terms of "decisionmaking." See infra section II.D.2.

231. See supra note 27. One of the ways in which this notion of interpretation is vague is that it doesn't specify what "determining" means. "Determining" here is ambiguous. It could mean something like "discovering" or "asserting" (in law, this asserting is often authoritative). See Greenberg, Legal Standards vs. Fundamental Determinants, supra note 5, at 107 ("[T]he term 'legal interpretation' is often used in a way that is ambiguous between ascertaining the meaning of legal texts and using the relevant texts to ascertain what the law is."); Soames, Toward a Theory, supra note 50, at 231 (explaining that interpretation has a constitutive and an epistemic aspect). Both activities are related: What is asserted may, and perhaps should, be what is discovered. But this is neither conceptually nor practically

choice nothing depends on getting the specific contours of "interpretation" right. The definition refers to determining the meaning of legal materials because here it is presupposed that this is a typically important and distinctive activity in law,[232] one that agents often have reasons to engage in (in some way or another), and that it is the object of many theories of interpretation.[233] Different theories will characterize this activity in different ways. There can be theoretical or practical concepts of interpretation, as suggested above. Having a concept of interpretation allows for central and peripheral instances of that which the concept refers to, as well as for pretended or purported instances of it (interpretation "in name only").

This takes us to the idea of "methods of interpretation." Methods of interpretation specify what one could do in determining the meaning of legal materials. Is it to attend to the original public meaning? Is it to engage in an effort to understand a text in a way that makes most moral sense? Is it something else? What is it that one should do when "interpreting"? The specific activities recommended by methods of interpretation may, from the point of view of some theory, appear as central, peripheral, or even false instances of interpretation—or not instances of interpretation at all.[234] This terminology is ecumenical: They are all "methods of interpretation."

"Interpretive choice" is a choice in which the alternatives are "methods of interpretation"—including those that, from the point of view of some theory or even the best theory, are peripheral forms of interpretation or don't qualify as interpretation at all. Interpretive choice legitimately includes (what for some theory is, or is a central case of) "interpretation" and all available alternatives to it. What matters is only their normative appeal—though in a well-functioning legal system, there will be reasons to follow the law, and to do so in a specific way, and thus the fact that a method of interpretation faithfully determines the meaning of the law will often be an important normative reason in favor of it.

2. *Why Not Decisionmaking?* — If the normative choice thesis stresses the practical nature of interpretive choice, why frame the argument in terms of interpretation or interpretive choice rather than, for example, in terms of judicial, legal, or constitutional decisionmaking? Perhaps if we set aside interpretation and replace it with, say, judicial decisionmaking, we would be on safer ground for the defender of normative considerations.

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necessary. Some methods of interpretation may emphasize one rather than the other and relate them in different ways. This Article is interested in both precisely because interpretive choice is, in principle, open regarding what task should be undertaken.

232. See infra section II.D.2.

233. But if wrong, then this analysis is wrong in its expectations of the actual practice and the existing theories of interpretation, but not in defending the practical character of interpretive choice that the normative choice thesis vindicates.

234. See supra note 28.

Why theorize interpretive choice and not focus directly on legal or constitutional decisionmaking?

There are two main reasons for this: one scholarly and one substantive.

The scholarly point is that it's legitimate for theory to address the phenomenon as it appears in practice (in legal decisions and in scholarly and legal debates)—where the question arises as one of interpretation. In this regard, decisionmaking can be a plausible framework for interpretive debates only if a normative account of interpretive choice is plausible. The two intellectual enterprises of exploring legal or constitutional decisionmaking and interpretive choice are important and, on the view defended here, related. But this relation needs to be established, and to establish it is a matter for a theory of interpretive choice.

For example, Professor Richard Primus frames debates on whether originalism should be adopted in terms of "methods of constitutional decisionmaking."[235] His framework "analogizes the choice of methods to a choice among physical tools, each of which has multiple uses but none of which is good for everything."[236] One should match methods to values. "The validity of the methods in the first set as aids to constitutional decisionmaking is a function of their relationship to the values in the second set."[237] Methods, like tools, are appropriate in some contexts and not in others.[238] This is all illuminating and true. But it presupposes that it is legitimate to assess methods of interpretation in terms of a practical choice (as choosing a tool). This presupposition needs to be vindicated, including by assessing alternative grounds for methods of interpretation.[239] This is not a critique of Primus's argument, but rather it highlights the need for a different kind of argument.

The substantive point is that, from a practical perspective, interpretive choice is distinctive. Interpretive choice in law is always part of a practical enterprise, to which it is ordered. It is nested in a larger practical undertaking, and it is ordered to the good of that undertaking, as a part is ordered to the whole. And yet, as mentioned in the previous section, it remains a distinctive part. The normative choice thesis doesn't entail that, from a practical viewpoint, there is nothing distinctive about interpretation, or that one never has most reason to engage in that distinctive practice. Framing the issue in terms of interpretive choice allows us to focus on something distinctive in a decisionmaking processes.

Focusing on decisionmaking may do away with the distinctness of this practice. For example, Professor Andrew Jordan observes that Primus's

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235. Primus, supra note 5, at 168.

236. Id.

237. Id. at 172.

238. See id. at 175–76, 186–221 (explaining the limited use of originalism).

239. As those addressed in section II.C. Primus does address objections related to the nature or concept of interpretation. See Primus, supra note 5, at 180–82.

"toolbox approach" invites dispensing with the question of constitutional content altogether:

> If the driving force for constitutional decisionmaking is certain constitutional values, then it is not clear why we should not just try to vindicate those values directly rather than try to do so in a mediated manner via a constitutional theory or a determinate set of constitutional tools. . . . [W]hy not simply ask what sort of decisions serve those values?[240]

Jordan's insightful critique of Primus's approach presses the question of why frame the decision in terms of "originalism," "textualism," and other such interpretive approaches, and not directly in terms of which courses of action most realize the relevant values. If what matters is decisionmaking, why frame the issue in terms of a choice of methods of interpretation?

The answer lies in the practical reality sketched above. From a practical point of view, it is often the case in legal practice that one has reasons to follow and be guided by the law, and thus to determine the meaning of the law, and therefore to settle on a particular way of doing so from the many available. That settling entails a choice, but it is a choice that is, *for practical reasons*, oriented to methods of determining the meaning of the law. True, theories will dispute what really counts as such. And methods of interpretation are proposals for choice and action, and thus one can legitimately—and illuminatingly—call them "decisionmaking" tools, as Primus does.[241] But if following the law matters, then interpretation matters. Of course, as explained above, there may be different ways of determining legal meaning, and there are things that one could do instead of interpreting, and there are in-between things that are marginal instances or borderline cases of interpretation. All these are alternatives regarding what an agent could do. There is a choice. But the choice is usefully presented as one about interpreting: regarding whether to "interpret" and how. This is useful because it gets at the practical distinctiveness of this particular choice in the general context of legal decisionmaking and at the practical reality that many or at least some prominent alternatives in this choice can be aptly characterized, highlighting its distinctiveness, as "interpretation." The fact that the conceptual boundaries of "interpretation" don't constrain interpretive choice in practice doesn't entail that, for theory, it is not useful to characterize such choice as a choice "about" interpretation.

Now, Jordan's view is precisely that, in constitutional law, one should "reject[] the idea that there is any role for an account of constitutional

240. Jordan, Constitutional Anti-Theory, supra note 5, at 1542–43.

241. Primus, supra note 5, at 176.

content in sound constitutional decisionmaking."[242] He criticizes the "traditional model"—of Primus and others—which entails that "constitutional content grounds, at least partially, the theorists' preferred account of sound constitutional decisionmaking."[243] Constitutional law can play a role in practical deliberation, but as an external factor. For example, "the reason that a lower court should not ignore the Supreme Court decision is not that the Supreme Court creates law . . . . Rather, it is that the Supreme Court creates reasonable expectations and lower courts should not unnecessarily upset those expectations."[244] On this view, there is nothing distinctive about following the law.[245] It presents the law as an external phenomenon that provides reasons for action, in the same way that, say, the acts of a central bank create reasons for that central bank in the future not to upset expectations, and for other agents to adjust their behaviors to its monetary policy. Jordan rejects the view presupposed here, namely that there can be reasons for agents to treat the law not merely as some external fact but rather to allow their practical reason to be guided and constrained by the law's content. Upsetting expectations may be a relevant normative consideration. But so it may be to faithfully *follow* precedent so as to keep the integrity and coherence of a legal norm, or to benefit from the superior epistemic capacities and legitimacy of a higher court, or for other reasons—even if the people have misunderstood the Supreme Court's precedent, and following precedent would actually upset their expectations. This will require determining the meaning of the relevant precedents. There is no reason to exclude the possibility that one may have normative reasons to engage with the law not as a purely external fact to which one needs to adjust but as a proper guide to one's practical deliberations.

It's legitimate for a theory of interpretive choice to presuppose the commonsense view that the content of the law can and often should guide our practical deliberations. But, in any case, there is no reason to deny the importance of legal content. Ultimately, Jordan seems to deny it based on a commitment to an "eliminativist" position[246] of the kind proposed by

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242. Jordan, Constitutional Anti-Theory, supra note 5, at 1517–18. This is part of Jordan's critique of the "traditional model," according to which "constitutional content grounds, at least partially, the theorists' preferred account of sound constitutional decisionmaking." Id.

