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### Recommended Citation

Michael Moore, *Originalist Theories of Constitutional Interpretation*, 73 Cornell L. Rev. 364 (1988)  
Available at: <http://scholarship.law.cornell.edu/clr/vol73/iss2/15>

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# ORIGINALIST THEORIES OF CONSTITUTIONAL INTERPRETATION

*Michael Moore* †

When I first received the invitation to this conference, the letter had a text in it that included the following sentence: “Each speaker will give a ten minute talk.” Now, I construed the word “will” to be “should” and took this to be a normative injunction. One of the things in which I have been interested as I have listened to my preceding panelists is how they interpret, by their actions, this authoritative text. One of the framers of this letter came up to me before the talk, and said, “We meant what we said.” So both the plain meaning of the text and the framer’s intent here point to the same result, namely, a ten minute talk. Nonetheless, I thought all of the speakers did something quite sensible. The only problem is that what they did is not consistent with their professed originalist theories of interpretation, whether of an intentionalist or a textualist kind. What they did was construe the language of the authoritative text by what they took to be some underlying purposes behind it—presumably a balance of the amount of time needed in order to gain some understanding of their theories, versus the competing purpose of allowing others some time too, as well as the audience, balanced yet again by the fact that those who came later would like to have equal chance as those who were earlier—all of that together leading to an interpretation allowing each a range of roughly fifteen to twenty-five minutes apiece. The evidence was very clear what the intentions were on this issue—we have the framers here and they are telling us—and the text is equally plain. Despite this, no one interpreted the text in a plain meaning or intentionalist way.

Aside from illustrating that originalists about interpretation do not find it desirable to practice what they preach, the point the example makes is that there is a larger debate about interpretation of which the topic for this panel is only a small part. This panel is to focus on the debate between those who want to interpret the Constitution by its text—and you have to say something about what text is—and those who want to interpret it by the intentions with which that text was authoritatively uttered—what is called intentionalist interpretation. Notice that both text and intent are part of Charles

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Fried's "janitorial tools" because they are both tools designed to keep interpretation value-free, either as a matter of linguistic fact (plain meaning) or as a matter of psychological fact (intent). Non-janitorial tools for interpretation include precedent, the purposes behind a rule (meaning purpose in the sense of function not in the sense of intention), and also some general principles that run throughout the law. The larger debate between value-free and non-value-free interpretive theories is not what we are addressing on this panel, but it is important to remember the larger setting in which this panel's discussion takes place.

Let me then talk about the specific debate between intentionalists and textualists. What textualism is, what intentionalism is, and how you might argue for one or the other in some combination against more value-laden theories, can only be seen if we abandon Fried's "janitorial tasks" and do some philosophy. First of all, what is intentionalism? Well, I am afraid Raoul Berger's "old-time religion"—intentionalist interpretation—is badly fractionated. There is not just one kind of intentionalism. Any speaker, including a constitutional speaker, might have two quite different kinds of intentions. First of all, they might have what I have elsewhere called semantic intentions. These are intentions to fix the meaning of a word in a certain way, either by examples that the speaker pictures, or by definitions that the speaker has in mind. Second, a speaker might have a consequence of uttering the word which he or she would like to see achieved by making the utterance that is made. This intended consequence is usually called the purpose of the rule in which the word appears. Those two intentions are not the same thing. Raoul Berger actually mentioned both in the same breath. Those are quite different. If I use the word "vehicle" as I author some legal text, I might intend to fix its meaning by an intended exemplar, such as "blue Ford sitting in front of me." Alternatively, I might have in mind a general consequence I hope to achieve by uttering the word "vehicle" in the authoritative text I am writing (for example, keeping peace in the park, if the rule in which the word appears is, "no vehicles in the park").

There are not only two quite different intentions by which one can interpret a text, there are also quite different levels of force one might give to either such intention in one's overall theory of interpretation. First, there is Judge Bork's position, which is that you must have an intended exemplar from the framers of the Constitution that includes the statute under review in order to overturn that statute. That is to say that the intended exemplar is not only *sufficient* for constitutional interpretation but also *necessary*. A second and more sensible version of intentionalism would be one according

to which it is not necessary to have a particular intention in order to overturn the statute, but if there is such an intention, it is sufficient. And a number of people who would talk about intentionalism have that in mind. A third, even more sensible version of intentionalism would be one according to which it is neither necessary nor sufficient for judicial review that there be an historical intention; it is simply relevant, along with other items to be put into an overall interpretive theory. Under one interpretation—at least of his earlier work—that is Ronald Dworkin's position about how to use certain of the publicly expressed intentions of the framers of legal texts.

