Interpretation in Law

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I. INTRODUCTION

Interpretation is a familiar feature of law and legal practice. For some legal theorists, interpretation is a central—even foundational—aspect of law. Despite many discussions of interpretation, in a variety of legal theoretical contexts, there remains widespread disagreement over the nature of interpretation in law. It may well be that the reason interpretation remains a widely contested aspect of legal theory is that our very conception of what counts as law depends on a proper understanding of the role of interpretation in law.

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I argue that interpretation is a *parasitic* activity in legal practice. In other words, I want to disagree with those who make the case for interpretation as a basic or fundamental feature of law.[1] While

1. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986). I anticipate that some will take issue with my characterization of Dworkin's interpretivism. One version of this criticism is that Dworkin is not really making a semantic argument at all. Rather, his claims are normative in nature and, thus, not susceptible to critique in the same manner as, say, Stanley Fish. At a minimum, I think this is a contestable reading of the argument in LAW'S EMPIRE. I will not make a sustained argument here because I have already made the case elsewhere. *See* DENNIS PATTERSON, LAW AND TRUTH 76–98 (1996). I will, however, record my complete agreement with Gerald Postema's characterization of a central problem with Dworkin's argument. *See* Gerald Postema, *"Protestant" Interpretation and Social Practices*, 6 LAW & PHIL. 283, 288–89 (1987) ("[W]hile [Dworkin] regards the activity of the practice [of law] as public and collective, he seems to regard the enterprise of understanding that activity as private and individual . . . . I shall argue that Dworkin's theory thus interpreted fails to describe adequately participant understanding of common social practices."). Dworkin leaves us in no doubt when it comes to the pervasive nature of interpretation in law. For Dworkin, there is no *in principle* distinction between easy and hard cases:

> We have been attending mainly to hard cases, when lawyers disagree whether some crucial proposition of law is true or false. But questions of law are sometimes very easy for lawyers and even for nonlawyers. It "goes without saying" that the speed limit in Connecticut is 55 miles an hour and that people in Britain have a legal duty to pay for food they order in a restaurant. At least this goes without saying except in very unusual circumstances. A critic might therefore be tempted to say that the complex account we have developed of judicial reasoning under law as integrity is a method for hard cases only. He might add that it would be absurd to apply the method to easy cases—no judge needs to consider questions of fit and political morality to decide whether someone must pay his telephone bill—and then declare that in addition to his theory of hard cases, Hercules needs a theory about when cases are hard, so he can know when his complex method for hard cases is appropriate and when not. The critic will then announce a serious problem: it can be a hard question whether the case at hand is a hard case or an easy case, and Hercules cannot decide by using his technique for hard cases without begging the question.
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> This is a pseudoproblem. Hercules does not need one method for hard cases and another for easy ones. His method is equally at work in easy cases, but since the answers to the questions it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all. We think the question whether someone may legally drive faster than the stipulated speed limit is an easy one because we assume at once that no account of the legal record that denied that paradigm would be competent. But someone whose convictions about justice and fairness were very different from ours might not find that question so easy; even if he ended by agreeing with our answer, he would insist that we were wrong to be so confident. This explains why questions considered easy during one period become hard before they again become easy questions—with the opposite answers.

DWORKIN, *supra*, at 353–54. The problem with Dworkin is simple: he confuses the fact that it is always possible that someone will need an interpretation (i.e., an explanation that is usually given) with the false claim that we always interpret in order to understand. *Cf.* Nicos Stavropoulos, *Interpretivist Theories of Law*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), *at* http://plato.stanford.edu/ archives/ win2003/entries/law-interpretivist (last visited Feb. 28, 2005) (explaining that interpretivism is not fully determined by practice or values served by it).

interpretation is certainly an important element of legal practice, it is an activity that depends upon existing and widespread agreement among legal practitioners with respect to most features of legal practice. In short, interpretation is not the firmament of law.

I do not wish to deny that interpretation is an important aspect of the practice of law. Rather, my aim is to clarify the role of interpretation in law. But before we can begin to understand more clearly the nature of interpretation in law, we must first clarify the nature of understanding, for it is to understanding that interpretation owes its parasitic status.[2]

The need for interpretation arises from the firmament of *praxis*. That is, interpretation in law arises from established forms of action that all participants recognize and employ whenever they make, appraise, and adjudicate claims about the state of the law. Interpretation is grounded in a distinct form of discursive action that we recognize as legal in nature. Thus, before we can truly understand the role of interpretation in law, we must first explicate the particular form of understanding we identify as legal.

Only with a clear view of the nature of understanding in law can we then properly explicate the nature and scope of interpretation in law. When we look at how participants in law engage in interpretation, the activity can best be described by a few general principles. These principles capture what it is that lawyers do when they, of necessity, interpret the law.

This Article is divided into three principal parts. In Part II, I reprise an argument that myself and others have made about the "logical" status of interpretation. I add to the discussion of the role of interpretation in understanding by making the claim that interpretation is a parasitic activity, the efficacy of which is dependent upon understanding already being in place.

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2. All interpretation presupposes understanding. No one could interpret the following: Nog drik legi xfom. The term first has to be translated (and, contra Quine, translation is not interpretation) or deciphered before interpretation takes place. W.V. QUINE, ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 51–55 (1969). We interpret an utterance when we choose between different ways of understanding it. Legal interpretation is the activity of deciding which of several ways of understanding a given provision is the correct or preferable way of understanding. This is precisely the sort of activity Wittgenstein has in mind when he writes: "we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 201 (G. E. M. Anscombe trans., 3d ed. 1958).

In Part III, I explicate what it means to *understand* the law. Again drawing on my earlier work,[3] I explain that understanding law is a matter of being the master of a technique, specifically, a technique of argument. I describe the forms of legal argument in detail and make the case that the use of these argumentative forms is the nerve of law.

