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Three Mistakes About Interpretation

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CORRESPONDENCE

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The single most important word in modern constitutional theory is "interpretation." The single most confusing word in modern constitutional theory is "interpretation." What accounts for this unhappy state of affairs?

The following passage appears in Barry Friedman's recent contribution to the unending debate concerning the legitimacy of judicial review:

> The Constitution has evolved far more outside Article V than within it. Interpretations of constitutional clauses have undergone sea changes from generation to generation, far outstripping the consequence of many explicitly worded amendments. Obvious examples abound: the Commerce Clause, the Contracts Clause, the Fourth Amendment, the Equal Protection Clause, and so on. One seriously wonders if the Constitution would have endured absent language spacious enough to accommodate such change.
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> Because the Constitution is spacious, no single offered interpretation of the text is likely to be accepted as correct now and for all time. . . . As disagreement occurs, the document will take on new meanings.
>
> Nor is the lack of finality necessarily a bad thing. . . . In reality, the process of constitutional interpretation is dynamic, not static. . . . Moreover, such dynamism is critical to the success of the venture. Judges too are human, and judges get things wrong. . . .
>
> Finality would curtail the evolution of our Constitution; dynamism encourages it. Constitutional meaning changes because people disagree about what the text means. Dynamism is to be encouraged, for the dynamic process helps formulate the interpretation of our fundamental charter.[1]

This passage makes certain assertions that have achieved the status of axioms among many contemporary constitutional law scholars and that are central to Friedman's defense of judicial review. Three of these assertions are particularly important in regard to questions of constitutional interpretation: (1) the meaning of the constitutional text has changed and continues to change; (2) disagreements about the meaning of the text cause these changes; and (3) these disagreements

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1. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 651-52 (1993).

are desirable because judges sometimes make interpretive errors, and disagreement creates the opportunity to replace erroneous interpretations with correct ones.

I will try to show that these assertions, as well as others that are but rephrasings of the same basic ideas, are not the common sense truths that so many constitutional theorists assume them to be, but are instead the products of an extraordinarily confused and ultimately incoherent set of assumptions regarding the interpretation of language.[2]

I. ASSERTION NUMBER ONE: THE MEANING OF THE CONSTITUTIONAL TEXT HAS CHANGED AND CONTINUES TO CHANGE.

What truth conditions must hold in order to give this claim a measure of plausibility? First, the interpreter of the text must dispense with any notion that the intentions of its author(s) determine the meaning of a text. The assertion that a text means what its author intends it to mean leads to the conclusion that the text's meaning cannot change unless and until the text has a new author. Yet if *the* text acquires a new author, and the interpreter holds the text to mean what its new author intends it to mean, then it is simply arbitrary to claim that one is dealing with one and the same text.[3]

I can clarify this point with an example. Suppose my wife leaves a note in our mailbox reading "Meet me at the usual place at noon," and that my colleague Bob's friend Jane leaves a verbally identical note in his mailbox. No one would suppose that my wife's note means the same thing as Jane's verbally identical message. It would be just as peculiar to suppose that the meaning of my wife's text had *changed* when *it* was employed by Jane. Obviously, Jane has used the same linguistic signs to signify a different message, and therefore she has, according to an intentionalist account of textual interpretation, necessarily created a different text.

It follows that the meaning of the constitutional text can change only if something other than the authors' intentions generates that

2. For an account of what textual interpretation must always in fact consist, see Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279 (1992) [hereinafter, Campos, *Against Constitutional Theory*]; Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993) [hereinafter Campos, *That Obscure Object of Desire*].

3. Supplying old texts with new authors is becoming a common methodological recommendation in contemporary legal theory. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (statutes should be interpreted in a present-minded fashion, as if they had been enacted recently); Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. (forthcoming 1993) (arguing that the Thirteenth Amendment should be read as if the slaves themselves had written it).

meaning. Therefore, even if the interpreter is willing to jettison the original authors and replace them with someone else, the new author(s) would, from an intentionalist perspective, generate a new text, even if *that* text should remain verbally identical with the text it replaces.

Another important consequence that flows from the claim that the constitutional text's meaning changes is that the interpreter cannot claim that textual meaning is determined by some realist ontology that equates textual meaning with the text's supposed capacity to reflect ultimate moral truths. In other words, the true knowledge held by — (fill in god-term with appropriate signifier)[4] — concerning the ultimate morality of abortion, or capital punishment, or flag desecration laws would be irrelevant to the question of how the constitutional text's meaning changes in regard to these or any other issues. For unless God or the Equivalent changes His mind as to what constitutes moral truth, it would make no sense, according to a moral realist account of interpretation, to claim that the meaning of the constitutional text ever changes in regard to the moral issues with which that text deals.