Textualism too is badly fractionated as a theory of interpretation. What is it to look at a text? Well, the first question is, what do you think the meaning of a text is? And here you have to leave Fried's janitorial school and do some philosophy of language. Here you have to ask yourself what sort of meaning theory you have in mind when you talk about the meaning of a word or the meaning of a sentence? Very, very generally, I think there are two sorts of meaning theories. First, there are meaning theories that resort to the conventions of the linguistic community that fix (either by paradigm example or by definition) the class of things referred to by a word. Second, there are nonconventionalist theories that say that language picks out items that exist in the world prior to human convention; on such theories, the meaning of the term is given by the nature of the thing to which the word refers. Such nature is not a matter of convention but a matter of how the world stands. These are two very different notions of meaning, with very different impacts on originalist arguments such as Mr. Berger's. Berger wants to argue that you change the meaning every time you disregard an author's intention or the linguistic conventions in place at the time the author spoke. Yet depending on what meaning is, that might not be the case at all. If meaning is the second of the two alternatives, you do not change the meaning of a word when you change your theory about the nature of the thing to which the word refers. Was there a change in meaning when we found out that whales were not cold-blooded fish, but warm-blooded mammals? Or did we mean the same by the word "whale" as those who used the word before but had a very different theory as to the nature of its referents?

As with intentions, there are not only two different kinds of textualisms because there are two different sorts of theories of meaning; here also there is a good deal of variation as to how much force theorists want to give to the meaning, whatever it is, of the text. Some textualists urge that under a stringent plain meaning rule, wherever the meaning of some constitutional text is plain, that is both sufficient and also necessary to overturn a statute; whereas

where the constitutional text's meaning is not plain, the statute survives. A second and somewhat more sensible possibility would be to say that if the meaning of some constitutional provision is plain, that is sufficient to overturn the statute. But on this view, such plain meaning is not necessary for the exercise of judicial review: even in the penumbra (where meaning is not plain) you might overturn the statute by relying on some interpretive technique other than plain meaning. Third, and even more sensible yet, one could urge that you always look for the ordinary meaning of constitutional language, that it is always the place you start in constitutional interpretation, even though it is neither necessary nor sufficient for the exercise of judicial review that the meaning be plain. I myself have defended this last version of textualism, calling it a natural law theory of interpretation.

So much for clarification of the kinds of intentionalism and textualism that exists. With respect to the distinctness of textualism and intentionalism from each other, there is an unfortunate tendency for people who call themselves intentionalists to want to bring to their own theory the normative power of the text, as if the plain meaning of the text were part of the intentions such theorists defend. I think Mr. Berger's quotation from John Selden is of that character. When Selden says that you have to figure out what the author meant in order to figure out what he said, he is just wrong. You do not have the power to make words mean anything but what they already mean. What *you* can mean by them is a function of your intention. Thus, you can mean by your words anything you like. I can say, "gleeg, gleeg, gleeg," and mean that it is snowing in Tibet. There is nothing wrong—other than a kind of irrationality in thinking that my audience would understand me—in saying "gleeg, gleeg, gleeg," with that as my intention. But what I mean by those words is irrelevant to what the words mean; their meaning (or the absence of it) is untouched by my intention. So there is a difference between what is meant and what is said, and one does not want to collapse the two.

Leaving now the analytic distinction between intentionalism versus textualism, what is wrong with intentionalism as a theory of constitutional interpretation? There are two kinds of arguments against intentionalism, and I think you have heard both today and both are in the literature. One is a possibility argument: you could not possibly find the framers' intentions, even if you wanted to; since you cannot do it, you ought not do it, completes this kind of argument. The second sort of argument is: even if you could find it, you should not try to.

Since I have just been handed a reminder of the ten minute

rule, and although I am not an intentionalist interpreter, let me very quickly look at the second kind of argument against intentionalism. One such argument stems from a fear of judicial power. Another argument is the historical argument that Mr. Berger has made, which is that the framers intended that we interpret the Constitution by reference to their intentions; this historical argument presupposes that we care what the framers intended about how we should take their intentions.