The forms of argument are central to any understanding of law and legal practice. But the forms of argument conflict, and when they do, the need for interpretation arises. Part IV contains a discussion of three cases that illustrate both the use of the forms of argument and the way in which their conflict requires interpretation. I conclude that interpretation in law is best explained by three principles. These are: minimal mutilation, coherence and generality. When the forms of argument conflict, we must choose between competing resolutions of their conflict. In my discussion of cases where the forms of argument conflict, I will show how the principles of interpretation that I identify provide a perspicuous account of what lawyers do when they interpret the law.

II. UNDERSTANDING IS NOT INTERPRETATION

It has now become quite popular to explicate understanding in terms of interpretation. Interpretivists believe that interpretation is the most perspicuous way to explicate or explain the phenomenon of human understanding. Interpretation knows no disciplinary boundaries. From philosophy to psychology to anthropology and the natural sciences, interpretation plays a central role in the explanation of human action.

So, how do interpretivists account for the phenomenon of human understanding? Interested as we are in law, consider the views of a leading proponent of interpretivism, Stanley Fish. Fish developed the theory of Reader-Response Criticism—the idea that in the act of reading, the reader creates the meaning of the text.[4] This view is a function or corollary of Fish's general philosophical views about the nature of meaning, which he expresses thus:

> All shapes are interpretively produced, and since the conditions of interpretation are themselves unstable—the possibility of seeing something in a "new light," and therefore of seeing a *new* something, is ever and unpredictably present—the shapes that seem perspicuous to us now may not seem so or may seem differently so tomorrow. This applies not only to the shape of statutes, poems, and signs in airplane lavatories, but to the disciplines and forms of life within which statutes, poems, and signs become available to us.[5]

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3. *See* PATTERSON, *supra* note 1, at 86–88 (explaining that understanding is the act of properly responding to a request).

4. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 21–67 (1980) (developing the theory of affective stylistics).

5. STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND

In accounting for our understanding of statutes, poems, and airplane lavatory signs, Fish posits an act of interpretation interposed between the object of our understanding and our grasp of its meaning. The interpretive act mediates between the thing we seek to understand and our grasp of its meaning. Interpretation makes understanding possible. Of course, there is often disagreement over the meaning of texts, especially legal texts. Fish thinks that interpretation can account for this phenomenon. In accounting for the divergent perspectives of the majority and dissenting opinions in *Riggs v. Palmer*,[6] Fish writes:

> [I]f it is assumed that the purpose of probate is to ensure the orderly devolution of property at all costs, then the statute in this case will have the plain meaning urged by the defendant; but if it is assumed that no law ever operates in favor of someone who would profit by his crime, then the "same" statute will have a meaning that is different, but no less plain. In either case the statute will have been literally construed, and what the court will have done is prefer one literal construction to another by invoking one purpose (assumed background) rather than another.[7]

For Fish, interpretive assumptions are the bridge between a statutory text and our grasp of its meaning. Interpretive assumptions mediate or make possible our grasp of the meaning of the New York Statute of Wills. Without these interpretive assumptions, the requirements of the statute would elude us. But, according to Fish, the interpretive assumptions of the majority and the dissent were different. It is due to these differences in interpretive assumptions that the court divided on the question of the meaning of the rules articulated by the statute. Thus, *per* Fish, interpretation not only accounts for human understanding, it accounts for disagreement in understanding as well.

There is nothing in Fish's account of either understanding or disagreement that can withstand scrutiny. Fish's signature move is the slide from the fact of interpretive dispute to the (false) conclusion that interpretive disputes are best explained by the "fact" that the disputants lack a common ground of understanding. Explicating the common ground of understanding puts us on the road to a better understanding of interpretation.

THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 302 (1989).

6. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) (holding that a man could not receive his grandfather's estate because the principle that no one should be permitted to profit from his own wrong supersedes the applicable statutes).

7. FISH, *supra* note 4, at 280.

With this in mind, consider Wittgenstein:

> A rule stands there like a sign-post.—Does the sign post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or the footpath or cross-country? But where is it said which way I am to follow it; whether in the direction of its finger or (e.g.) in the opposite one?—And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground— is there only *one* way of interpreting them?—So I can say, the sign-post does after all leave no room for doubt. Or rather: it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one.[8]

Without a practice of following it—a way of acting—the signpost, by itself, leaves considerable room for doubt. There are as many potential ways of following the signpost as there are possible conventions for determining how it is to be used and what counts as following it. But once a convention for following signposts is adopted, a background of understanding evolves. It is against this background that the need for interpretation arises.

In explicating understanding, interpretation is a nonstarter. Even if we were to grant the interpretivist his premise that all understanding involves interpretation, the interpretivist position collapses on its own terms. If all understanding is interpretation, then all interpretation is itself in need of interpretation. That is, if understanding a rule, symbol, or sign is a matter of an act of interpretation standing between the interpreter and the thing interpreted, there is no reason why this same logic should not apply to the interpretation itself. Wittgenstein's point is not to deny understanding. Rather, his argument is that interpretation cannot explicate the very idea of understanding because it gives rise to an infinite regress of interpretations (the Regress Argument).[9] In the end, interpretation obscures rather than illuminates the phenomenon of human understanding.

In addition to the infinite Regress Argument, Wittgenstein advances a second argument, what Meredith Williams calls the "Paradox of Interpretation."[10] First, Wittgenstein:

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.[11]

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8. WITTGENSTEIN, *supra* note 2, at § 85.
9. *Id.* at §§ 141, 198 (introducing the Regress Argument in two places).
10. MEREDITH WILLIAMS, WITTGENSTEIN, MIND AND MEANING 160 (1999).
11. WITTGENSTEIN, *supra* note 2, at § 201.