243. Id. at 1518. The "traditional model" also entails that "a normative justification . . . justifies the theorists' preferred account of constitutional content." Id.; see also id. at 1523–24 (explaining the traditional model).

244. Id. at 1555.

245. Id. at 1554 ("If legal actors should just act on the basis of whatever practical reasons bear on the decision that confronts them, then one might worry that we have lost anything distinctly constitutional, or indeed legal, about constitutional reasoning.").

246. See id. at 1554 n.158 (drawing a parallel between his argument and eliminativist positions in jurisprudence). Thank you to Andrew Jordan for highlighting the importance of this as a point of disagreement, and generally for raising questions addressed in this section.

Professor Scott Hershovitz.[247] On this view, "we could abandon the thought that, in addition to their moral and prudential upshots, legal practices have distinctively legal upshots."[248] Jordan, in turn, argues that "the common assumption of constitutional theorizing is that there is some fact about constitutional content that grounds constitutional normativity—in other words, such content has distinctly constitutional upshots—and that this is an assumption that we ought to reject."[249] Eliminativism is a controversial view in legal philosophy.[250] But, in any case, that there is no distinct legal or constitutional normativity doesn't mean that there can't be good moral and prudential reasons to follow a law—and thus to care about how *its content* determines moral and prudential (if not specifically "legal") reasons that bear on our actions. Eliminativism doesn't rule out this possibility. Hershovitz, for example, seems to explicitly accept it.[251]

In well-functioning legal systems, there are often reasons to follow the law. A theory of interpretive choice presupposes that sometimes agents should do that and engage in interpretation—whatever are the contours of that capacious concept. And, in a sense, the use of the term "interpretive" choice acknowledges that this possibility has a certain pride of place (perhaps as a typically or normally practically appealing possibility). But a theory of interpretive choice must also accept that sometimes agents don't have most reason to engage in interpretation, or that they have reasons to do something that is a marginal instance of "interpretation." All these are live possibilities. Theoretical work needs to illuminate this complexity, rather than do away with it.

3. *Interpretation and Construction.* — Some authors distinguish between "interpretation" and "construction."[252] Not all theorists of

247. Scott Hershovitz, The End of Jurisprudence, 124 Yale L.J. 1160, 1193 (2015) (referring to his view as "a kind of eliminativism").

248. Id. at 1173.

249. Jordan, Constitutional Anti-Theory, supra note 5, at 1554 n.158.

250. See Angelo Ryu, How Reasons Make Law, 44 Oxford J. Legal Stud. 133, 134 nn.2–3 (2024) (distinguishing between types of eliminativism and offering a critique of category eliminativism).

251. Hershovitz, supra note 247, at 1193 n.54 ("Murphy is surely right to think that we need to be able to talk about what the law requires . . . . What I want to eliminate is the idea that there is a distinctively legal domain of normativity . . . that we appeal to when we make claims about what the law requires.").

252. There is a vast literature on the distinction. Some prominent works defending and applying the distinction to discussions on interpretation are Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 5–14 (1999) [hereinafter Whittington, Interpretation] ("Drawing a distinction between constitutional interpretation and constitutional construction can ultimately help clarify both the role of judicial review in constitutional government and the specific function of originalism within constitutional theory."); Randy E. Barnett, Interpretation and Construction, 34 Harv J.L. & Pub. Pol'y 65, 65 (2011) [hereinafter Barnett, Interpretation

interpretation adopt this distinction, and some reject it.[253] Yet the interpretation–construction distinction plays an undoubtedly important role in scholarship on legal interpretation. Hence, it is appropriate to inquire how the normative choice thesis relates to this distinction.

The distinction calls attention to a divide between "two different moments or stages that occur when an authoritative legal text (a constitution, statute, regulation, or rule) is applied or explicated."[254] For Professor Lawrence Solum, a leading proponent of the distinction, "interpretation" (in the sense of the distinction)[255] is "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text."[256] For this view, "the linguistic meaning of a text is a fact about the world"; it "is determined by a set of facts: these facts include the characteristics of the utterance itself . . . and . . . facts about linguistic practice."[257] Linguistic meaning "cannot be settled by arguments of morality or political theory."[258] Construction, in contrast, is "the process

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and Construction] ("[F]ollowing the lead of political science professor Keith Whittington, legal scholars are increasingly distinguishing between the activities of 'interpretation' and 'construction.' Although the Supreme Court unavoidably engages in both activities, it is useful to keep these categories separate." (footnote omitted)); Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 485 (2013) [hereinafter Solum, Originalism and Constitutional Construction] (arguing that the interpretation–construction distinction is both "real and fundamental").

253. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 15–18 (2012) (describing the connection between interpretation and statutory construction); John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 98 Geo. L.J. 1693, 1696 (2010) ("[Original methods originalism] sharply contrasts with the so-called new originalism, which contends that much of the Constitution is so vague and ambiguous that judges must construct a meaning to fill in these gaps."); John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 Nw. U. L. Rev. 751, 752 (2009) ("We find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing."); John O. McGinnis & Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, 96 Notre Dame L. Rev. 919, 930–31 (2021) ("[C]onstruction as a concept first emerged a half century after the Framing."); Frederick Schauer, Constructing Interpretation, 101 B.U. L. Rev. 103, 109 (2021) ("In other words, interpretation itself is often constructed in just the way that the point of the interpretation-construction distinction is committed to denying.").

254. Lawrence B. Solum, The Interpretation–Construction Distinction, 27 Const. Comment. 95, 95–96 (2010) [hereinafter Solum, Interpretation–Construction Distinction].

255. In what follows, the word "interpretation" is in inverted commas when used in the specific and restricted sense of the interpretation–construction distinction. As authors defending the distinction often remark, nothing depends on the terminology. See id. at 96 ("[T]he terminology (the words 'interpretation' and 'construction' that express the distinction) could vary . . . ."); see also Barnett, Interpretation and Construction, supra note 252, at 65 ("Although I begin by offering definitions of interpretation and construction, the labels are not important.").

256. Solum, Interpretation–Construction Distinction, supra note 254, at 96.

257. Id. at 99.

258. Id. at 99–100; see also Barnett, Interpretation and Construction, supra note 252, at 66 ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empirical*, not normative.").

that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text)."[259] This includes the determination of legal content.[260] Construction allows for normative considerations. "[T]heories of construction are ultimately normative theories: because constructions go beyond linguistic meaning, the justification for a construction must include premises that go beyond linguistic facts."[261]

Is the normative choice thesis about "interpretation" or construction? It is about both. The normative choice thesis is about interpretive choice, and interpretive choice is concerned with the determination of legal content.[262] In the interpretation–construction distinction, "interpretation" determines the linguistic content of a provision while construction determines the legal content generated (at least partly) by that linguistic content (construction entails other things as well).[263]

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259. Solum, Interpretation–Construction Distinction, supra note 254, at 96. For other definitions, see Barnett, Interpretation and Construction, supra note 252, at 66 ("*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances."); Richard S. Kay, Construction, Originalist Interpretation and the Complete Constitution, 19 U. Pa. J. Const. L. Online 1, 2 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1024&context=jcl_online [https://perma.cc/H4GL-9AMJ] (similarly understanding construction in terms of application). Professor Gregory Klass distinguishes between accounts of the distinction in which construction supplements the deficiencies or limitations of "interpretation" and accounts in which construction always accompanies "interpretation." See Gregory Klass, A Short History of the Interpretation–Construction Distinction, Georgetown Law Faculty Publications and Other Works, Working Paper No. 2607, 2024, https://ssrn.com/abstract=4857430 [https://perma.cc/23PV-3H8F] (distinguishing between both views). This Article does not engage with all the accounts of the distinction, and focuses on the latter view (which is also Solum's), which seems to be the strongest and separable from a specific method of interpretation (such as originalism).

260. Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 483 (2013) (asserting that construction is the "determination of the legal content and legal effect produced by a legal text").

261. Solum, Interpretation–Construction Distinction, supra note 254, at 104; see also Whittington, Interpretation, supra note 252, at 7 ("Constitutional interpretation is essentially legalistic, but constitutional construction is essentially political. Its precondition is that parts of the constitutional text have no discoverable meaning."). But see Randy E. Barnett, Restoring the Lost Constitution 124 (2013) [hereinafter Barnett, Restoring the Lost Constitution] (criticizing Whittington's idea that construction is "political").

262. See supra sections II.D.1–.2 (discussing the distinctiveness of interpretive choice).

263. Construction may also involve other things. For example, the determination of legal content and the elaboration of doctrine are arguably different things (whatever the names given to these activities may be). See Mitchell N. Berman, Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space, 27 Const. Comment. 39, 67 (2010) [hereinafter Berman, Constitutional Constructions] (drawing this distinction). Doctrine may simply state the content of the law, but it often does more, like providing implementing or decision rules for the application of legal content. See Richard H. Fallon, Jr., Implementing the Constitution 38 (2001) (distinguishing between an activity of "identifying constitutional

Determining legal content requires construction, but construction is at least premised on (though not necessarily constrained by) the results of "interpretation." One determines legal meaning . . . of what? Of a legal material such as a statute: not of the way it's formatted or of the font in which it's typed but of its linguistic content as determined by "interpretation." Even when construction transcends the text, or understands it in novel or innovative ways, or attributes to it a legal meaning that is specific to law and far removed from what the words used may convey in ordinary talk, the point of reference (whose legal meaning is determined, and which may be transcended, complemented, overridden, etc.) is the legal material as "interpreted."

