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Paul F. Campos
University of Colorado Law School

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A TEXT IS JUST A TEXT

PAUL F. CAMPOS*

In this Article, I will mean by "originalism" the claim that one *should* interpret legal texts in general, and the Constitution in particular, by determining the semantic intentions of the text's author(s). What I wish to explore here are some of the implications for originalism of an argument that I have elsewhere called "strong intentionalism."[1] Strong intentionalism asserts that any interpretation of a text that really is an *interpretation* of that text is a reading of that text; that the reading of a text is always the act of determining the semantic intentions of the text's author; and that those intentions and the text's semantic meaning are identical. Discovering what an author intended to say is simply identical to determining successfully what the author in fact said, which is to say that in matters of textual interpretation, textual meaning and authorial intention are the same thing.

After years of considering the nature of interpretation, these claims seem to me not merely correct, but almost embarrassingly obvious. Still, I recognize that within the overheated world of academic arguments regarding constitutional meaning this is not exactly a popular view.[2] So let me illustrate the claims with an example that may strike the reader as rather profane in this constitutionalized context, but whose very profanity has a point. Suppose my wife gives me a grocery list that instantiates a domestic *grundnorm* obligating me to purchase the list's contents by that evening. The list reads in part, "Vegetarian chili—pinto beans, chili powder, Spanish onions, and various appropriate vegetables." I stand amid the dazzling plenitude of an American supermarket's produce section and ponder: does this text authorize or perhaps even require the purchase of tomatoes?

We can, of course, imagine various approaches to this interpretive conundrum. An analytical philosopher, or a Seventh Circuit judge, might well conclude that the situation called for an objec-

* Associate Professor, University of Colorado School of Law

1. For an elaboration of the argument, see Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993) [hereinafter *Obscure Object*]; and Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279 (1992).

2. Indeed, one recent commentator has suggested that "originalism . . . now has no serious defenders in the [legal] academy." Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087 (1992).

tive methodology—that my interpretive search should not be for the mental contents of my wife's head, but rather for the formal rules of language she used.[3] A Gadamerian hermeneutician would probably recommend that I forget about my wife altogether, and engage in a dialogic discourse with the text itself until, ideally, the grocery list and I reach a fusion of interpretive horizons that allows our respective world views to be reconciled through an Aristotelian exercise of practical reason.[4] Those devoted to Rawlsian principles would doubtless insist that I make the grocery list the best grocery list it can be—that I deploy the best available political theory sometime before reaching the checkout counter.

These are all fascinating suggestions, but they share a common deficiency. It is this: if I am *interpreting* what this grocery list has to say about tomatoes, then I am attempting to determine if my wife meant tomatoes when she wrote "various appropriate vegetables," and nothing more. Contrary to the claims of linguistic formalists, hermeneuticians, deconstructionists, and theoretically-minded law professors, there is nothing particularly mysterious or metaphysically challenging about this activity. It is called "reading," and indeed every author of every text assumes implicitly that it is possible. Thus if I am asking a question about a text's meaning, I am asking what the author of the text meant to say, for the simple reason that that is the only meaning the text has or could have.

Now as the examples above illustrate, there are literally an infinite number of other sorts of questions that one can ask about a text. We can ask, what should this text mean? Or, what would this text mean if it had been written by someone else? Or, what would it mean if its author knew what we know, or believed what we believe? And so forth. But these are not questions about what the text means. They are questions about what the text does not mean. They are, in a word, counterfactuals. They are not questions about textual interpretation, but rather questions about another text—a text that does not exist unless and until it is brought into being by some activity that itself is not interpretation.

3. *Cf. In re* Sinclair 870 F.2d 1340, 1342 (7th Cir. 1989) (Easterbrook, J.) (describing the use of such a search as an appropriate method of interpreting legislative history).

4. *See Obscure Object, supra* note 1, at 1071-72.

So in a descriptive sense, originalism is absolutely correct. Indeed, it is not merely that legal actors *should* interpret legal texts by attempting to determine the intentions of the texts' authors—strong intentionalism asserts that the interpreters of any kind of text cannot possibly be doing anything else.[5] But before defenders of legal originalism declare total intellectual victory, I would like to note three important limitations to the strong intentionalist position.