The Regress Argument undercuts our ability to prefer one interpretation over another. By contrast, the Paradox of Interpretation argument shows that no matter what action we deem "correct," we can interpret the rule in question in such a way that the action can be made either to accord with the rule or not. Williams sums up the situation thus:

> The Regress Argument shows that the view of objectified meaning as embodied in decision, formula, or any other candidate for the role cannot account for the *necessity of rules*, for the fact that rules constrain the behavior of the agent. The Paradox shows that the view cannot account for the *normativity of rules*, for the fact that there is a substantive distinction between correct and incorrect. There is nothing in the mind of the agent or in the behavior of the agent that shows what rule he is following, so long as we think of rules as embodying objectified meaning. In sum, there is no explanatory role (via the Paradox) nor epistemic role (via the Regress) for objectified meaning to play.[12]

If interpretation is a dead end, how do we explain the fact that we do understand signposts and that we do grasp the requirements of all sorts of norms (that is, follow rules)? Wittgenstein rejects the idea of interpretation as a necessary mediating device between a rule and our grasp of its requirements. His point is not only that interpretation is a logically incoherent explanation of understanding. He goes further, arguing against the very picture of understanding embraced by interpretivists. For Wittgenstein, *nothing* stands between a rule and what counts as following a rule (that is, correct action). And yet, we still do not have a clear picture of the nature of understanding. Precisely what, we may still ask, does understanding consist of?

Wittgenstein's answer is twofold: technique[13] and practice.[14] We show our understanding of a concept when we use the concept correctly. The "giving of a correct explanation is a criterion of understanding."[15]

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12. WILLIAMS, *supra* note 10, at 161.

13. WITTGENSTEIN, *supra* note 2, at § 199 ("To understand a language means to be [the] master of a technique.").

14. G.P. BAKER & P.M.S. HACKER, 2 WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 136 (1985).

15. G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: UNDERSTANDING AND MEANING 667 (1980).

> [G]iving a correct explanation is a criterion of understanding, while the explanation given is a standard for the correct use of the expression explained. Correspondingly, using an expression in accordance with correct explanations of it is a criterion of understanding, while understanding an expression presupposes the ability to explain it.

Id. Thus, when a lawyer is asked why two persons are required to witness a will, the connection between attestation and validity will be explicated, thereby demonstrating the lawyer's understanding of the concepts.

Correct understanding is not a function of something that goes on in our head (for example, a private act of interpretation or translation). Concept possession is the demonstrated ability to participate in the manifold activities in which the concept is employed (for example, rule following).[16]

Interpretation is a nonstarter because interpretation draws our attention away from the techniques that make understanding possible. Correct and incorrect forms of action are immanent in practices. Thus, correct forms of action cannot be imposed on a practice, by interpretation or otherwise. It is only when we master the techniques employed by participants in a practice that we can grasp the distinction between correct and incorrect action.[17]

But where does this leave interpretation? If understanding—knowing how to engage in a practice—is exhibited in action, what role is there for interpretation? Again, Wittgenstein is instructive here. When it comes to interpretation, we can see that interpretation depends upon understanding—unreflective action—already being in place.[18] We should, as Wittgenstein argues, "restrict the term 'interpretation' to the substitution of one expression of the rule for another."[19] Interpretation is an activity—one that not only depends upon understanding already being in place, but an activity that is actuated by a breakdown or failure in understanding. In short, interpretation is a therapeutic, not foundational, activity.

III. UNDERSTANDING LAW: THE GRAMMAR OF LEGAL ARGUMENT

I have argued that interpretation is an activity that depends upon understanding. I have said that understanding—be it of law or any other human practice—is a matter of being the master of a technique. But what is the technique grasped by a competent practitioner of law, and in what does mastery of such technique consist?

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16. *See* WILLIAMS, *supra* note 10, at 176.

> The rule as formula, the standard as chart, or the paradigm as an instance have no normative or representational status in their own right. They have this status only in virtue of the way the formula or the chart or the instance is used. It is the use that creates the structured context within which sign-posts point, series can be continued, orders obeyed and paradigms be exemplary. Only then can we see a particular action as embodying or instancing a grammatical structure. In short, the mandatory stage setting is social practice.

Id.

17. *See* ROBERT B. BRANDOM, MAKING IT EXPLICIT 13 (1994) ("[T]he meaning of a linguistic expression must determine how it would be *correct* to use it in various contexts. To understand or grasp such a meaning is to be able to distinguish correct from incorrect uses.").

18. WITTGENSTEIN, *supra* note 2, at § 219 ("When I obey a rule, I do not chose. I obey the rule *blindly*.").

19. *Id*. at § 201.

The nerve of law is argument. Facility in legal argument is the measure of the degree to which one has mastered the grammar of justification that is central to the practice of law. The grammar of legal argument is immanent in the practice of law. By immanent, I mean to say that law is an intersubjective practice wherein participants coordinate their behavior through the employment of a grammar of appraisal that is a constitutive feature of the practice itself.[20]

The fundamental form of expression in law is assertion. Argument in law begins with an assertion that something is the case—true—as a matter of law. Everything from a claim that a statute is unconstitutional to averment that a contract is unenforceable are all examples of legal assertions, claims that the purported proposition is true *as a matter of law*.

Lawyers appraise the truth and falsity of legal assertions through forms of legal argument. The forms of argument are themselves neither true nor false. Rather, the forms of legal argument are the means by which lawyers show the truth and falsity of legal propositions.[21] The forms of argument are the grammar of legal argument. They are immanent in the sense that they make possible the assertion of claims for the truth of legal propositions which are then disputed, evaluated, and judged by all who are competent in their use (technique).[22]

There are six forms of legal argument in the American system of law. While some are more familiar than others in different departments of law,[23] these six forms comprise a complete list of the argumentative tools of American law. The forms of argument in law are:

> Textual: taking the words of an authoritative legal text (e.g., a constitution, statute, contract or trust) at face value, i.e., in accordance with their ordinary meaning;

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20. In short, I agree with Jules Coleman that law is a conventional practice "sustained by the behavior of participants." JULES COLEMAN, THE PRACTICE OF PRINCIPLE 99 (2001). I believe an account of the forms of argument, and the way the forms of argument are used to show the truth of legal propositions, is the best explanation of the practice of law.