In this sense, proposals about how to determine the legal meaning of, say, a statute or a constitution (named here "methods of interpretation") must be about both construction and "interpretation." Methods of interpretation also entail a view as to how to relate interpretation and construction: for example, whether interpretation constrains construction or whether construction can override interpretation.[264] A method of

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norms and specifying their meaning and another of crafting doctrine or developing standards of review"). Similarly, the determination of legal effect is different from the determination of legal content. For example, in many legal systems, when a norm is declared unconstitutional, this entails both a determination of the legal content of that norm (which is thought incompatible with the legal content of the constitution) and the denial of legal effect (precisely because it infringes the constitution). See, e.g., Hans Kelsen, The Nature and Development of Constitutional Adjudication, *in* The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law 29 (Lars Vinx ed., trans., 2015) ("The unconstitutionality of a statute can consist . . . in the fact that the content of the statute contradicts the basic principles or guidelines laid down in the constitution, or that it exceeds the limitations imposed by it."). There is nothing wrong with grouping these different activities (determining legal content, elaborating doctrine, and determining legal effect) under the label "construction," particularly if one wishes to highlight what they all have in common and what sets them apart from "interpretation," namely, that all those activities necessarily involve practical reasoning, whereas "interpretation" is (for proponents of the distinction) purely empirical.

264. For example, for originalism, "interpretation" constrains construction. See, e.g., Solum, Interpretation–Construction Distinction, supra note 254, at 116 (arguing that "[m]ost Originalists also affirm a partial theory of constitutional construction: they claim that the legal content of constitutional doctrine should be constrained by the linguistic content of the text"); see also Barnett, Restoring the Lost Constitution, supra note 261, at 102 ("[A]ny construction must not contradict whatever original meaning has been discerned by interpretation."); Amy Barrett, The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law: Introduction, 27 Const. Comment. 1, 5 (2010) ("[O]riginalists treat a text's fixed semantic meaning as defining the permissible bounds of construction . . . ."). This "relation" can be understood as part of construction, as the reference to Solum above in this footnote illustrates. Here it is treated separately only to highlight it. Nothing of substance depends on this. This relation also concerns the intensity with which each activity is performed. For example, Sachs criticizes "authors" for "choosing not to take the trouble to find out very much about [social sources], resting on claims of ambiguity rather than running the social and political facts to ground." Sachs, According to Law, supra note 155, at 1292–93. But this is not obviously wrong. As Sachs says, whether to run "the social and political facts to [the] ground" is a *choice*, which should be made on normative reasons. Id. at 1293.

interpretation is a "package": It entails a view of construction, of the "interpretation" that is its necessary antecedent, and of the relation between the two.[265]

Interpretive choice is a choice of methods of interpretation. On a first approach, then, the normative choice thesis concerns both "interpretation" and construction in that it is about a choice (interpretive choice) between alternatives (methods of interpretation) regarding "interpretation," construction, and the relation between the two.

It could be thought that this is in tension with a key tenet of the distinction: that only construction calls for normative reasoning whereas "interpretation" is exclusively about facts. Extending the normative choice thesis to "interpretation" would contradict this tenet. But there is no such contradiction. We should distinguish between the criteria for doing "interpretation" or construction and the criteria for *choosing* methods of "interpretation" or construction. The criteria for choosing methods of "interpretation" are not the same as the criteria for "interpreting." There is no contradiction in thinking both that the former are normative criteria while the latter aren't. It may be that a method of "interpretation" X pays no attention to normative considerations: It determines semantic meaning by reference to purely factual considerations as, for example, the meaning of words in a particular community at a particular time. But if there are other ways of doing this, then this will give rise to the question of which method should be used. For example, X could entail attending only to the literal meaning, while Y to that meaning plus communicative context,[266] and Z to authorial intentions. How does one settle this?

One view sees this as a choice. Then this is a practical matter, governed by normative considerations. A second view could hold that

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265. Recall the distinction between theories and methods of interpretation. See supra note 3. A theory of interpretation offers an account of interpretation. It will cover whatever the theorist thinks worth theorizing. It could be about "interpretation," construction, both, or some aspect of these activities. The theory may (or may not) recommend a way to interpret, and this recommendation may be incomplete, referring only to a part of the interpretive process. A "method of interpretation," on the other hand, is an alternative for action on determining the meaning of a legal text. See supra section II.D.1. If this determination requires both the activities of "interpretation" and construction, a method of interpretation must be an alternative for how to undertake both activities. Otherwise it will fail in specifying a course of action for determining legal content—thus failing to be a real alternative. Interpretive choice is not about choosing "theories" but about choosing "methods of interpretation." See supra note 3. This doesn't mean that an interpreter can't consider a theory that only proposes a partial account of "interpretation" and construction. In doing so, they will consider the partial account of the theory as specifying one or more alternatives in interpretive choice and will have to supplement that with some other view (perhaps an unarticulated, intuitive view, not gathered from any theory) of the elements missing in the theory.

266. On the distinction between the two, see, e.g., Lawrence B. Solum, Originalism and Constitutional Construction, supra note 252, at 464–65. Solum adds that it "is possible that [originalists] will disagree about the precise role that contextual enrichment plays." Id. at 466.

adopting a method of "interpretation" should be guided not by practical considerations but by speculative or theoretical ones. It is not about which choice is most appealing but about which form of "interpretation" best conforms to, for example, the truth about language use and communication.

The first view is plausible: If "interpretation" is about linguistic content, and what language communicates could be more than one thing—depending on different ways of understanding our, and ultimately engaging in, communication—choice of a way of "interpreting" is about what practice of communication we think best to engage in. Framed like this, "interpretation" entails a moment of choice. This argument, however, is not pursued here. Instead, two more modest points are offered. First, the interpretation–construction distinction, in itself, doesn't entail favoring the second view over the first.[267] Second, even if the "interpretation" part of a method of interpretation is not justified normatively, ultimately "interpretation" forms part of a method of interpretation—the whole "package" which, as a unit, forms an alternative for interpretive choice and thus for the application of the normative choice thesis.[268]

This Article does not adopt the language of the "interpretation"–construction distinction. But if one adopted the distinction in thinking about the normative choice thesis, then the previous discussion referring to interpretation generally should read to refer to "interpretation" and construction in the way just explained. And, crucially, the same caveat concerning conceptual delimitation applies: In deciding how to determine the content of law, an interpreter may face a range of alternatives, some of which may be central instances of "interpretation" and construction, some marginal, and some not even qualify as instances of such activities at all. As long as these are possible courses of action, they

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267. A view incompatible with the normative choice thesis (because it is incompatible with the existence of interpretive choice) would be one composed of the following ideas: (i) all the determination of legal content is done by "interpretation"; the normative work is done only as a matter of application of legal content when legal content runs out (this could be called "construction"); (ii) the "second view" referred to above (no choice regarding ways of "interpreting"). Something like this is the view that Berman attributes to "most proponents" of the distinction. See Berman, Constitutional Constructions, supra note 263, at 46 ("[M]ost proponents of the interpretation/construction distinction likely mean to advance the compound thesis that interpretation is the search for legal content, that legal content is linguistic content, and that linguistic content is fixed."). Whatever the views of those proponents, (i) and (ii) are distinguishable from the interpretation–construction distinction.

268. On the "second view," one could say that interpretive choice is only about construction, just that any proposal for construction will be premised on some view of "interpretation" to which it will adjust. In substance, this is the same as the "package" formulation when that formulation is taken in conjunction with the second view. Here the "package" formulation is adopted to highlight that construction is necessarily premised on the results of "interpretation," and thus a method of construction necessarily entails some view of "interpretation."

are alternatives in interpretive choice, and the fact that some of the alternatives are noncentral instances of "interpretation" or of construction shouldn't count against them.[269]

III. CONSEQUENCES OF THE NORMATIVE CHOICE THESIS

What difference does the normative choice thesis make? This Part outlines four main consequences: the sufficiency of normative reasons, the diversity of normative reasons, the contingency of interpretive choice, and the instability of interpretation.[270] It singles them out because of their influence on interpretation debates. The second and the third consequences place distinct argumentative burdens on proposals for methods of interpretation. The first removes a possible argumentative burden, and the fourth also serves as a reply to a possible objection.

What follows is not a refutation of any method of interpretation. On occasion, the discussion focuses on some version of intentionalism or originalism, when this helps illustrate some point. Thus, not all the relevant versions of these theories are discussed here—which would be necessary to refute them rather than merely use them to illustrate a point. The following sections don't contain a critique of these theories any more than they contain a critique of other theories of interpretation.

