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An Interpretivist Agenda

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AN INTERPRETIVIST AGENDA

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As I write these words, bevies of law clerks assigned to cases involving the Bill of Rights are dutifully editing their bench memos for publication in the national reporter system. Once printed, these bench memos will be solemnly treated by lawyers, scholars, other law clerks, and the occasional judge who runs across them as legally significant, or even binding, interpretations of the Constitution. Two features of this burgeoning mass of otherwise unpublishable law review comments bear mention. First, most of them are tedious, tendentious, pretentious, and badly reasoned when reasoned at all, just as one would expect from authors who are one or two years out of law school.[1] Second, many, if not most, of these law clerk opinions bear no visible relationship to the actual words of the Bill of Rights. In fact, it is possible to find opinions purportedly applying the Bill of Rights that never deem it necessary to quote the amendments supposedly at issue.[2]

Those who embrace a stodgy, wooden, and formalistic approach to interpreting the Constitution tend to find this latter state of affairs at best peculiar, and at worst pathetic. But while I yield to no one in the stodginess, woodenness, and formalism departments, I am nervous about leaping to such a conclusion too quickly. Interpretivists still need to do some serious reflecting on the source of and justification for our distress over the state of constitutional interpretation.

To some extent that process of reflection is underway and has already borne fruit. Witness, for example, the almost total substitution in the past half-decade of the principle of original

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1. I do not mean to suggest that the clerks' employers, if left to their own devices, are not equally capable of producing opinions that are tedious, tendentious, pretentious, and badly reasoned when reasoned at all. I maintain only that law clerks will almost inevitably do so.

2. Upon examination, it turns out to be more possible than I had ever imagined. During the October 1986 term, which I selected as a test period, the Supreme Court decided fifty-four cases involving interpretation of the Bill of Rights, either directly or via incorporation. According to my very quick and no doubt wildly unreliable count, in thirty-four of those cases the majority or plurality opinion did not quote a single word of any of the supposedly relevant constitutional provisions. A few of these opinions gave tolerably accurate paraphrases of the amendments in question, but the overall figures seem startling, even to me.

meaning for the far less defensible principle of original intent—a substitution that probably would have taken much longer if not for the efforts of certain friends and members of the Federalist Society who recognized the need for re-examination of what had long been accepted as gospel.[3] But although interpretivist thinking and scholarship have grown in sophistication in recent years, a substantial research program remains uncompleted. Specifically, interpretivists who are unhappy with the work product of our nation's Article III law clerks need to do serious work on each of the three major problems of constitutional theory, which I unimaginatively call the problem of interpretation, the problem of justification, and the problem of precedent. First, exactly how do you determine whether judicial interpretations are consistent with the Constitution? Second, why should anyone care whether judicial interpretations are consistent with the Constitution? Finally, assuming that you can identify inconsistent interpretations about which you should care, how should they be dealt with? Mercifully, I have no intention of solving these problems here,[4] but I do want to sketch out the research agenda these problems generate for interpretivists.

Let us begin with the problem of interpretation. Interpretivists, as noted above, have made much progress in this area by shifting their focus from a search for original intent—that is, for the subjective meanings held by particular Framers or ratifiers—to a search for original meaning—that is, for the public understandings of the words used in the relevant documents. Arguing for the primacy of original meaning, however, only addresses one-half of the problem of interpretation.[5] To illustrate this point, consider the proof of a simple fact at trial: Was the

3. The contributions to this interpretative revolution made by such figures as Robert Bork, Edwin Meese, and Antonin Scalia are well known, at least to Federalist Society members. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1989); Speech of Attorney General Edwin Meese III (July 9, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1 (Federalist Society 1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989). Less well known, but equally deserving of acknowledgement, are the largely unrecorded efforts of people like Steve Calabresi, John Harrison, and Lee Liberman.

4. For what it is worth, I am presently in the process of solving the first problem, but I would gladly accept some help with the latter two. *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. (forthcoming 1992).

5. Indeed, it only addresses one-third of the problem if "original" and "meaning" are in fact separable concepts that require separate justifications. *See* Gary Lawson, *In Praise of Woodenness*, 11 GEO. MASON U. L. REV. 21, 22 n.8 (1988).

defendant wearing a blue suit? The law has an elaborate set of rules, the familiar rules of evidence, that tell us which things are permitted to count for and against any particular answer to that question. A theory of interpretation serves, *inter alia*, the same function in determining the meaning of legal texts as do the rules of evidence in determining the legal truth of factual propositions.[6] That is, your theory of interpretation tells you what to look for, what is admissible, in determining the truth value of any proposition about a given text.[7] For example, interpretivism tells you to look for constitutional answers in the document's text, structure, and history; noninterpretivism might tell you instead to look for answers in the collected speeches of Senator Howard Metzenbaum. In either case, the theory of interpretation dictates the nature of the inquiry.