21. "[P]ropositions of law are typically statements not of what 'law' is but of what *the law* is, i.e. what the law of some system permits or requires or empowers people to do." H.L.A. HART, THE CONCEPT OF LAW 247 (2d ed. 1994).

22. Robert Brandom describes well the project of joining the assertoric and the normative. *See* BRANDOM, *supra* note 17, at 167 ("What is it we are *doing* when we assert, claim, or declare something?").

23. The phrase "departments of Law" is Dworkin's. *See* DWORKIN, *supra* note 1, at 250–54.

Doctrinal: applying rules generated from previously decided cases (precedents);

Historical/Intentional: relying on the intentions of the Framers (constitution), legislature (statute), or parties to an agreement (contract);

Prudential: weighing or assessing the consequences (in terms of "costs") of a particular rule;

Structural: inferring rules from relationships created by the structures created by the Constitution or statute; and

Ethical: deriving rules from the moral ethos established by the Constitution or by statute.[24]

I have said that the forms of legal argument in the American practice of law are employed to show the truth and falsity of legal propositions. While this is certainly true, I need to say more about the argumentative framework within which the forms of legal argument are immanent. Once this structure is articulated, I can then explicate the nature of understanding in law as a prelude to my discussion of the role of interpretation in law.

As mentioned, legal argument begins in assertion. An assertion in law is a claim that a given proposition is true as a matter of law. Consider this proposition: p = "The contract between Smith and Jones is unenforceable." I will call this proposition a Claim because it is asserted as a correct or true proposition. Before we can assess the truth or falsity of the Claim, we need to know what it is about the contract between Smith and Jones that might lead one to assert that the contract is unenforceable.

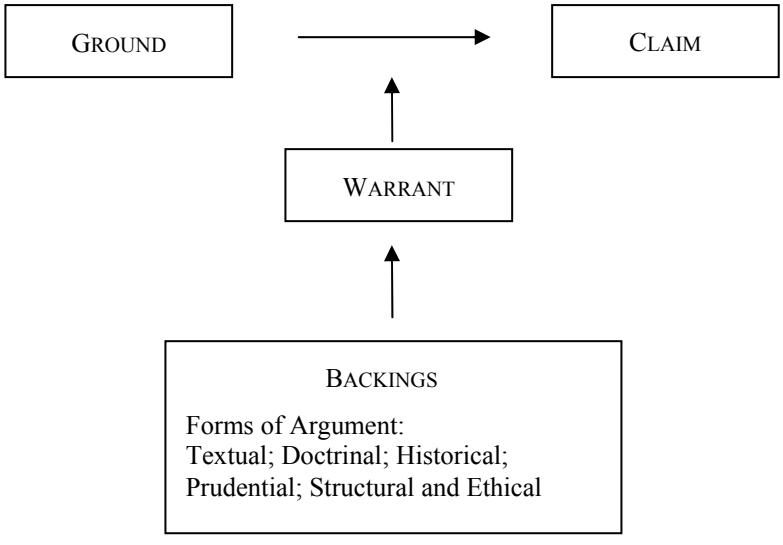
What we seek is a Ground, a reason (for example, a fact) that connects the Claim of unenforceability with some aspect or feature of the contract by virtue of which the contract is allegedly unenforceable. Suppose Smith is fourteen years of age. This fact is the Ground for the Claim that the contract is unenforceable. But what is it that makes this so? In other words, in virtue of what are the Claim and Ground joined such that the Ground supports the Claim (that is, makes it true)?

The answer to this last question is a Warrant. The Warrant makes the Ground significant vis-à-vis the Claim. The Warrant is the means by

24. The six forms of argument in American law, paraphrased in modern terms here, were first explicated by Philip Bobbitt. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter CONSTITUTIONAL INTERPRETATION]; PHILIP BOBBITT, CONSTITUTIONAL FATE (1982). Structural argument in the constitutional context was first articulated by Charles Black. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

which we can say with certainty that the Ground is a legally relevant reason for concluding that the Claim is true as a matter of law. But Warrants are not self executing. For Warrrants to be meaningful, there must be ways of construing Warrants that make Warrants meaningful. I shall refer to these as Backings.

The forms of legal argument are the Backings for Warrants, the grammar of legal justification with which we show the truth and falsity of Claims from the legal point of view. The following schema depicts these relationships explained in the preceding paragraphs: [25]



With this schema in view, let us work through the question whether *p* is a true proposition of law. Obviously, Smith's status as a minor is the Ground for the Claim that *p* is true. If the Claim arose in a jurisdiction where the Restatement (Second) of Contracts is deemed to be the controlling law on this question, a textual argument that references the

25. The framework that follows (Claim, Ground, Warrant, Backings) is taken from STEPHEN E. TOULMIN ET AL., AN INTRODUCTION TO REASONING 23–67 (1979). The approach was originally advanced in STEPHEN EDELSTON TOULMIN, THE USES OF ARGUMENT (1958).

operative provision[26] would be sufficient to show the truth of *p*. In addition to the relevant Restatement text, there would no doubt be precedent construing the rule in question (doctrinal argument), noting exceptions, and describing qualifications. Taken together, the textual and doctrinal arguments show the truth of *p*. It is through the use of these forms of argument that we are able to say that *p* is true.

The normativity of law—the distinction between correct and incorrect assertions—is a matter of the proper use of the forms of legal argument. The forms of argument are the (immanent) grammar of legal justification. Understanding in law is best explained as a disposition on the part of individuals to employ the forms of argument in appropriate ways as context requires.[27] The normativity of law assures objectivity in legal judgment.[28] Meaning—the basis of objectivity—is made possible by the harmony in action and judgment of participants in legal practice over time. Most importantly, it is in virtue of what participants in legal practice have *in common*[29] that normativity and objectivity are possible.

IV. INTERPRETATION IN LAW

Interpretation is a constitutive feature of legal practice. Notwithstanding its importance within legal practice, interpretation is an activity that is dependent on understanding already being in place. The need for interpretation arises when our conventional ways of understanding break down. This occurs, in law, when our use of the forms of legal argument "is in some way rendered problematic and thrown in doubt."[30] How does understanding in law break down, and how does interpretation serve to repair the fabric of understanding?