First, originalism properly understood has no methodological value. The insight that the meaning of a text is identical to its author's intention does not help the interpreter determine how to go about ascertaining the meaning of any particular text. Whatever methods the interpreter may choose to employ—consulting the author, reviewing certain documents, investigating contemporaneous uses of the same terms—may or may not prove helpful in any particular interpretive situation. That James Madison or John Bingham thought or did not think something concerning some constitutional provision might be useful to know; on the other hand, such information could turn out to be quite misleading. Such is the nature of all historical, which is to say all empirical, inquiry. How then can we be certain what a constitutional provision, or any other text, actually means? The answer, of course, is that we cannot. We can, however, be confident *enough* in our interpretations—close enough, that is, for our practical interpretive purposes.

Second, an originalist understanding of what interpretation must be is not itself a theory of political obligation. The claim that legal actors should interpret texts, as opposed to deploying them in some other fashion, is a normative claim about which originalism in the descriptive sense has nothing to say. Now it seems to me that a great deal of the debate concerning constitutional interpretation, both in and out of the academy, tends to degenerate into a sort of argument by definitional fiat, in which each faction shouts at the top of its collective voice that its preferred approach to the controversy is nothing less than "law," while characterizing its opponents' claims as politically motivated, frighteningly radical, or fundamentally unprincipled—

5. As Stanley Fish puts it, "there is only one style of interpretation — the intentional style — and . . . one is engaging in it even when one is not self-consciously paying 'attention to intention.'" Stanley Fish, *Play of Surfaces: Theory and the Law, in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 297, 299 (1992).

and therefore "lawless."[6] Given that in our present legal culture it is becoming extremely difficult to make out what someone does or does not mean when he claims that something is "law," these arguments have about them a rich air of unreality. In such a confused interpretive situation pointing out that a text only means what its author meant by it can have, perhaps, some clarificatory value; it cannot, however, resolve debates that in the end have very little to do with questions of textual interpretation.

Third, those who advocate a normative originalism need to keep in mind that a text is just a text—which is to say that a text's limitations are inevitably and precisely those of its author. Consider again my wife's hypothetical grocery list. Obviously, a grocery list is not a constitution. But in an important sense, a constitution—at least *our* Constitution—is not *not* a grocery list. If we dispense with various forms of what my colleague Steve Smith has termed constitutional idolatry, the Constitution is in most ways a fairly prosaic text.[7] Despite the obscurantist theology of modern judicial review, the Constitution's text is not full of nebulous generalities calling out for interpretive solidification at the hands of berobed jurisprudential philosophers and their academic hangers-on. In comparative literary terms it is in many ways a thoroughly quotidian document, full of specific compromises addressed to the local politics of various quite particularized disputes. Given this, originalists must ask themselves what sort of semantic artifact would even be capable of serving as the enabling entity for an interpretive practice whereby a centuries-old text would actually provide answers to the contingent controversies of the present moment. I will conclude by speculating on that very question.

In the second volume of his epic fantasy *The Lord of the Rings*, the philologist J.R.R. Tolkien imagines a race of tree-like creatures called Ents. The Ents are a sort of animated forest, and their language reflects centuries of unhurried sylvan contemplation. In the following passage, their leader Treebeard gives some hint of its form:

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6. *Compare* Ronald Dworkin, *The Bork Nomination*, N.Y. REV. BOOKS, Aug. 13, 1987, at 3, 6-10 (arguing that Bork's view of original intent is inconsistent and that Bork's "constitutional philosophy is empty . . . no philosophy at all") *with* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 176-78 (1990) (arguing that the philosophy of original understanding requires a political neutrality that would mark the end of liberal outcomes "legislated [by the Court] in the name of the Constitution")

7. *See* Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583 (1993).

> 'I am not going to tell you *my* name, not yet at any rate. . . . For one thing it would take a long while: my name is growing all the time, and I've lived a very long, long time; so *my* name is like a story. Real names tell you the story of the things they belong to in my language, in the Old Entish as you might say. It is a lovely language, but it takes a very long time to say anything in it, because we do not say anything in it, unless it is worth taking a long time to say, and to listen to.
>
> . . . .
>
> . . . 'Let us leave this—did you say what you call it?'
>
> 'Hill?' suggested Pippen. . . .
>
> Treebeard repeated the word thoughtfully. '*Hill.* Yes, that was it. But it is a hasty word for a thing that has stood here ever since this part of the world was shaped. . . .'[8]