A. *The Sufficiency of Normative Reasons*

On the normative choice thesis, only normative reasons count by themselves for or against choosing a method of interpretation. Hence, only normative reasons are sufficient to justify adopting or abandoning a method of interpretation.

It is important to highlight this to avoid a possible confusion. It could be argued that the normative choice thesis doesn't make any difference to debates on interpretation, since non-normative reasons can feature in deliberation on interpretive choice, just that as "subordinate" rather than as "independent" reasons. Take intentionalism, for example. Authors defending intentionalism often rely on linguistic reasons.[271] In principle, those reasons don't count for interpretive choice, but they do count if they are connected to some normative reason. This is the case with respect to

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269. See supra sections II.C.1. and II.D.1.

270. As indicated below, other authors have drawn similar consequences of normative approaches to interpretation or legal decisionmaking. See infra note 280 (discussing Fallon's, Greenberg's, and Jordan's treatments of the diversity of normative reasons). The most thorough discussion is Jordan, Constitutional Anti-Theory, supra note 5, at 1528–38 (referring to the plurality of constitutional values, the open-ended nature of constitutional values, and the context-variation of the normative relevance of such values as consequences of Jordan's normative approach to constitutional decisionmaking). In what follows, this Article only address the consequences related to the normative choice thesis and focuses on the implications for the view of interpretive choice defended here.

271. See supra section I.B.

some prominent intentionalist arguments, which are premised on normative reasons, such as respect for authority.[272] Assume, for example, that there is a normative reason for intentionalism (respect for authority) and a linguistic reason for it (one best complies with the will of an authority if one attends to its intentions in interpreting the legal provisions it enacts).[273] The linguistic reason matters because it's about how the normative reason is best satisfied. But then, what difference does the normative choice thesis make? In the end, linguistic reasons do count, even if one categorizes them as "subordinate" rather than as "independent" reasons. Does the distinction matter?[274]

Yes. When non-normative reasons feature as subordinate reasons in arguments for methods of interpretation, the force of the whole argument rests on normative reasons. On the normative choice thesis, normative reasons can always provide a sufficient reason to choose or challenge a method of interpretation. To challenge intentionalism, for example, one only needs to point to a normative reason in support of a different method that is stronger than authority (or whatever is the underlying normative value)—regardless of any truth about language.[275] Because authority is not always a conclusive reason for action, it could be overridden by weightier reasons.[276] The same could be said about other reasons for other methods of interpretation.

This finding illuminates the burdens that arguments against a method of interpretation must satisfy. Arguments against adopting a method of interpretation don't need to challenge any subordinate reason for that method of interpretation. Arguments against intentionalism, for example, don't need to show that intentionalists got the nature of language wrong. It suffices to show that the normative reasons that support intentionalism are defeated by those supporting other methods of interpretation.

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272. See supra note 168.

273. This is only a stylized version offered for ease of exposition and is not meant as an accurate description of any particular justification for intentionalism.

274. Note that the normative choice thesis still removes from consideration a number of non-normative reasons: all those not connected to normative reasons. The objection would only apply to non-normative reasons that are "subordinate" reasons for interpretive choice.

275. Though, of course, one may challenge a method by challenging a subordinate non-normative reason. Thus, arguing that facts about language don't support the claim that intentionalism is the best (or only) way to fulfill authority in interpretation is a legitimate way to challenge intentionalism.

276. This is the case even if authority operates as an exclusionary reason, since exclusionary reasons can be defeated by other (second-order) reasons. See Joseph Raz, Practical Reason and Norms 47 (3d ed. 1999) [hereinafter Raz, Practical Reason and Norms] (explaining conflicts between second-order reasons); id. at 62–65 (explaining authority as an exclusionary reason).

B. *The Diversity of Reasons*

1. *Conceptual vs. Normative Determination.* — To explain the diversity of normative reasons, it is helpful to contrast normative reasons with other kinds of reasons.

Take conceptual reasons. Imagine a rival of the normative choice thesis: the conceptual determination thesis. On the conceptual determination thesis, only conceptual reasons matter for adopting a method of interpretation, and the concept of interpretation is sufficiently determined to include only one method of interpretation, method X. On this theory, there isn't really any interpretive "choice": There is only one thing for interpreters to do.[277]

For this thesis, there is only one reason that really matters: the fact that the concept of interpretation only includes X. The situation is the opposite if one adopts the normative choice thesis. Normative reasons are typically many.[278] In this respect, interpretive choice is not different from any practical choice. In choosing a course of action (be it whether to go for a walk or read a book, or whether to begin a career in law or medicine,[279] or something else) an agent is usually confronted with several and diverse considerations that bear on that choice.

2. *Avoiding the Vice of Narrowing Normative Considerations Down.* — If we take the normative choice thesis seriously, then we need to inquire about the relevant normative reasons before choosing a method of interpretation. Normative reasons matter—all the relevant normative reasons. It is a mistake, then, to offer a normative reason as the single normative premise in the justification of an interpretive method without assessing whether there are other reasons that bear on that interpretive choice, including opposing normative reasons. Authors have alerted against this vice.[280] This subsection only adds two things to this literature.

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277. As Coan notes, "metaphysical arguments mask the role of choice in constitutional decision-making and thus the need for moral justification." Coan, supra note 5, at 847. The insight can be extended to all non-normative reasons.

278. This Article presupposes, but can't prove, that there are many relevant normative considerations bearing on interpretive choice. This is intuitive, given the plurality of plausible normative considerations mentioned in debates on interpretation. See supra section I.C. It is also consistent with the literature criticizing theories for focusing on one or a limited set of considerations. See infra note 280. For a discussion of pluralism, see Jordan, Constitutional Anti-Theory, supra note 5, at 1528–30.

279. These examples are discussed in Joseph Raz, The Morality of Freedom 304, 328, 332 (1986).

280. Fallon, for example, criticizes arguments based on the rule of law on the grounds that "this objection . . . ignores other values bearing on the choice of an interpretative theory." Fallon, Meaning of Legal Meaning, supra note 5, at 1304. Greenberg makes a similar point: "The Moral Impact Theory makes clear that it is not enough that some normative factor supports treating provisions as contributing to the law in a particular way; a method of interpretation must be favored by all relevant values on balance." Greenberg, Natural Law, supra note 5, at 139 (emphasis omitted). Jordan argues that the "plurality of

First, non-normative considerations may obscure the normative considerations that ultimately support a method of interpretation. Take intentionalism. Given the sophistication of the linguistic reasons offered by intentionalists, and the prominent role these play in their accounts,[281] it is easy to miss that—at least for some prominent accounts—the whole edifice rests on normative reasons, typically, authority.[282]

Second, the vice of narrowing normative considerations down occurs not only when authors focus on a single value but can also take place when they focus on a broader and more complex criterion. For example, there is no reason to think that all the potentially relevant reasons are captured by Sunstein's criterion of what "would make the American constitutional order better,"[283] unless that term is understood so broadly as to empty it of all content. For example, speaking of the "U.S. constitutional order" suggests that the relevant reasons relate to something systemic ("order").[284] If so, this criterion would leave out of consideration reasons that have no systemic impact, such as those that bear only on a specific case (for example, consequences for the parties).[285] It would also seem to leave out of consideration reasons related to orders different from the "constitutional" order, such as the economic order.[286] Finally, what about the impact of the decision in places beyond the United States, as is the case with judicial decisions concerning foreign policy or military intervention? Of course, these decisions might have some impact on the domestic constitutional order, but that impact is different from—and may not be commensurate with—its impact abroad. A decision that allows a military

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values will present a problem for some constitutional theories that pick a single value, or even a narrowly constrained set of values, to justify the theory." See Jordan, Constitutional Anti-Theory, supra note 5, at 1528.

281. See supra sections I.B. and II.C.2.

282. For an illustration, see supra note 168. There may be other normative reasons at stake. Ekins, for example, refers to "[t]he continuity of law and the importance of self-government over time." See Ekins, Objects of Interpretation, supra note 18, at 22. These can also be normative reasons for a particular method of interpretation. But they will not be the only ones. Id.

283. See Sunstein, How to Interpret the Constitution, supra note 3, at 8.

284. Id.

285. It may seem difficult to think of a Supreme Court decision that does not have a systemic impact, given its precedent-setting powers and influence. The Supreme Court is not the only interpreter, though. And, in any case, the systemic effects of precedents may provide reasons different than (and even opposite to) non-systemic considerations.

286. Of course, often there is a relation. Changes in the constitution affect the economic order. See Torsten Persson & Guido Tabellini, The Economic Effects of Constitutions 7 (2003) (offering a comprehensive study of economic effects of constitutions). And changes in the economic order may have an impact on the constitutional order, as when the executive grows in power to respond to an economic crisis. See Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 208 (2010) (referring to how the "financial crisis of 2008–2009 also revealed the extent of executive power"). But these considerations (economic and constitutional) are distinct: They may be of different magnitudes and support different methods of interpretation.

intervention may have a minor impact on, say, the allocation of war powers domestically (in the U.S. constitutional order) but momentous consequences in the country where the military intervention takes place.