Lawyers use the forms of argument to appraise claims about what is true as a matter of law. In many cases (we may call them easy cases), the relevant forms of argument all point to a single conclusion. But the forms of argument do conflict, and, when they do, the tension must be

26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (describing capacity to contract).

27. *Cf.* WILLIAMS, *supra* note 10, at 177 (describing a disposition as the ability to act appropriately under the circumstances).

28. *See* Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325, 356 (2001) (showing how normativity arises from a practice of argument with criteria for appraising assertions).

29. Of course, this is directly contrary to the argument made by Ronald Dworkin. *See* DWORKIN, *supra* note 1, at 250–54 (showing the compartmentalization of the departments of law); Postema, *supra* note 1, at 283, 288–89 (making the case for the intersubjective nature of understanding).

30. James Tully, *Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection*, *in* THE GRAMMAR OF POLITICS: WITTGENSTEIN AND POLITICAL PHILOSOPHY 17, 39 (Cressida J. Heyes ed., 2003).

resolved. Resolving this tension is the activity of legal interpretation.[31] It is in the act of interpretation that the fabric of law is repaired, thereby enabling practitioners to go on with the practice. I shall now discuss three cases to illustrate these points.

A. Statutory Interpretation

Let us start with a case familiar to all students of legal theory, *Riggs v. Palmer*.[32] Having executed a valid will, Francis Palmer intended to leave the bulk of his estate to his grandson, Elmer.[33] Upon the remarriage of his widower grandfather, Elmer feared he would lose his inheritance.[34] To prevent this turn of events, Elmer killed his grandfather by poison.[35]

There was no dispute about the requisite statute at the center of issue in the case. The New York Statute of Wills articulated what all probate statutes required: where there is a valid will, a dead testator, and a named beneficiary, the latter is given the testator's property according to the dictates of the will.[36] The proposition of law to which the parties gave their attention is simple: Elmer is entitled to his grandfather's property in accordance with the dictates of his grandfather's will. Elmer's argument was grounded in the language of the New York Statute of Wills.[37] Before we consider the arguments for and against the asserted proposition of law, a few preliminary remarks are in order. They concern the concept of understanding and its relationship to the forms of argument discussed earlier. As argued above, understanding is exhibited by participants in legal practice in the unreflective employment of forms of argument to show the truth of legal propositions. To see this, consider a case where murder is not an element of the facts—the normal probate context. Once validated by the probate court, the will of the testator dictates the devolution of property of the testator. This requirement is gleaned from a straightforward reading of the Statute of Wills. In short, textual argument is sufficient to show the truth of the proposition that the beneficiary of a valid will is to be given property in

31. Conflict among the forms of argument is a significant but not exhaustive aspect of interpretation in law.
32. Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).
33. *Id.*
34. *Id.* at 189.
35. *Id.*
36. *Id.*
37. *Id.*

accordance with the dictates of the will. What turns a case of understanding into one where the need for interpretation arises?

The need for interpretation is actuated by facts. In *Riggs*, the actuating fact was the murder of the testator by his grandson. But why is *this* fact an actuating event? Not only does the majority opinion show why the murder actuates the need for interpretation, the opinion shows how the state of the law explains the legal (that is, interpretive) significance of the murder. In other words, we need to explain how understanding (that is, the unreflective act of probating the will in the normal course of things) broke down as the court tried to come to terms with the significance of the murder as the event that precipitated the breakdown in understanding.

The majority opinion in *Riggs* is a sophisticated doctrinal argument. As Professor Dworkin has taught us, the opinion makes good use of the common law maxim: *no man shall profit from his own wrong*.[38] But there is more to the opinion than mere recitation of an equitable maxim. When we look at the ways in which Judge Earl showed the true state of the law, we see why the facts themselves make it clear that a straightforward reading of the requisite statute was all but impossible.

The majority opinion begins in classic fashion with the distinction between law and equity. The distinction is embraced in full measure by the common law systems of both the United States and England and can be traced back to Aristotle. The sheer breadth and diversity of classic writers on the role of equity[39] within all departments of law should cause an educated legal mind to experience a sense of unease when confronted with the facts in *Riggs*.

Having shown how the *no man shall profit from his own wrong* principle is a constitutive feature of law in the most general way (that is, the law and equity distinction), Judge Earl then demonstrated the reach of the principle throughout varied departments of law. Citing cases from the law of wills and insurance, Earl made a strong case for the proposition that precedents both directly on point (that is, the law of wills), as well as those from related departments of law, support an exception to the ordinary meaning of the words of the statute. That is, Earl made a doctrinal argument to the effect that the words of a valid legislative enactment (here, the Statute of Wills) are to be given their normal force and effect unless there is some exception demonstrated by the facts. In short, Judge Earl did not *change* the law; he *clarified* it (by

38. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14–45 (1977); DWORKIN, *supra* note 1, at 15–20.

39. In its opinion, the majority cites Puffendorf, Bacon, and Blackstone, among other legal thinkers. *Riggs*, 22 N.E. at 189.

pointing to an underlying and well-established legal principle).[40]

By contrast, Judge Gray, in dissent, argued for a straightforward reading of the words of the statute. Claiming that the court was "bound by the rigid rules of law,"[41] Gray argued that Elmer is being twice punished for his offense.[42] In a clever rebuttal to Judge Gray, the majority pointed out that he begged the question of whether Elmer was entitled to receive his victim's property under the will. The point was that the very question before the court was *whether* the property rightfully belonged to Elmer or not. Judge Gray did not seem to notice his error.

What does *Riggs* teach us about interpretation in law? First, in terms of the forms of argument, it is clear that without the complicating factor of the murder of the testator, the textual argument is decisive. Without the murder of the testator, it is true as a matter of law that Elmer was entitled to receive his grandfather's property according to the dictates of the Statute of Wills. It is only when the complication of the murder is added to the facts that lawyers dispute the true state of the law.