Of course, neither of these truth conditions will prove in any sense troubling to the typical progressive constitutional law theorist. It is by now second nature for such persons to deride the absurd notion that the Constitution's text means what its authors intended it to mean.[5] And we can be fairly certain that even fewer *bien pensants* are willing to join such natural law theorists as Michael Moore and Heidi Hurd in the Platonic affirmation that nature is but a spume that plays upon a ghostly paradigm of things.[6]

But this response only leaves the fundamental question unanswered. If neither the author's intent nor the actual content of moral reality provides us with the appropriate interpretive referents, what *does* determine the meaning of the constitutional text? Here our second axiom comes into play.

4. On filling the "god-term," see KENNETH BURKE, A GRAMMAR OF MOTIVES 110 (1969).

5. "The framers' opinions [as to the text's meaning] . . . are both unknowable and, as they themselves thought, irrelevant." Ronald Dworkin, *The Reagan Revolution and the Supreme Court,* N.Y. REV. BOOKS, July 18, 1990, at 23. Consider this apt rejoinder: "The claim as summarized is sufficiently remarkable, for if the framers' opinions are unknowable, how do we know they considered them irrelevant; and if their opinions are irrelevant, why should we care what they thought about their opinions?" Steven Knapp, *Practice, Purpose, and Interpretive Controversy, in* PRAGMATISM IN LAW AND SOCIETY 323, 340 (Michael Brint & William Weaver eds., 1991).

6. *See* Heidi M. Hurd, *Sovereignty in Silence,* 99 YALE L.J. 945 (1990); Michael S. Moore, *A Natural Law Theory of Interpretation,* 58 S. CAL. L. REV. 277 (1985).

II. Assertion Number Two: The Meaning of the Constitutional Text Changes Because People Disagree About What the Text Means

This claim is, on its face, nothing less than bizarre. How does it differ from the claim that "the height of Mount Everest changes because people disagree about its height?" Unless one subscribes to something along the lines of an extreme Berkeleian idealism,[7] or to the crudest sort of pragmatism — that is, the notion that the truth of a matter is by definition identical with *beliefs* about the truth of a matter — it is hard to understand how anyone could even entertain such a view. Clearly some alternative characterization of the claim is necessary.

How must "the meaning of the text" differ from "the height of Mount Everest" so as to make our second axiom less absurd? The height of Mount Everest is an empirically verifiable fact, of a kind which necessarily remains external to the observer.[8] Disagreement concerning that fact does not alter its status as such. It would seem, then, that "the meaning of the text" would have to be a different *kind* of fact, if we are to make our second axiom intelligible.

Suppose we were to agree that what we meant by "the height of Mount Everest" was "the opinion of *A* concerning the height of Mount Everest," when *A* is anyone who is duly authorized to have an opinion on the subject. Suppose further that at time T1, *X* and only *X* is authorized to have an opinion concerning the question, while at time T2, *Y* and only *Y* is so authorized.[9] If *X* and *Y* disagree about the mountain's height, then under these conditions it would make sense to say that, in this special sense, Mount Everest's height differed at T2 from what it was at T1.

We can now intelligibly recharacterize the claim about the meaning of the constitutional text. *If the text means what the interpreter thinks it means,* then interpretive disagreement would, by definition, cause changes in textual meaning. If I interpret the phrase "cruel and unusual punishments" to include capital punishment, then it does. If you interpret those words to allow executions, then they do. The

7. *See* George Berkeley, A Treatise Concerning the Principles of Human Knowledge (Colin M. Turbayne ed., 1970) (Dublin 1710).

8. By contrast, the observer's *belief* about the height of Mount Everest is a psychological fact and therefore internal to the observer — although it too, of course, remains subject to empirical verification.

9. If *n* number of persons are simultaneously authorized to have such an opinion, then at any given time Mount Everest may exhibit *n* number of heights. Analogies to certain questions of constitutional interpretation will no doubt suggest themselves to more skeptically inclined readers.

meaning of a text can change *because* people disagree about its meaning if and only if we assume that the different beliefs about the text's meaning which constitute this disagreement also constitute that meaning.