But having a theory of interpretation, like having rules of evidence, does not by itself yield answers to particular questions. You also need to know *how much* of whatever your guiding theory tells you to look for you must find before you can establish that an interpretation is correct or that a fact has been proven. For example, in the case of the allegedly blue-suited defendant, precisely the same evidence admitted pursuant to precisely the same rules of evidence can yield different legal conclusions in civil and criminal trials, because the quantum of admissible evidence needed to prove factual propositions differs in the two contexts. Similarly, it is not enough to have a theory of interpretation that tells you to look for the public meaning of words in a text and that tells you what to count as evidence of that public meaning; you also need to know *how much* evidence of that public meaning is necessary before you can say that the meaning of the text has been established.[8] Everyone, interpretivists and noninterpretivists alike, must address this problem; to my knowledge, however, no systematic treatment of it has been attempted. Until there is an answer, interpretivism, and probably every other interpretative theory, is radically incomplete.

6. Legal truth is not necessarily metaphysical, or ontological, truth. For a variety of policy reasons, the rules of evidence can and do tell you not to consider evidence that is in fact probative.

7. A theory of interpretation may also do *more* by telling you not only what evidence is admissible, but also how much weight to attach to the evidence. At the very least, however, it serves this admissibility-screening function.

8. The answer to the "how much" question can be explicit or implicit, absolute or comparative, cardinal or ordinal; but there *must* be an answer.

Once the interpretative problem has been solved and you can confidently declare that "the meaning" of a particular constitutional provision is "X," the next question is whether anyone in particular, such as a judge or a law clerk, should care about that meaning. This question is not trivial. If interpretivism is the correct theory of constitutional interpretation, as I think it is, then interpretivists can fairly say that if you want to interpret and apply the Constitution, you must, as a matter of instrumental morality, use interpretivism. That conclusion leaves unexplained, however, why interpreting and applying the Constitution is a desirable goal.

The standard response is to invoke some process-based theory of authority, which usually amounts to a variant of "the consent of the governed" theme: The Constitution as written is what "the people" ratified, so shut up and apply it. Arguments of this kind, however, simply do not work. They did not work for Socrates; they did not work for John Locke; and they will not work for interpretivists.[9] Interestingly, the demise of intentionalism may serve to make the gaps in the standard normative case for interpretivism more evident than before. If you believe in some kind of contractual, consent-based theory of constitutional justification, then it makes sense to look to the intentions of those persons who did the consenting—in this case a relatively small group of Framers and ratifiers acting pursuant to an assumed, if patently nonexistent, delegation of authority. In other words, a "consent of the governed" theory of justification makes traditional intentionalism look more attractive than it really is as a theory of interpretation. Once intentionalism is jettisoned, it becomes easier to lead people back up the logical chain to reexamine the soundness of the underlying theory of justification.

This point bears emphasis: To say that interpretivism is the correct way to ascertain the meaning of the Constitution by itself says nothing about how public officials should make decisions. I do think that there are persuasive arguments for why the Constitution should be considered binding on government officials, but those arguments, which involve a mixture of substantive political theory and rule-of-law process concerns, have

9. The problem with tacit consent is that it is almost always about one hundred parts tacit to one part consent.

yet to be developed.[10]

Finally, assuming that we can confidently say that a particular judicial interpretation is inconsistent with the Constitution and that consistency with the Constitution is a desirable goal for judicial interpretation, the problem of what to do with the incorrect interpretations that fill the pages of the national reporters still remains. As far as federal courts are concerned, the problem of precedent seems to lend itself to textual analysis. Article III vests "the judicial Power . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[11] The question for interpretivists is therefore straightforward: In 1789, did "the judicial Power" include the power to decide cases in accordance with prior decisions, even when those prior decisions contradict the text of the Constitution or a statute, and if so, to what extent and under what circumstances? Although I may not know the answer, I am quite certain that this is the correct question.[12] Of course, even answering this question does not necessarily tell us how state courts or other government officials ought to treat federal court precedents, but three problems are probably enough for now.

10. Randy Barnett has taken the first steps towards developing such a theory. *See* Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988). I have some serious reservations about Professor Barnett's analysis, but he is asking the right questions.

11. U.S. CONST. art. III, § 1.

12. *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 870 n.91 (1990).