3. *Reasons that Bear on Interpretive Choice vs. Reasons that One Should Consider.* — Some of the appeal of unduly focusing on a subset of the relevant normative considerations may come from an excessive focus on the judicial role. Much legal scholarship adopts the perspective of judges: It addresses how judges should reason and decide cases.[287] This is legitimate, but one should be cautious to extend it too far. Crucially, one shouldn't import the constraints of the judicial office into theoretical thinking.

The reasons that bear on a choice are not necessarily the same as the reasons that a specific person, in discharging a specific role, should weigh in making that choice.[288] Conversely, from the fact that it would be rational for a person to consider a set of reasons, and only such reasons, in making a choice, it doesn't follow that these are the reasons, or all the reasons, that bear on that choice.[289]

The fact that, say, consequences matter for interpretive choice doesn't mean that any judge should assess consequences in choosing a method of interpretation for adjudication. If judges have no way of knowing the possible consequences of their interpretive choices,[290] then

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287. See Frederick Schauer, Unoriginal Textualism, 90 Geo. Wash. L. Rev. 825, 855 (2022) ("Overwhelmingly, the literature on constitutional interpretation takes as its paradigm interpreter a Supreme Court Justice . . . ."); see also Sunstein & Vermeule, supra note 77, at 888 (2003) ("Legal education, and the legal culture more generally, invite interpreters to ask the following role-assuming question: 'If you were the judge, how would you interpret this text?'").

288. This could be for different reasons. For example, it could be because of the difference between the reasons that we have and the reasons that we believe we have. See Derek Parfit, Reasons and Motivation, 71 Procs. Aristotelian Soc'y (Supplementary Volumes) 99, 99 (1997) (explaining the distinction between normative reasons and motivating reasons). It could also be because it is reasonable to adopt (or impose the adoption of) second-order decisions. See Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions, 110 Ethics 5 (1999) (explaining the nature and role of second-order decisions). There may also be reasons that some person or institution should exclude from consideration, for moral or institutional reasons. See, e.g., A.M. Honore, Legal Reasoning in Rome and Today, 4 Cambrian L. Rev. 58, 64 (1973) (arguing that "the most important feature of Roman and modern legal argumentation" is "the existence of a canon of unacceptable arguments").

289. See Courtney M. Cox, The Uncertain Judge, 90 U. Chi. L. Rev. 739, 741 (2023) (distinguishing between "what the judge ought to do according to a particular . . . theory" and "what the judge ought do given her beliefs about which jurisprudence(s) might be correct and her aim of doing that which she ought (judicially) to do"); Felipe Jiménez, Two Questions for Private Law Theory, 12 Jurisprudence 391, 407–08 (2021) (defending this claim in the context of private law theory).

290. For example, this could be the case if assessing consequences requires understanding empirical evidence. See Paul Yowell, Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review 56–89 (2018) (arguing that "courts lack institutional capacities to acquire and assess empirical research").

that provides a reason for them not to directly assess the consequences of that choice. But, from this, it doesn't follow that it is indifferent whether their interpretive choice leads to good consequences. If, say, a legislator or superior court was well aware of the consequences of an interpretive choice, and there were no stronger opposing reasons, it would be reasonable for this legislator or superior court to choose for the lower courts the method of interpretation that produces the best consequences if it had the competence and could do so (perhaps through a law of interpretation).[291] Furthermore, if the public is aware of the consequences of an interpretive approach adopted by courts, it would be reasonable for it to criticize that interpretive approach on the grounds of the consequences it produced or failed to produce—even if it was reasonable for judges not to assess the consequences.

The normative choice thesis is about the reasons that bear on interpretive choice. Whether those reasons should be weighed directly by an interpreter, and how, is a different question that cannot be answered without attention to the specific circumstances and the institutional role of each interpreter.[292] Perhaps judges should assess a narrow range of considerations. But one shouldn't go from that view to the view that the reasons bearing on interpretive choice are only those that judges should consider.

4. *Burden of Proof.* — One should pay attention to all the normative reasons bearing on interpretive choice. In this sense, the normative choice thesis entails the following burden for arguments for methods of interpretation: They must show that the normative reasons in favor of a method of interpretation are undefeated by other applicable normative reasons.[293] The normative choice thesis doesn't answer the question of which normative reasons are relevant in a specific interpretive choice and which ones should predominate. It only entails that these are the questions that interpretive choosers must ask.

C. *The Contingency of Interpretive Choice*

Another consequence that follows from the normative choice thesis is the contingency of interpretive choice. Authors who emphasize in some way the normative character of interpretive choice have noticed that this requires that such choice be case by case, context-dependent, limited, or non-monolithic.[294] Contingency doesn't entail that interpretive choice

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291. See supra section I.D.

292. See supra section II.B.2. (interpretive choice is practical and situated); see also supra section I.E; supra section II.C.4; infra section III.C.2.b (discussing institutional considerations).

293. The appropriate burden is for the normative reasons to be "undefeated" because it is possible that interpretive choice be rationally underdetermined.

294. See supra note 6 (referring to the views of Fallon, Jordan, Primus, and Watson on the contingent character of interpretive choice). For a thorough discussion, see Jordan, Constitutional Anti-Theory, supra note 5, at 1534–38.

needs to be undertaken case by case, but rather that it has to be made with an eye to circumstances. It rules out the idea that one chooses methods of interpretation in the abstract once and for all. Because relevant circumstances change, it's unlikely that interpretive choice will be the same for every domain, place, time, institution, etc.

1. *Contingency and Circumstances*. — Recall the hypothetical rival of the normative choice thesis: the conceptual determination thesis. For the conceptual determination thesis, only conceptual reasons matter. Since there is one thing that interpretation just is—only one method that conforms to the idea of interpretation—this is the method that interpreters should adopt. This is method X. Because the reason for adopting X is the concept of interpretation, and the concept of interpretation doesn't change with changes in circumstances or interpreters, then one can confidently assert that interpreters should adopt X, regardless of who interprets and their circumstances.

In contrast, for the normative choice thesis, there is no guarantee of stability. As seen in the previous section, many normative reasons could be relevant. These reasons change according to actors and circumstances.

On the practical view of interpretation defended here, interpretive choice in law is always the choice of some person for some practical purpose, be it to adjudicate a dispute, to pass legislation that is responsive to extant law, to implement and enforce legislation, or to evaluate the work of those interpreting law, among others.[295] Interpretive choice is thus *situated*. There is no interpretive choice in a vacuum—not in law.

The situated nature of interpretive choice means that interpretive choice takes place under specific circumstances. This leads to contingency if (unlike conceptual and other non-normative reasons) normative reasons vary with circumstances. There are good reasons for thinking that this is the case, though proving this is beyond the scope of this Article.[296]

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295. See supra section II.B.2.

296. This is so even for rule-consequentialist theories and for theories that include moral absolutes. Regarding the former, contingency doesn't deny the view that sound practical reasoning about interpretive choice could be oriented to determining what the "rule" whose acceptance will bring about the best consequences in interpretive choice is. If the rule could be different in different circumstances and places, then this is contingent as understood here. If, contrary to the claims this Article advances about contingency, some method of interpretation is universally applicable, its proponents need to argue for its universality. See infra section III.C.4. Regarding moral absolutes (exceptionless moral requirements), if they exist, then there are reasons that are always decisive. If one should never torture, whatever the circumstances, then presumably there is some reason that is always decisive against that action. Do any of such reasons bear on interpretive choice? Unless they bear directly on the interpretive process (which is dubious), moral absolutes would bear on interpretive choice indirectly: Interpretation may lead to an action that one has always-decisive reasons never to undertake (e.g., an interpretation that allows for torture). Interpretive choice would still be contingent, because the always-decisive reason wouldn't bear on all cases or all cases of a certain type, but rather whether it bears or not in a case would be contingent on the specifics of the case. Thank you to R. George Wright and Lawrence Solum for raising this point.

What makes this plausible is that at least the normative reasons usually mentioned in debates on interpretation[297] (a sample of which the next subsection surveys) change with circumstances. Jordan explains this: Both the set of such reasons,[298] and their balance,[299] change with circumstances.[300] Among those circumstances is the function the interpreter is performing (legislating, adjudicating, etc.), institutional setting, jurisdiction, area of law, the group affected by the decision, possible consequences, and many others. It is not only that "[n]o theory makes sense for every imaginable world."[301] In our own world, the relevant circumstances change.

Perhaps part of the appeal of non-normative reasons derives from the aspiration to avoid contingency.[302] But if non-normative reasons don't matter in themselves for interpretive choice, contingency cannot be avoided.

Contingency doesn't mean "case by case." It only means that interpretive choice depends on circumstances. In many circumstances, the reasons that bear on interpretive choice are such that can lead to adopting an interpretive method for a range of circumstances and cases. It could be that circumstances are stable, and thus interpretive choice is stable. Some agents, such as courts, may have reasons (say, the value of legal certainty) to be consistent in their interpretive choices, or to coordinate with other agents in adopting the same interpretive approach.[303] Similarly, the contingency of interpretive choice doesn't entail that interpretive choice needs to be undertaken by each individual agent. There could be reasons (for example, the need for coordination for the sake of legal certainty) for some actor (a constitution-maker, a legislator, a superior court) to choose

297. See supra section I.C.

298. As Jordan explains in the context of constitutional law, "[T]he range of constitutionally relevant values . . . is not a closed set." Jordan, Constitutional Anti-Theory, supra note 5, at 1530.