How did Judge Earl persuade enough of his colleagues to see the law as he did? Three factors suggest themselves. First, the majority opinion did no damage to the existing state of the law. I will call this the interpretive principle of *minimal mutilation*.[43] In other words, deciding against Elmer did not put in question the efficacy of any other element of the New York Statute of Wills. Second, through its decision, the majority demonstrated that its conclusion was consistent with everything else it knew to be true about the law of wills. I shall refer to this as *coherence*.[44] Finally, the opinion shows how a decision against Elmer comports with similar decisions in other departments of law. I shall

40. *See* FISH, *supra* note 4, at 327 ("Interpretation is not the art of construing but the art of constructing.").

41. *Riggs*, 22 N.E. at 191 (Gray, J., dissenting).

42. *Id*. at 193 ("[T]o concede appellants' views would involve the imposition of an additional punishment or penalty upon [Elmer].") (Gray, J., dissenting).

43. *See* W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF 66–67 (2d ed. 1978) (discussing the virtue of conservatism). *See also* GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY 12 (1996) ("It is rational to make the least change in one's view that is necessary in order to obtain greater coherence in what one believes.") (citations omitted). *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 147 (1994) (discussing reasoned elaboration).

44. The idea of coherence is apt. *See* CONAL CONDREN, THE STATUS AND APPRAISAL OF CLASSIC TEXTS 148 (1985) ("[A]t its most general level, coherence refers to the ways in which parts are interconnected to form a whole; and at a similar level of generality, the appraisive category of coherence is an abridgment of the range of questions one asks of a text in terms of its parts and the closeness of their interrelationships.").

refer to this aspect as *generality*.[45] Taken together, minimal mutilation, coherence, and generality are the three aspects of the majority's opinion that support the notion that its interpretation of the law is more persuasive than that offered by the dissenting opinion.

More important than the particulars of the majority and dissenting opinions is the fact that neither advanced any *theory* of legal interpretation. Of course, it is always possible to elevate a form of argument into a theory if that means relentless adherence to a single form of argument.[46] However, the move to theory hides the tension felt by practitioners of law as they struggle to persuade one another that their choice of how to go on with the practice is correct. To see such a struggle as a competition of theories obscures this important aspect of the practice.

B. Contract Law

The discernment of legal meaning is a fundamental feature of law. Contracts, trusts, wills, and constitutions all come to us in the form of written instruments. How lawyers construe texts to decide their meaning is a complex and sophisticated undertaking. Interestingly, the forms of argument—previously explained as the means by which lawyers show the truth of legal propositions—are the same whether the document is a contract or a constitution. In fact, it was the existence of the forms of argument at common law that made the American innovation of a *written* constitution workable.[47]

Contracts usually take the form of a writing because the parties wish to hold one another to their bargain. But sometimes the writing—no matter how clear it may be—fails to settle the question of the parties' agreement. *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.* is illustrative.[48] A building owned by an Iowa corporation whose president was a farmer was burglarized. The thieves made off with chemicals, office equipment, and shop equipment valued at approximately $10,000.[49] The stolen chemicals, which constituted the bulk of the value of the lost items, had been stored in a locked interior room in the warehouse.[50]

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45. QUINE & ULLIAN, *supra* note 43, at 73 ("The wider the range of application of a hypothesis, the more general it is.").

46. For an exquisite example *see* MARK TUSHNET, RED, WHITE AND BLUE 179–87 (1988) (reducing all the forms of constitutional argument to prudential argument). For discussion of this point, see Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989) (reviewing TUSHNET, *supra*).

47. *See* CONSTITUTIONAL INTERPRETATION, *supra* note 24, at 5 ("Since the Constitution was a written law, it had to be *construed*, and this was to be done according to the prevailing methods of legal construction.").

48. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975).

49. *Id*. at 171.

50. *Id*.

Interestingly, there were no visible marks on the exterior of the building, nor was there any sign of tampering upon the Plexiglas door to the warehouse. The court described the facts as follows:

> There were truck tire tread marks visible in the mud in the driveway leading to and from the plexiglas door entrance to the warehouse. It was demonstrated this door could be forced open without leaving visible marks or physical damage.
>
> There were no visible marks on the exterior of the building made by tools, explosives, electricity or chemicals, and there was no physical damage to the exterior of the building to evidence felonious entry into the building by force and violence.[51]

The insurance policy defined burglary as:

> [T]he felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are *visible marks* made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry.[52]

Following the text of the insurance policy, this loss was not covered, as the burglar left no visible marks on the exterior door. And yet, the Iowa Supreme Court held to the contrary. Its reason for doing so is a lesson in the art of interpretation in law.

The dissent makes the obvious textual argument: "We may not—at least we *should* not—by any accepted standard of construction meddle with contracts which clearly and plainly state their meaning simply because we dislike that meaning, even in the case of insurance policies."[53] In contract law, due to the emphasis on writing, textual argument often enjoys supremacy among the forms of argument. And yet, there are many examples where the plain meaning of the text yields to other considerations.

The majority opinion evinces no lack of appreciation for the power of textual argument.[54] But the majority uses an historical argument to make the case—ultimately persuasive—that the specific language of the contract cannot control the ultimate decision of what rights the parties have under their agreement. In constitutional law, and in the interpretation of statutes, appeal is made to the announced intentions of ratifiers or legislators in interpreting the present meaning of constitutional or

51. *Id*.
52. *Id*. (quoting trial court) (emphasis added).
53. *Id*. at 183 (LeGrand, J., dissenting).
54. *Id*. at 173–75.

legislative provisions. Where circumstances change, the outcome of decisions may well be different from those originally contemplated.