A similar semantic idea is explored by several of the early modern philosophers, including Descartes, Leibnitz, and Locke. These thinkers imagined the possibility of a comprehensive analytical language that would organize and contain nothing less than all human thought. Perhaps the most ambitious of these grand linguistic schemes was developed by the now-forgotten English polymath John Wilkins.[9] Wilkins's procedure involved dividing the universe into forty categories, called classes. These in turn were subdivisible into differences, which were themselves divided into species. Each class was then assigned a monosyllable consisting of two letters; each difference was represented by a consonant, and each species by a vowel. Thus *de* means element; *deb* is the first of the elements, which is of course fire; while *deba* is a portion of that element, the flame. As Jorge Luis Borges notes:

> The word salmon does not tell us anything about the object it represents; 'zana,' the corresponding word [in Wilkins's scheme] defines (for the person versed in the forty categories and the classes of those categories) a scaly river fish with reddish flesh.[10]

Characteristically, Borges adds that "a language in which the name of each being would indicate all the details of its destiny, past and future, is not inconceivable."[11]

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8. J.R.R. TOLKIEN, THE TWO TOWERS 68-69 (Houghton Mifflin Co. 1954).

9. *See* JOHN WILKINS, AN ESSAY TOWARDS A REAL CHARACTER AND A PHILOSOPHICAL LANGUAGE (1668).

10. Jorge L. Borges, *The Analytical Language of John Wilkins, in* BORGES, A READER: A SELECTION FROM THE WRITINGS OF JORGE LUIS BORGES 141, 143 (Emir R. Monegal & Alastair Reid eds., 1981).

11. *Id.*

Perhaps inspired by this example, Borges himself exploited the idea of a total language in several of his labyrinthine fables, most notably in the tale *Funes the Memorious*, in which a Uruguayan peasant boy, Ireneo Funes, suffers a crippling accident that leaves him—inhuman, godlike—with an absolutely perfect memory.

> He knew by heart the forms of the southern clouds at dawn on the 30th of April, 1882, and could compare them in his memory with the mottled streaks on a book in Spanish binding he had seen only once and with the outlines of the foam raised by an oar in the Rio Negro the night before the Quebracho uprising. . . . Locke in the seventeenth century, postulated (and rejected) an impossible language in which each individual thing, each stone, each bird, each branch, would have its own name; Funes once projected an analogous language, but discarded it because it seemed too general to him, too ambiguous. In fact, Funes remembered not only every leaf of every tree of every wood, but also every one of the times he had perceived or imagined it . . . . He was . . . almost incapable of ideas of a general, Platonic sort. Not only was it difficult for him to comprehend that the generic symbol *dog* embraces so many unlike individuals of diverse size and form; it bothered him that the dog at three fourteen (seen from the side) should have the same name as the dog at three fifteen (seen from the front).[12]

Behind each of these visions of a total semantic code is an appreciation of the absurd pretentions of our own fallible languages. We should remember that to name something is in some sense to claim to know what it is—to know its significance. Indeed, these dreams of verbal utopias remind us that to signify accurately would require that we know, like Adam in his prelapsarian garden, what our universe is—for every thing we name implies the otherness and thus the identity of everything else from which the act of signification distinguishes the thing signified.

If we believe that an accurate interpretation of the Constitution's text vindicates anything remotely resembling the results of the modern practice of judicial review, we must assume that the object of interpretation is written in some hermetic code that mimics the total languages in which divinities undoubtedly converse. Perhaps those who believe themselves committed both to a thoroughgoing originalism and to what is called "constitutional

12. Jorge L. Borges, *Funes the Memorious*, *in* LABYRINTHS, SELECTED STORIES & OTHER WRITINGS 59, 63, 65 (Donald A. Yates & James E. Irby eds., 1964).

law" should try to imagine how successful we would be if it were our task to produce a text that would do what we demand of the Constitution, or more precisely, of its problematic authors. Could we generate a legal code that would *in fact* answer whatever unimaginable questions the inhabitants of that undiscovered country which is the Twenty-Third Century might ask of it? To believe that our constitutional text answers such questions today is to assert that its omniscient authors foresaw analogous complexities, and that they encoded within that text's capacious signifiers a secret discourse revealing all they knew—and all we need to know—of what was past, or passing, or to come.