For brevity, let us put aside both of these arguments and ask what I regard as the basic question here: as a matter of political theory, what makes the constitutional text authoritative for us? Do you adopt the kind of political theory about constitution-making that Mike McConnell was adopting, namely, that there is a consent theory that justifies the text's authority? Or do you adopt some other kind of theory as to why that text is authoritative for 20th-Century Americans? Suppose you take the consent theory; that does not answer yet the question of *what* it is that was consented to. And to use an argument at least as old as Justice Story: if you want to know what it is that has the consent of the governed, look to what was *said* by the people or their representatives, not what was meant (intended).

There is a very good example of that in Mr. Berger's most recent reply to Powell about framers' intent. It seems that there was a debate about a national bank amongst the framers, including Hamilton. Since the text—the necessary and proper clause—does not speak one way or the other on the issue, the question for Berger is whether or not there was an intention about the bank. Well, it was the case, apparently, that with regard to corporate charters for a canal, there had been an eight to three rejection. Mr. Berger sees this rejection as an expression of an intention that should bind subsequent interpretations of the necessary and proper clause, including application of that clause to the legitimacy of a national bank. Yet I would not see it that way at all. What Mr. Berger's history shows is that the people who did have this opposition did not have the clout to put it one way or the other into the language of Constitution. What they actually thought, apparently, was that it was too controversial and thus they would not put it in. But is not that a perfectly good reason to say the intent of those eight people who voted against canal charters does not count for anything as the choice of all of those people who voted for the Constitution? If one cares about what was really consented to, why not look to what in fact you know was voted on, which is the text, rather than what you only suppose might have been secretly intended, but did not in fact have the votes to get into the text?

Let me close by adverting briefly to the kind of intentionalism that even Bob Bennett shares with Raoul Berger. This is the intentionalism of particular exemplars: if an authoritative speaker had an exemplar in mind when he wrote constitutional language, then you the interpreter ought to use that at least as a starting point for your interpretation. Four critical points: first of all, when you use language, how often do you think of intended exemplars? When the letter used the phrase, "speak for ten minutes," was there a pictured exemplar of a particular person—Judge Posner?—sitting down at the end of ten minutes? The fact of the matter is that when you use language you rarely have such pictured exemplars of anything. It is the case, once in a while, that you do, and arguably the fourteenth amendment equal protection clause had one, the black codes of the South, but those are very rare.

Second point: suppose that in fact there is one; why would you think that such an exemplar is supposed to give the meaning of the word? In ordinary speech you do not have the interpretive intent that Raoul Berger ascribes to the framers; you do not have an intent that your pictured exemplars fix the meaning of your words. If I utter the word "vehicle" and happen to be picturing a blue Ford, I certainly do not intend that class of things only to include that Ford, nor do I intend people to use the Ford as a paradigm example (*a la* Bob Bennett) and reason by analogy. Third point: If you had intended exemplars and even if they were intended by you to fix the meaning of the words you used, you have to ask yourself whether an interpreter of your words can infer anything else about what you intended? We are going to go to lunch shortly and I intend, if they have a salad, to eat the salad that ends up in front of me. If this lunch is as I expect it to be, your salad—all of yours—is going to be very much like my salad. That does not mean that, because I intend to eat my salad, I also intend to eat your salad. If that were true, I would intend to eat all the salads, and that is not my intention. So what you have to argue, fourth, is what Bob Bennett wants to argue, which is this: because I intend to eat my salad, you then have to analogize your salad to my salad in order to decide whether your salad should be included within the class term, "salad." And that, as he recognizes, is not itself to infer other intentions that I had, because I had an intention only with respect to my salad. So you have to argue by analogy, based on some similarity between my intended exemplar and other salads. Yet there is no relation called similarity that is itself primitive. Similarity is parasitic on there being specific properties by virtue of which one thing is like another. What is the property that makes other salads *like* my salad? Well, unless the rule's context suggests some other property, I would say, they share

the property of being salads. In which event, you are interpreting, not by the intended exemplar (my salad), but by the ordinary meaning of the word, "salad." What is a salad? Well, figure it out, but my intention about the starting example will not help you at all.