299. "Balance" (of reasons) here refers simply to the adequate way of relating reasons to one another. This is compatible with, for example, "trumps" or constraints. See Philip Pettit, Rights, Constraints and Trumps, 47 Analysis 8, 11–12 (1987) (explaining the notions of trump and constraint). Some literature on proportionality alludes to a narrower sense of "balancing." See Francisco J. Urbina, A Critique of Proportionality and Balancing 9–10 (2017) (explaining the different senses of balancing).

300. For Jordan, the "fit between the theory and the normative bases or values that justify it," the "relevance of those putative value bases," and the "agent relativity with regard to the reasons a decisionmaker has for making a constitutional decision," all entail that choice is "context dependence." See Jordan, Constitutional Anti-Theory, supra note 5, at 1534.

301. Sunstein, How to Interpret the Constitution, supra note 3, at 159.

302. See Coan, supra note 5, at 845 (arguing that "metaphysical arguments," including conceptual reasons, "hold a powerful appeal" in "a world of uncertainty and ambiguity").

303. On the value of judicial coordination and how law may facilitate it, see Urbina, Human Rights Adjudication, supra note 151, at 165.

an approach to interpretation for a range of situations and actors through a law of interpretation.[304]

Yet even if interpretive choice is in some place (more or less) regular, it is still contingent—it could be otherwise and it could change. The normative choice thesis should lead to an awareness of the ever-present possibility of striking a new balance of reasons and of the need to change methods of interpretation.

2. *Authority, Institutions, and Consequences.* — The possibility that new circumstances will justify a new balance of reasons and a change in method of interpretation is not only theoretical. Normative reasons are often mutable in strength.[305] Some are particularly mutable, as is the case with consequences. This section illustrates this mutability with reference to three examples of reasons that plausibly bear on interpretation: authority, institutional considerations, and consequences.

a. *Authority.* — Authority provides reasons for action—normative reasons. This is because there are reasons for authority. Yet the force of these reasons, and hence of authority as a reason, can vary with circumstances.

For example, if democracy is the reason to respect certain legal authorities,[306] then we should bear in mind that authorities can be more or less democratic. A constitution that is the product of representative lawmaking and is validated by democratic practice is not in the same position as a constitution enacted by a dictator, or an "abusive" constitution,[307] or a constitution that is passed through irregular procedures that exclude the opposition.[308] Similarly, legislation may be fully democratic (for example, the end-result of intense democratic deliberation, participation, and voting) or not democratic at all. Even within the same country, some laws may realize the democratic ideal more and some less, depending on the deliberation and democratic

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304. See supra section I.D; see also Jiménez, Minimalist Textualism, supra note 1, at 57 (holding that a lawmaker could settle interpretive choice). In a sense, an authority can settle interpretive choice for those subject to it. In another sense, each actor bound by that authority still needs to choose whether to follow or not the authoritative determination, though authoritative determination may provide strong reasons in favor of an alternative.

305. Though not all. Some may have absolute normative force and thus should always be satisfied. For example, in some theories, absolute rights are taken to provide such reasons. See Finnis, Natural Law, supra note 192, at 223–26; see also supra note 296.

306. See Scalia, supra note 51, at 9–14, 40 (arguing for textualism and originalism based on respect for democracy).

307. See David Landau, Abusive Constitutionalism, 47 U.C. Davis L. Rev. 189, 191 (2013) (discussing how constitutional change can be used to undermine democracy).

308. As in the case of the 2019 constitutional reforms in Benin challenged in XYZ v. Republic of Benin, No. 010/2020, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (Nov. 27, 2020), https://www.african-court.org/cpmt/storage/app/uploads/public/5fc/7b5/78c/5fc7b578ce85b302168501.pdf [https://perma.cc/LZG9-BKEV].

engagement that went into it.[309] Time may also be a factor, with democratic authority waning over time.[310]

The same can be said of other justifications for authority. Two common ones are coordination and superior knowledge.[311] If the reason for authority is that it secures coordination, then some authorities may be more successful at coordinating than others. If the reason for authority is the epistemic advantages of some authority (an authority knows more than those subject to it), then some authorities have more epistemic capacities than others, and their relative advantage vis-à-vis their subject varies not only with their epistemic capacities, but also with those of their subjects.[312]

The same applies to the authority of law. As Finnis says, "the moral obligation to obey each law is variable in force."[313] One way to think about this is in terms of central and noncentral cases of law. A central case of a law is a just law, enacted by someone with authority to do so, through the proper procedures, and which contributes to the common good.[314] The reasons to comply with a particular law (say, a statute) will change according to whether that law is closer to or farther from the central case. For example, if a reason to comply with the law is that it's just, then, other things being equal, the less just a law is, the less reason there is to comply with it. There may be no reason whatsoever to comply with some laws.[315]

In a well-functioning democracy, one should expect authority to provide relatively stable reasons. But even in a developed democracy, the force of reasons relating to authority, and to the authority of the law, can vary.

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309. Further considerations related to the kind of democratic engagement that is at stake may bear on interpretive choice. For example, the appropriate method for interpreting legislation passed by referenda may not be the same as the one that is appropriate for legislation passed by a representative body. See, e.g., Ethan J. Leib, Interpreting Statutes Passed Through Referendum, 7 Election L.J. 49 (2008) (explaining how interpretive methods may vary when applied to legislation passed through a referendum). This is compatible with the normative choice thesis, because the differences may be normatively relevant. Thank you to Aaron-Andrew Bruhl for raising this point.

310. For such an argument with regard to originalism, see Primus, supra note 5, at 186–211.

311. See Raz, Practical Reason and Norms, supra note 276, at 63 (referring to these "methods of justifying authority" as "two of the most common and important"); see also Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules & the Dilemmas of Law 14 (2001) ("Authoritative settlement solves the problems of coordination, expertise, and efficiency." (emphasis omitted)).

312. As illustrated by the example of the "wise electrician" in Timothy Endicott, The Subsidiarity of Law and the Obligation to Obey, 50 Am. J. Juris. 233, 244–45 (2005).

313. Finnis, Natural Law, supra note 192, at 318 (emphasis omitted).

314. This is a simplified version of Finnis's "focal meaning" of law. See Finnis, Natural Law, supra note 192, at 276–77. The expression "focal" refers to "meanings" and "central" to "instances," but they are used to the same effect by Finnis. See id. at 429–30.

315. See, e.g., Anna Lukina, Making Sense of Evil Law (Univ. Cambridge Faculty of Law, Research Paper No. 14/2022, 2022), http://ssrn.com/id=4180729 [https://perma.cc/344H-CHQD] (arguing that evil law is law, but doesn't create pro tanto moral duties).

b. *Institutional Considerations*. — For the normative choice thesis, interpretive choice is always situated, and thus requires framing questions about interpretive choice as questions regarding the performance of a specific role in a specific context. If the choice of a method of interpretation attempts to effectively realize the relevant normative reasons, one needs to take into account the circumstances that will affect their realization in practice. In this sense, institutional considerations are subordinated to normative reasons: They provide a factual input for deliberation on the realization of normative reasons in concrete circumstances. This entails two things that lead to contingency in interpretive choice.

First, as Jordan explains, there is "[a] kind of agent relativity" to constitutional decisionmaking,[316] and the same can be said of interpretive choice generally. Different actors have different roles, and their roles shape the reasons for which they should act. Respect for the law and the law's integrity presumably weighs more heavily on judicial interpretive choice than on a citizen's interpretive choices. The fact that a superior court chose a particular method of interpretation may be a strong reason for a lower court to choose that same method, but that may not be as strong a reason for interpretive choice in the legislature.[317]

Second, as Vermeule explains, the different institutional capacities and limitations of institutions also affect interpretive choice.[318] Take the judicial role: The way in which the judicial power is actually institutionalized in our society provides a factual context that sound normative reasoning can't ignore. Institutional considerations are an important part of this factual setting. Thus, realizing the value of substantive justice in the concrete case, to take only one specific normative reason, requires special awareness of the expected capacities and motivations of courts. If courts are not particularly good moral reasoners,[319] then this counts against them assessing reasons of justice, and thus against a method of interpretation that requires them to do that. The interpretive method that would rank higher on that value is that which,

316. Jordan, Constitutional Anti-Theory, supra note 5, at 1538.

317. See id. (providing examples of how "reasons for constitutional decisions" change according to the different "social roles that constitutional decisionmakers might occupy").

318. See supra section II.B.2; see also Vermeule, Judging Under Uncertainty, supra note 5, at 86.

319. For an exploration of this claim, see generally Yowell, supra note 290, at 104–15 (arguing that a judge's training focuses on technical legal learning and reasoning, not moral reasoning); Jeremy Waldron, Judges as Moral Reasoners, 7 Int'l J. Const. L. 2, 5 (2009) (arguing that a judge's duty to follow precedent and the implications of a statute prevent him from fully applying moral reasoning).

given the capacities and motivations of courts and judges, is more likely to realize that value to a greater degree than other alternatives.[320]

Now, institutional considerations vary from institution to institution, as different institutions (including courts of different levels[321]) have different capacities, legitimacy, and motivations, and their actions produce different effects.