In characterizing the nature of the contractual process, the majority writes: "[m]any of our principles for resolving conflicts relating to written contracts were formulated at an early time when parties of equal strength negotiated in the historical sequence of offer, acceptance, and reduction to writing. The concept that both parties assented to the resulting document had solid footing in fact."[55] But the course of history moved away from the era of parties of equal strength bargaining freely. It is this historical change that, in the view of the majority, merits an outcome not contemplated by a mere reading of the contractual text.[56]

The great change that underlies the majority's historical argument is the rise of standard form contracts.[57] Presented on a *take it or leave it* basis, insurance contracts present the buyer in need of coverage with no options and no ability to negotiate terms (for example, the definition of burglary) or any other material element of the contract. The contract is, in effect, composed of boilerplate terms to which there is no real assent at all.

Owing to the fact that terms cannot be negotiated, purchasers of policies rarely read the terms of the document with care. Of course, any purchaser of insurance will have *reasonable expectations* about the scope and limits of coverage. These expectations, the majority argued, require a different approach to the question whether the purchaser *assented* to the terms offered in the insurance policy. The majority concluded, because of the fact "that modern insurance companies have turned to mass advertising to sell 'protection'"[58] that the law required that the "reasonable expectations" with respect to coverage be of greater importance than the ordinary meaning of contract terms.[59]

How did the majority resolve the conflict between the textual and historical arguments? First, the court showed how the doctrine of reasonable expectations is an established feature of insurance law,[60] thereby demonstrating coherence within the immediate department of law. Minimal mutilation and coherence are both at work, building a persuasive interpretation. But the real strength in the majority's interpretive argument is generality. The majority opinion convinces by showing

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55. *Id*. at 173.
56. *Id*.
57. *Id*.
58. *Id*. at 178.
59. *Id*. at 176. However, the majority did make the point that the record demonstrated no actual knowledge of the restrictive definition of burglary in the policies. *See id*. at 176–77. Had such knowledge been shown, the result might well have been different.
60. *Id*. at 176–77.

how the strategy of argument that it employs in the instant case is consistent with what courts are doing in other departments of law. From common law sales contracts[61] to common law leases[62] to transactions governed by the Uniform Commercial Code,[63] the majority used decisions[64] from various departments of law to make the case that the present decision fit within a wide fabric of decisions. It is the feature of generality that enables the majority opinion to favor the historical argument over its textual counterpart.

C. Constitutional Law

In the American legal system, no department of law is more contested than constitutional law. Theories of constitutional law are numerous and wide ranging. Notwithstanding the plethora of theoretical approaches to constitutional law, there is general consensus that the forms of argument outlined above are the grammar for advancement and assessment of constitutional claims.[65]

I will discuss a single opinion of the United States Supreme Court to illustrate the claims made earlier regarding the forms of argument and the role of interpretation in law. While questions in constitutional law are often unique, there is nothing special about the forms of argument in constitutional law. As mentioned earlier, the forms of argument at common law were the very thing that enabled the early Supreme Court to interpret the written Constitution. Thus, everything we learn about interpretation in constitutional law is, *ceteris paribus*, equally applicable to other departments of law.

The late nineteen twenties through the nineteen thirties were a time of great economic turbulence in the United States. Over the course of a decade, state legislatures were repeatedly called upon to stave off the harsh effects of economic depression and widespread fiscal misery. Particularly hard hit by financial crises were American citizens in the middle class, who saw their very ability to shelter their families put at

61. *Id*. at 178.
62. *Id*. at 179.
63. *Id*. at 179–80 (citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 93 (N.J. 1960)).
64. The majority cited both Iowa precedents and persuasive precedents from other jurisdictions. *Id*. at 178–79.
65. *See* THOMAS E. BAKER & JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS 307–36 (2d ed. 2003); PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 33 (4th ed. 2000).

risk. In 1933, the Minnesota Legislature passed the Mortgage Moratorium Law. In an effort to mitigate the harsh effects of numerous mortgage foreclosures, the Mortgage Moratorium Law extended the period of time for redemption of property for up to two years, to May 1, 1935.[66]

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66. The pertinent section of the statute reads:

> Sec. 4. *Period of Redemption May be Extended*.—Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided that upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that if such mortgagor or judgment debtor, or personal representative, shall default in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from said sale shall terminate 30 days after such default and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the filing of notice of such default with the clerk of such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. If default is claimed by allowance of waste, such 30 day period shall not begin to run until the filing of an order of the court finding such waste. Provided, further, that the time of redemption from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this Act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this Act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in the possession of the property, may, prior to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided. Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of

In *Home Building & Loan Association v. Blaisdell*, the United States Supreme Court considered a challenge to the constitutionality of the Minnesota Mortgage Moratorium Law.[67] Pursuant to the statute, the Blaisdells applied for an extension of the redemption period on the foreclosure of a mortgage they had given on land they owned in Minneapolis.[68] The mortgage had been properly foreclosed: the appellant and mortgagee was the purchaser of the mortgage at the foreclosure sale.[69] The Blaisdells applied for relief under the statute prior to the running of the period of equitable redemption, the time during which they were legally permitted to retain ownership of land by paying the mortgagee/purchaser the sum of $3,700.98.[70] The reasonable value of the property, the Court stated, "greatly exceeded the amount due on the mortgage including all liens, costs and expenses."[71]

The Minnesota Supreme Court upheld the constitutionality of the Minnesota statute, finding the statute to be a constitutionally permissible exercise of Minnesota's police power.[72] The question of the statute's constitutionality hinged on the question of whether or not the statute violated the Contract Clause of the U.S. Constitution.[73] In the end, a divided U.S. Supreme Court decided that the Minnesota statute was constitutional. There is much in the opinion to be learned about constitutional interpretation and the role of the forms of argument in showing the truth of propositions of law.

The Court put the question as one of "the relation of emergency to constitutional power"[74] and began with the observation that "[w]hile emergency does not create power, emergency may furnish the occasion

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this Act, has expired.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 417 n.1 (1934) (quoting Minnesota Mortgage Moratorium Law, ch. 339 § 4, 1933 Minn. Laws 514).

67. *Id.* at 415–16.
68. *Id. at* 418–19.
69. *Id*. at 419.
70. *Id*.
71. *Id*.
72. *Id*. at 420.
73. Article 1, Section 10, Clause 1 reads:

> No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10, cl. 1.