Indeed, several contemporary constitutional theorists have advocated this account of interpretation. From this "reader response" perspective, the meaning of the constitutional text is equivalent to some interpretive community's beliefs about the text's meaning.[10] But whether or not a theorist holds this position explicitly is less important than the fact that anyone who subscribes to the view that the meaning of the constitutional text changes must either accept some version of it or be placed in the untenable position of the theorist who holds that the actual height of Mount Everest alters in response to the plurality of beliefs that exist on that particular question.

The "reader response" version of the second axiom thus both saves it from absurdity and renders the first axiom intelligible. It has, however, disastrous consequences for the third axiom.

III. Assertion Number Three: Interpretive Disagreement Is Often Desirable Because Judges Make Interpretive Mistakes, and Disagreement Helps Distinguish Erroneous Interpretations from Correct Ones

"Interpretive disagreement" has recently undergone intellectual gentrification and been transformed into the valorized concept of "dialogue."[11] The idea is that disagreement about what the Constitution means creates a dialogic dynamic which allows the text to "evolve" as a "living Constitution," and that this process of evolution thereby helps eliminate erroneous interpretations.

This vision of interpretive conflict — which improbably combines animism, social Darwinism, and a dash of Hegel via the hermeneutics of Gadamer[12] — is perhaps the most crucial element in the belief systems of progressive constitutional theorists. Surely, these progressive

10. *See, e.g.*, Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. (forthcoming 1993).

> The interpretation thesis, properly understood, frees us of the illusion not so much that a text has only one meaning, but rather that it is the text itself, rather than the community of readers, that determines its meaning. The point of the interpretation thesis, then, is [that] . . . the meaning of a text may be fully determined, but if so, it is determined by institutional, professional, or cultural attributes of the community of its interpreters, rather than by the text itself.

Id.

11. Good examples are provided by ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992), and Friedman, *supra* note 1, at 655-80.

12. I describe the unfortunate influence of Gadamer's work on American legal theory in Campos, *That Obscure Object of Desire*, *supra* note 2, at 1068-73.

thinkers argue, the Constitution must "grow" through an evolutionary process of "interpretation." If it did not, what hope would remain for achieving the one sacred goal of all secular politics — progress?[13] The dynamic process which helps formulate the interpretation of our fundamental charter works properly, then, when mistaken textual interpretations give way to correct — or, at least, less mistaken — interpretations, thereby helping transform the meaning of the constitutional text into the best it can be.[14]

It is difficult to convey adequately the fundamental incoherence of this account. We have seen that, if interpreters hold the constitutional text's meaning to change, this change can only take place on the assumption that the interpreters' beliefs determine what the text's meaning actually is. But if what the interpreter thinks the text means determines the meaning of a text, it then involves the purest sort of logical contradiction to imagine that an interpreter could produce a *mistaken* interpretation.

How could it ever be possible, on this account, for a judge (or anyone else) to "get things wrong?"[15] Note that the reader-response account of interpretation does not preclude some interpretations from being more desirable than others; it merely eliminates the possibility of criticizing any interpretation *on the grounds that it is an incorrect interpretation.*

For example, suppose I like cheeseburgers. Although you can, of course, deplore this preference — cheeseburgers destroy the rain forests, cause heart disease, and so forth — it would be very strange for you to do so on the grounds that I did not actually like cheeseburgers. Yet, such a claim is precisely analogous to the position of constitutional law scholars who proclaim at one and the same time that the meaning of the constitutional text *changes,* that this change is produced through *interpretation,* and that it is still possible to produce a *mistaken* interpretation of the constitutional text.

But the reader-response approach to interpretation is even more confused than this objection implies: for if a text means what its reader thinks the text means, it becomes impossible to give an even minimally coherent description of what interpretation actually involves. Recall the example of Mount Everest's height. Suppose we recharacterize "the height of Mount Everest" as meaning "how high *X*

13. A perfect example of this mentality is President Clinton's statement about Ruth Bader Ginsburg: "[Clinton] said he expected [Ginsburg] to move the court neither to the 'right' nor the 'left,' but 'forward.' " Joan Biskupic, *Senate, 96-3, Approves Ginsburg as 107th Supreme Court Justice,* WASH. POST, Aug. 4, 1993, at A4.

14. *See* RONALD DWORKIN, LAW'S EMPIRE 228-38 (1986).