Ekins rightly notices that, for a view such as Sunstein's, institutional reasons can lead to different interpretive choices, adding that he regards as "very odd to think . . . that sound interpretation varies with the interpreter."[322] From the vantage point of the normative choice thesis, there is nothing odd in this. If interpretive choice depends on institutional considerations, and institutional considerations vary with different institutions (including different kinds of courts within the judiciary), then the interpretive methods that are reasonable for each institution could vary accordingly.[323]

c. *Consequences*. — If there is a type of normative reason that is prone to change, it is consequences. An interpretive choice can have good or bad consequences. The fact that it will produce good consequences is a reason for it, and the fact that it will produce bad consequences is a reason against it.[324] Even in legal adjudication, consequences vary. Consequences may be modest in many cases, and when that is the case, consequences may not matter, or matter little, for interpretive choice.

But consequences change with circumstances. The method of interpretation that usually leads to immaterial or acceptable consequences could, in some specific case, lead to nefarious consequences. Then, consequences will provide reasons for changing the method of interpretation, and depending on the magnitude of the consequences, these reasons may override the reasons supporting the method usually

320. See Vermeule, Judging Under Uncertainty, supra note 5, at 1 ("The question is always 'What decision-procedures should particular institutions, with their particular capacities, use to interpret this text?'").

321. See Aaron-Andrew P. Bruhl, Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court, 97 Cornell L. Rev. 433, 458, 470, 487 (2012) (arguing that different courts may approach interpretation differently, depending on their hierarchy, democratic legitimacy, and institutional capacities).

322. Ekins, Objects of Interpretation, supra note 18, at 15.

323. They could also vary in relation to other factors as well, such as complexity of the issue, pressure of public opinion, capacities of other related institutions to deal with the specific problem at hand, and so on.

324. This does not entail that the normative choice thesis is consequentialist. See John Tasioulas, Punishment and Repentance, 81 Philosophy 279, 279–80 (2006) (warning against assuming that a concern for consequences is necessarily "consequentialist" in criminal punishment).

adopted.[325] Because consequences change, they contribute to the contingency of interpretive choice.

3. *One Shouldn't Commit to a Method of Interpretation.* — The contingent nature of interpretive choice should cast doubt on a remarkable aspect of American legal practice: that jurists self-identify or are identified by others by reference to the method of interpretation they favor. Some judges and scholars are originalists,[326] some are not. At work here is the intuition that the "right" or "best" method of interpretation must be one that applies to every instance of interpretation. An originalist, then, would be committed to the idea that the U.S. Constitution should always be interpreted according to originalist methods. The same would apply to other approaches to interpretation. There are less strict variations of the same idea: a "faint-hearted" originalist would think proper to interpret the Constitution according to originalist methods but allow for some specific exceptions when originalism leads to clearly unacceptable outcomes.[327] Approaches to interpretation are typically defended as the best approach *tout court*, not as the best approach for this type of case, in this type of institution.[328]

The contingent nature of interpretive choice challenges this. There is no reason for jurists to defend one method of interpretation as the unqualified best, just as there is no reason to adopt in practice a method of interpretation for all situations and offices.[329]

Now, just as contingency casts doubt on any unqualified commitment to a method of interpretation, it can also redeem its contingent, perhaps even opportunistic, use.

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325. The claim here is not that judges should always consider consequences in adjudicating. As said above, there may be good institutional reasons for them not to do so. But these reasons also vary with circumstances. Some courts may be better placed than others to assess empirical facts regarding consequences; some courts may hold a special responsibility regarding one type of consequence (e.g., a constitutional court in a transitional period, regarding political consequences that could derail the transition process); and sometimes consequences may be clear and certain, and sometimes not.

326. See, e.g., Sunstein, How to Interpret the Constitution, supra note 3, at 30 ("Justice Clarence Thomas subscribes to [original public meaning originalism], and so does Justice Neil Gorsuch.").

327. See Scalia, Originalism: The Lesser Evil, supra note 11, at 862, 864 ("I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

328. There are exceptions to this. Fallon, for example, argues that interpretive choice should be case by case. See Fallon, Meaning of Legal Meaning, supra note 5, at 1242–43, 1303–05. Professor Philip Bobbitt famously defends a nonexclusive approach to interpretation based on modalities of legal argumentation. See generally Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982) ("[T]here are five types [of constitutional argument]. As will become clear, these five are really archetypes, since many arguments take on aspects of more than one type.").

329. Though it could happen that, under some circumstances, it is advantageous that some interpreters (say, courts) apply a uniform approach—for example, if reasons of legal certainty became particularly important in a certain period.

For example, contingency explains why interpretation can be a local phenomenon. Take originalism again. If conceptual reasons determined interpretation, defenders of originalism would have to argue that originalism is the only method of interpretation that conforms to the "true" idea of interpretation. But isn't originalism an almost uniquely American phenomenon?[330] If so, then does everyone else in the world get interpretation wrong? If one thinks that methods of interpretation must be vindicated by reference to some truth about the idea of interpretation, or some basic truth about language use, or a theory of law, or any other noncontingent factor, then being a local phenomenon would cast doubt on originalism. Not so on the normative choice thesis. The relevant normative reasons and their balance can shift from place to place. For example, the Framers may command such authority and respect that there are very strong reasons to read the Constitution as they or their generation would have. But these reasons might be absent in places where the constitution has less conspicuous origins.

Similarly, it vindicates the "invention" of a method of interpretation. Sometimes originalism is portrayed critically as a doctrine made up to respond to specific political concerns. This is the version of the story according to which "in its modern form, originalism was born as a political movement, not only as a legal movement; it was a self-conscious response from the right to a set of Supreme Court decisions that pleased the left."[331]

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330. See Jack Balkin, Why Are Americans Originalists?, *in* Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell 309, 309 (Richard Nobles & David Schiff eds., 2016) (defending the claim that "[o]riginalism is mostly unknown outside of the United States"); Jamal Greene, On the Origins of Originalism, 88 Tex. L. Rev. 1, 6 (2009) [hereinafter Greene, Origins of Originalism] ("[A]lthough some version of originalist judicial practice is not peculiar to the United States, the historicist appeals that support American originalism have a potency here that is found in few foreign constitutional courts . . . ."). But see Yvonne Tew, Originalism: A Uniquely American Preoccupation?, 31 Diritto Pubblico Comparato ed Europeo 647, 647–51 (2017) (surveying the use of originalist arguments in India, Malaysia, and Singapore); Ozan O. Varol, The Origins and Limits of Originalism: A Comparative Study, 44 Vand. J. Transnat'l L. 1239, 1252–87 (2011) (analyzing the use of originalism by the Turkish Constitutional Court); Lael K. Weis, What Comparativism Tells Us About Originalism, 11 Int'l J. Const. L. 842, 846–48 (2013) (discussing originalism's foundations in Australia).

331. Sunstein, How to Interpret the Constitution, supra note 3, at 28; see also Sunstein, Originalism, supra note 93, at 1673–74 ("[O]riginalism seemed to be a highly political weapon in a highly political war over the future direction of the Supreme Court. Whether right or wrong, originalism served as a foundation for an objection to the Warren Court and to *Roe v. Wade*."). For accounts of the "making" of originalism, see Jack Goldsmith, The Conservatives and the Court, Liberties J. Culture & Pol., Winter 2021, 126, 129–31; Jamal Greene, Origins of Originalism, supra note 330, at 63–71; Jamal Greene, Selling Originalism, 97 Geo. L.J. 657, 680–81 (2009); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 547, 554–61 (2006); Keith E. Whittington, Is Originalism Too Conservative?, 34 Harv. J.L. & Pub. Pol'y 29, 29–30 (2011).

Originalists seem to resist this narrative.[332] With good reason. It casts doubt on claims that originalism is grounded on some atemporal and necessary truth about interpretation. But this shouldn't be a cause for concern from the point of view of the normative choice thesis. Because interpretive choice is contingent, it should always respond to circumstances. The fact that originalism was a response to specific needs of legal practice in the '70s and '80s actually counts in favor of originalism, if those needs were real and originalism was indeed an apt means to address them.

Perhaps this is not the defense that originalists want.[333] It can vindicate the adoption of originalism at one moment and justify its abandonment at another. It allows for claims that "originalism has now outlived its utility."[334] If contingency is a necessary feature of interpretive choice, one should always be open to the possibility of changing one's favored method of interpretation.

Finally, contingency vindicates the faint-hearted of this world.[335] Commentators have noticed that judges rarely stick to a single method of interpretation;[336] sometimes judges are criticized for this.[337] But inconsistency is not a vice.[338] There is nothing arbitrary or immoral in adopting different methods of interpretation in different situations. To the contrary, this may be the most reasonable course of action, given that the normative reasons that ground an interpretive choice change with circumstances. On the normative choice thesis, change and adaptation is what we should expect of conscientious judges.