74. *Blaisdell*, 290 U.S. at 425.

for the exercise of power."[75] In deciding the scope and limits of power, the Court must discern the proper relationship between the power sought to be exercised and constitutional limits on that exercise of power. For this, the Court needed to construct the meaning of the Contract Clause. To do this, the Court turned to the forms of legal argument.

The majority began with an historical narrative. History tells us why the ratifiers or framers propounded a constitutional clause and what purpose that clause was meant to serve. The majority maintained that notwithstanding the failure of a clear answer to emerge from the debates in the Constitutional Convention, there could be no doubt as to the reasons which led to adoption of the clause. The Court explained:

> The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. . . . The occasion and general purpose of the contract clause are summed up in the terse statement of Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. pp. 213, 354, 355: "The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government."[76]

This history runs directly counter to the decision the Court ultimately reached. In this regard, the dissenting opinion—written by Justice Sutherland—is particularly instructive. Sutherland was adamant that the historical form of argument was decisive in answering the question of the constitutionality of the Minnesota statute. In constructing the meaning of the Constitution, Justice Sutherland argued: "[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."[77] Constitutional interpretation is a matter of "plac[ing] ourselves in the condition of those who framed and adopted it."[78] Doing so, Sutherland maintained, "will demonstrate conclusively

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75. *Id*. at 426.
76. *Id*. at 427–28.
77. *Id*. at 453 (Sutherland, J., dissenting) (citing Lake County v. Rollins, 130 U.S. 662, 670 (1889)).
78. *Id*. (Sutherland, J., dissenting) (citing *Ex parte* Bain, 121 U.S. 1, 12 (1887).

that [the Contract Clause] was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress."[79]

The weight of history, so thoroughly recited by Justice Sutherland in dissent, meant that the majority opinion had to persuade on some basis other than history. For this, Chief Justice Hughes employed a variety of forms of argument to show why the Minnesota statute survived constitutional challenge. His primary arguments were two: doctrinal and prudential. First, ample precedent exists for the proposition that "the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations, by a temporary and conditional restraint, where vital public interests would otherwise suffer." [80] The example Hughes provided was a series of New York cases where the state extended the periods for residential leases during a housing crisis as long as current residents paid "a reasonable rent or price for their use and occupation."[81] These cases set the stage for the majority's most important argument: the prudential argument.

Finding an emergency existing in Minnesota, the Court granted that the end sought by the State is worthy of protection. But the key question was the means. Could the Court have found that the end of "protection of a basic interest of society"[82] could be accomplished without compromising the Court's obligation to state the law and not remake it according to its own lights? Having recited a variety of considerations—historical, doctrinal, and prudential—Chief Justice Hughes drew the opinion to a conclusive end.

Taking judicial notice of the emergency condition in Minnesota, the majority concluded that the statute was addressed to a legitimate end (that is, it was within the police power). Now Hughes needed to persuade that the end sought is legitimate, and that the means employed to achieve that end was constitutionally permissible. His argument is an entirely prudential one. First, he noted that the period of time for extension of the period of redemption was not unreasonable. Second, the integrity of

79. *Id*. (Sutherland, J., dissenting). Further bolstering his point, Sutherland recited a number of nineteenth and twentieth century Supreme Court precedents where the Court found debtor relief statutes unconstitutional. *Id*. at 465–66 (Sutherland, J., dissenting).

80. *Id*. at 440. This situation, according to the Court, involved debtor relief and leases in the context of scarce housing. *See id*. at 440–43.

81. *Id*. at 440–41.

82. *Id*. at 445.

the mortgage interest was in no way impaired. Third, the mortgagor was required to pay the rental value of the land, which amount was added to the indebtedness. Finally, the legislation was temporary, limited to the period of the exigency.

Chief Justice Hughes' opinion is a model of the interpretive principle of minimal mutilation. Once it had concluded that the police power was legitimate, the majority had to decide whether the exercise of that power could be accomplished in a way that recognized the power of both the textual and historical arguments that were at the center of the dissent. The success of the majority's interpretive argument turned on its ability to cabin the ill effects of trampling the clear language of the Contracts Clause. The majority's appreciation of this was evident in its attempt to emphasize the existence of a unique emergency situation and the very limited scope of the remedy that the decision afforded the respondents.

V. CONCLUSION

Law is a practice of argument. In the day to day practice of law, legal questions often admit of one right answer. Philosophy clarifies the practice of law when it engenders a clear view of the grammar of legal argument—the techniques employed by lawyers to settle disputed questions within a shared, conventional practice.[83]

The forms of argument are a central feature of the practice of law. But the forms of legal argument do not answer the question of what is to be done when they conflict, thereby engendering the need for interpretation. For this, we need to illuminate how it is that lawyers interpret the law when the forms of argument pull in opposing directions.

The forms of argument are immanent in the practice of law. As we have seen, the same is true of interpretation. The principles of minimal mutilation, coherence and generality are the hermeneutic tools of legal interpretation. In bringing these interpretive principles to light, it has not been my purpose to argue for a particular theory of interpretation. Rather, my aim has been to clarify what we already know and obtain a clearer view of what we do when, perforce, we interpret the law.

Clarity with respect to interpretation in law engenders a deeper understanding of the role of argument in law. Interpretation in law has purpose only because the possibility exists that we can persuade others

83. Or, as Jules Coleman puts it: "playing the game 'law'." COLEMAN, *supra* note 20, at 143. *See also* CONSTITUTIONAL INTERPRETATION, *supra* note 24, at 34 ("[I]f you believe the holdings of a court, insofar as they are constructions of the Constitution, are not statements about the world, but are moves within a serious game, movements as practised [sic] as any classical ballet and yet no less contingent, then reductionism is out of the question.").

to embrace our interpretations and that we are, ourselves, likewise capable of being persuaded. Interpretation, while not foundational, is certainly essential; without it, we could not preserve the common fabric of beliefs and dispositions that make law possible.