15. Friedman, *supra* note 1, at 652.

thinks Mount Everest is." I ask *X* to reveal the height of Mount Everest. *X* responds that he does not have this information. I then ask *X* to interpret the relevant evidence in order to acquire the information he lacks, so that he can enlighten me as to the truth of the matter. *X* replies that he has no idea what to do next. I proceed to reassure *X* that his ignorance presents no problem because whatever belief he has on the subject is, by definition, the correct answer to my question. Note the paradoxical situation that *X* is now in. What *fact* is he supposed to discover in order to form the belief that will provide the answer to his interpretive conundrum? By hypothesis, *the only fact that counts is a fact that does not, and indeed cannot, exist.* For if *X already has* a belief as to the height of Mount Everest, then he is no longer in the position of an *interpreter:* that is, there is nothing for him to interpret in order to acquire the necessary belief, because he *already has* that belief. On the other hand, if he really needs to *interpret,* if he really must acquire a belief about this particular fact — that fact being "how high *X* thinks Mount Everest is" — then there is quite literally nothing for him to do because the particular fact he must discover in order to acquire the appropriate belief concerning the height of Mount Everest can only be acquired if he has already acquired it.

Now defenders of reader-response theory will surely claim that this account is nothing but a caricature of their actual views. Such readers will insist that textual meaning is generated not by an interpretive community's discovery of its beliefs about the meaning of a text, but rather through the community's acquisition of beliefs about what it takes to be the *actual meaning* of the text — a meaning which the interpretive community, if it is to undertake interpretation at all, must believe is independent of its beliefs about that meaning.

But this response is simply evasive. The fundamental question remains: what *fact* is the interpretive community attempting to discover? To answer "the meaning of the text" merely begs the question. Yet if the reader-response theorist does point to some adequately specified fact, rather than to the interpretive community's beliefs about that fact, then the question becomes, why is *that fact itself* not the correct answer to the community's interpretive question?

The reader-response account of interpretation thus generates both logical and psychological absurdities: such an account requires interpreters either to have already interpreted the text in order to interpret it or to adopt an arbitrary and irrational preference in favor of whatever interpretive mistakes they happen to make. If one rejects reader-response theory, however, the assumption that the meaning of a text can change through its interpretation results in the obvious *em-*

pirical absurdity of such statements as "the height of Mount Everest changes because people disagree about its height."[16]

How did so much recent constitutional theory come to adopt such a profoundly confused set of assumptions concerning the identity and interpretation of texts? In my view, three interrelated factors have been of paramount importance: an apparently unshakable allegiance to linguistic formalism, a wholesale failure to clarify what "interpretation" means, and a willingness to pursue largely illusionary instrumental goals to the detriment of more intellectual projects.

The axiomatic status for a constitutional theory of formalist assumptions about language is best illustrated by the almost universal desire to separate something called "the constitutional text" from any agent's intentions or beliefs concerning that linguistic artifact. No matter what else constitutional theorists believe — whether they advocate "strict" or "moderate" originalism, or "progressive interpretation," or even an explicit reader-response theory — they are almost unanimous in their agreement that *the autonomous language* of the constitutional text precludes certain results.[17] Hence, a twenty-seven year-old cannot be elected President *not* because the Framers intended otherwise, or because such a result is per se undesirable, but simply because the relevant piece of constitutional text is insufficiently "spacious" to allow for this result. As I have argued elsewhere,[18] such beliefs mistakenly assume that it is some quality inherent in "the text itself," *rather than in our interpretive assumptions about the intentions of the text's authors,* which determines whether or not we believe a particular provision's meaning is "narrow" or "spacious" and therefore is or is not amenable to "interpretation."

An unfortunate consequence of this mistake is constitutional the-

16. A version of the claim that the meaning of a text changes through its interpretation, which avoids the pitfalls of reader response-theory, goes as follows: "The meaning of a legal text does not change per se, yet the *functional* meaning of a legal text must be understood to be what an authoritative interpreter says about that meaning. Hence a legal text's functional meaning may change, although its true meaning does not." This is indeed a plausible account of constitutional interpretation. The problem for progressive constitutional theorists remains that they have no plausible account of the ontology of the textual entity containing the "true meaning" that would enable such functional (mis)interpretation.

17. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation,* 100 HARV. L. REV. 1189, 1195 (1987).

> Arguments from text play a universally accepted role in constitutional debate. . . . Where the text speaks clearly and unambiguously — for example, when it says the President must be at least thirty-five years old — its plain meaning is dispositive. Where the text is ambiguous or vague, other sources are consulted as guides to textual meaning.

Id. Fallon's inclusion of the "framers' intent" as one of those "other sources" underscores the axiomatic status of textual autonomy for constitutional theorists.