4. *Burden of Proof.* — The contingency of interpretive choice entails a burden for proponents of methods of interpretation: They must either make explicit the circumstances under which their favored method is expected to apply (to which institution, where, for which area of law, for

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332. See Baude, Is Originalism Our Law?, supra note 36, at 2390 ("I know of no originalist who holds this view of the history, and I find it rather dubious myself . . . ." (footnote omitted)).

333. Though, as Sunstein notes, sophisticated defenses of originalism offer normative reasons. See Sunstein, How to Interpret the Constitution, supra note 3, at 61–62.

334. Adrian Vermeule, Beyond Originalism, The Atlantic (Mar. 31, 2020), https://theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/ X82X-4TNP].

335. See Scalia, Originalism: The Lesser Evil, supra note 11, at 864 ("[I]n a crunch I may prove a faint-hearted originalist.").

336. See, e.g., Stephen I. Vladeck, The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers, 96 Notre Dame L. Rev. 1869, 1872 (2021) ("[E]ven the staunchest originalists aren't originalists about everything.").

337. See Barnett, Critique of "Faint-Hearted" Originalism, supra note 13, at 13 ("Does Justice Scalia's faint-hearted fidelity to the original meaning of the Constitution not represent something of a refutation of originalism itself[?]").

338. Though inconsistency can be accompanied by some vices, such as disingenuousness. See, e.g., Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 233 (2023) ("If the originalist Justices are prepared to rest their decisions on originalist premises only some of the time, they should acknowledge as much . . . .").

example)[339] or offer an argument for the universal application of the method. Approaches to interpretation should place their limitations front and center by answering the following question: What is the set of circumstances and actors to which the proposal applies?

D. *The Instability of Interpretation*

Contingency in interpretation leads to instability of interpretation. Even when a method of interpretation seems exclusively appropriate for interpreting a given provision, that may change with a change in circumstances. This becomes clear when evaluating a possible objection.

It could be argued that interpretive choice is not always contingent because the appropriate method of interpretation doesn't always depend on normative considerations.[340] Rather, it can have a more fixed source: the formulation of a legal provision in the text. On this reasoning, a very precise text requires a more rigid form of interpretation, while a more open-ended or vague one, a more flexible approach. We can skip the details of what is "precise," "rigid," "flexible," etc. The general proposition is intuitive enough. For example, there seems to be broad agreement that the provision in the Constitution establishing that "neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years"[341] sets a very clear and precise requirement for a person to be eligible for the presidency: to be at least thirty-five years old.[342] This broad agreement suggests that nothing but the most naked

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339. They could do so in a number of ways. One possibility is to explain the conditions under which the method applies. Another is to treat the method as the default in a given area, but subject to defeasibility conditions. See, e.g., Lawrence B. Solum, Originalism and the Unwritten Constitution, 2013 U. Ill. L. Rev. 1935, 1977–78 (referring to defeasibility conditions to originalism in the form of doctrine "inconsistent with communicative content of the constitutional text").

340. Thank you to Michael Smith for raising this objection.

341. U.S. Const. art. II, § 1, cl. 5.

342. Several authors who adopt different approaches to interpretation share this view. Sunstein, for example, mentions it as an example of unproblematic "semantic originalism." "To be president, someone must be at least thirty-five years of age . . . . If the semantic meaning of words shifts over time, it is fair to say that what is binding is the original semantic meaning, not some new semantic meaning. Almost everyone almost always accepts semantic originalism." Sunstein, How to Interpret the Constitution, supra note 3, at 95–96. Moyn concurs: "Some aspects of American election law are perfectly clear—like the rule that prohibits candidates from becoming president before they turn 35 . . . ." Samuel Moyn, Opinion, The Supreme Court Should Overturn the Colorado Ruling Unanimously, N.Y. Times, (Dec. 22, 2023) https://www.nytimes.com/2023/12/22/opinion/trump-colorado-ballot-ban.html (on file with the *Columbia Law Review*). Similarly, Dworkin: "It is as illegitimate to substitute a concrete, detailed provision for the abstract language of the equal protection clause as it would be . . . to treat the clause imposing a minimum age for a President as enacting some general principle of disability for persons under that age." Dworkin, Freedom's Law, supra note 1, at 14. And Barnett: "[S]ome provisions of the Constitution are rule-like enough to be applied directly to most cases without need of

literal meaning is to be read from this provision, and hence nothing but the most austere textualism is pertinent to its interpretation. The intuition, then, is that what determines how to interpret this provision is not normative reasons, but the precision of its formulation.

The intuition is misleading. It's never the case that the formulation of a provision determines interpretive choice. What justifies interpretive choice here is that there are goods of paramount importance served by precision and stability in this domain: avoiding the risk of manipulation that a broader standard would entail, reducing the possibility of discord in elections, etc. Any alternative method of interpretation (living constitutionalism, moral readings, etc.) that could upset that stability and render this provision less determinate would compromise achieving goods of great importance. So, there is an (often intuitive) understanding of relevant normative reasons that are, in our circumstances, decisive.

This becomes transparent if one imagines a scenario in which the text remains constant but normative reasons change. If our intuitions are that interpretive choice could change with a normatively significant change in circumstances, despite the text remaining the same, then we'll have abandoned the intuition that the text's formulation determines interpretive choice.[343]

Here's the scenario: In the year 2100, people live until they are 300 years old. As a result of longevity and the chemicals that allow it, people mature much later than previous generations. At thirty-five, people are still adolescents. They typically haven't finished high-school, or had such experiences as having responsibility over others, working for a substantial time, voting, and participating in civic life. The most famous streamer, a thirty-five-year-old gamer known as "CptA1N," has announced his bid for the presidency. Confusing popularity with competence, he believes he is qualified to be president. Yet, he evidently lacks the maturity to run the country.

If there were a constitutional challenge to his nomination on the grounds that he does not fulfill the requirement set by the provision requiring thirty-five years of age for eligibility to the presidency, how should that provision be interpreted? In those circumstances, it is not obvious that a literalist approach would be justified. It would be more plausible than it is now to read the provision attending to its purpose, for example, as requiring that a person be of "middle-age," or of the maturity that, at the time the Constitution was written, people typically had at thirty-five, or in some other way that would go beyond the semantic meaning of

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intermediate doctrine. The most oft-cited example of this is the provision limiting the presidency to persons who are at least thirty-five years old." Barnett, Restoring the Lost Constitution, supra note 261, at 125.

343. There are other explanations compatible with the one provided here. See, e.g., Ryan D. Doerfler, High-Stakes Interpretation, 116 Mich. L. Rev. 523, 523–28 (2018) (arguing on epistemic grounds that "unambiguous" text can become unclear in virtue of the high-stakes of a case).

the text. Surely in weighing interpretive alternatives, one should consider the great benefits of having a precise rule mentioned above. Perhaps those reasons still outweigh all others, and we should keep our traditional reading. But the point is that an alternative reading (such as one that downplayed the literal meaning in favor of the purpose of the text) would be more plausible than it is now. This change can't be explained by reference to the formulation of the provision, because the provision hasn't changed. Because normative reasons can always change with a change in circumstances, interpretation is never entirely stable.

CONCLUSION

Only normative reasons can justify choosing a method of interpretation. This is the normative choice thesis advanced here. There is no immutable conceptual, linguistic, or theoretical consideration that can ground a method of interpretation. Since the balance of normative reasons changes with circumstances, the interpretation of no provision is fixed forever, and no one should always be an originalist, or a living constitutionalist, or a textualist, or a purposivist.

There is nothing cynical or anarchist in this argument. It's not a plea for disbelief in law or for failing to observe it. True, on the account of interpretive choice proposed here, interpreters confronted with a legal text may be more or less faithful to it in determining its meaning. They may undertake activities that can be plausibly categorized as "interpretation," or do something else. To the extent that these activities are practically available, they are all alternatives for choice. There is no point in hiding this reality. But one would expect that, in a well-functioning legal system, contemplation of all alternatives would make us *more* aware of the importance of fidelity to the law—whatever that entails. It would show, through contrast, the goods and requirements of practical reasoning that only law and its observance can secure.[344] But if, after pondering all the alternatives, we realize that fidelity to the law is unappealing, then our problem would not lie in our theories but in our practice.[345]

If the normative choice thesis were widely accepted, debates on interpretation would look different. They would be less structured around camps (originalists vs. living constitutionalists of different stripes; textualists vs. purposivists; etc.), would be less about grand philosophies, and would not be about an all-or-nothing determination of what is *the* right way of interpreting. Instead, they would be about more tentative,

344. See supra note 192.

345. This can happen for many reasons, of which the most evident is that the content of the law is unjust or otherwise deficient. A less evident reason is that law and legal methods are being used in matters for which they are unsuited. See Judith Shklar, Legalism 2 (1986) (referring to legalism as "one morality among others" and offering a criticism of the legalistic approach to politics).

circumscribed, compromising and, overall, modest proposals for going about determining the meaning of a legal text. In a highly polarized society, where the stakes of legal adjudication are already too high,[346] this should be an appealing prospect.

346. See Jamal Greene, How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart 143–44 (2021) ("Constitutional law has high enough stakes, but our courts keep making them higher.").