18. *See generally* Campos, *Against Constitutional Theory, supra* note 2; Campos, *That Obscure Object of Desire, supra* note 2.

ory's failure to recognize the essential inadequacy of a definition of "the text" which limits its identity to a particular set of marks. If a text is identical with the marks that encode it, then "interpretation" will come to mean whatever we can plausibly do with or to those same marks. Such a definition is extremely problematic for many reasons, not the least of which being that, as modern literary theory has demonstrated, the answer to the question of what we can plausibly do with or to a particular set of marks is: (almost) anything.[19]

Thus the formalist assumption that at least part — and often all — of the meaning of a text is determined through the application of the rules of language to a particular set of marks leads directly to constitutional theory's failure to specify adequately what is meant by "interpretation." Because the rules of language are by themselves such obviously inadequate tools for determining textual meaning, "interpretation" has come to signify whatever can be done to "texts" (marks) when the rules of language run out. And because this spacious category includes such things as determining what the author intended;[20] failing to determine what the author intended;[21] attempting to determine what the author(s) would have intended if he, she, or they knew what we know, or believed what we believe;[22] confusing the author with the reader;[23] ignoring the author to the extent necessary to undertake textual "rehabilitation";[24] misreading the author so as to make his text the best it can be,[25] or, conversely, the *worst* it can be;[26] as well as many variations on these and other "interpretive methods," it is hardly surprising that so little has been gained in the course of constitutional theory's obsessive and interminable analysis of all these phenomena under the single rubric of "interpretation."[27]

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19. A classic literary-critical demonstration of the protean malleability of linguistic signs is provided in STANLEY FISH, *How To Recognize a Poem When You See One, in* IS THERE A TEXT IN THIS CLASS? 322 (1980).

20. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

21. *Id.*

22. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

23. *See* West, *supra* note 10.

24. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).

25. *See* DWORKIN, *supra* note 14.

26. *See* DERRICK BELL, AND WE ARE NOT SAVED (1987); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987).

27. *See* Suzanna Sherry, *An Originalist Understanding of Minimalism,* 88 NW. U. L. REV. (forthcoming 1993).

> Dare I suggest that we stop talking about judicial review and theories of interpretation? This symposium celebrates one hundred years of scholarship on judicial review and the manner in which it ought to be exercised, and we are no further than [when] we started. The debates are still as unresolved, and as rancorous, as they have ever been.

Id.

To return to the question with which we began: how do we account for this unfortunate state of affairs? Among legal academics, whenever I have argued for the view that, as a descriptive matter, the meaning of a text is always what its authors intended it to mean and that claims that the constitutional text's meaning can change are based on a fundamental misunderstanding, someone will invariably ask, "but what about *Brown v. Board of Education?*" Now on one level this is a pretty strange question. The implication that, in 1993, any legal academic's views on textual interpretation could have any relevance to, let alone an effect on, the social issues dealt with in *Brown* is one that strikes this legal academic as fairly preposterous.[28]

But on another level the question makes perfect sense. The self-images of contemporary legal academics, and especially those of constitutional theorists, are, with very few exceptions, relentlessly normative.[29] If you imagine that your job is — or if your sense of self consists of — being a person who tells the Supreme Court exactly what our fundamental law requires, any lines of inquiry which might suggest that the social practice called "constitutional interpretation" is a deeply confused and essentially incoherent enterprise will tend to be dismissed out of hand. Legitimation anxiety takes over, and something akin to the following syllogism represses the impulse toward critical thought:

(1) —— (the theorist's sacred cow) was correctly decided.
(2) The "original meaning" of the relevant constitutional provision is at odds with this result, therefore
(3) the meaning of that provision has grown or evolved or been altered dynamically through . . . "interpretation."

Perhaps if constitutional theorists opened themselves up to the therapeutic insight that neither the Supreme Court nor any other player on the fields of state action is paying much attention to their Herculean exertions in the service of "the justice-seeking Constitution,"[30] they could develop more of an interest in certain radically underinvestigated questions. To name only one: if a social practice is deeply confused and fundamentally incoherent, does that necessarily imply that there is something wrong with it?

28. For a careful argument that the *Brown* decision *itself* had relatively little influence on the social problems it addressed, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

29. *See, e.g.*, Pierre Schlag, *Normative and Nowhere To Go*, 43 STAN. L. REV. 167 (1990).

30. *See* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. (forthcoming 1993).