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Getting Clear on the Originalism Debate: Is Originalism a Theory of Constitutional Interpretation or a Normative Rule of Law?

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Getting Clear on the Originalism Debate: Is Originalism a Theory of Constitutional Interpretation or a Normative Rule of Law?

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**Introduction**

In *Original Meanings*, Jack Rakove argued that originalists often collapse the conceptually distinct terms “meaning,” “understanding,” and “intent” and that this blurring of what is conceptually distinct has resulted in conceptual confusions. The aim of this essay is to demonstrate that failure to distinguish these terms has not only led to conceptual confusion but has also given originalism the appearance of being able to accomplish more than it in fact does. By using authorial intent and ratifier understanding as essentially interchangeable, proponents of originalism try to ground their approach on both a theory of meaning and on a theory of judicial review and adjudication. Distinguishing these terms demonstrates that the two theoretical Justifications of originalism are in internal tension and that, to remain coherent, originalists must choose between them.

**Distinguishing Intention and Understanding**

To inject some clarity into the scholarly discussion about originalism, Rakove diagnoses the tendency in originalist thought to collapse or conflate the use of the terms, “meaning,” “intent,” and “understanding” and proposes more explicit formulations of original intention and understanding. He begins his discussion by highlighting the conflation of these conceptually distinct notions:

The terms [meaning, intention, and understanding] are often used loosely and synonymously, at some cost to the clarity that [the originalist interpretive method] ostensibly seeks. But they are not fully interchangeable—or at least they need not be—and distinguishing them more carefully exposes some of the conceptual traps that ensnare the unwary.

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2 Ibid.
The difference between intention and understanding ultimately turns on the role of the agent (intending or understanding) in the process of creating and communicating meaning.

“Intention,” Rakove suggests,

connotes purpose and forethought, and it is accordingly best applied to those actors whose decisions produced the constitutional language whose meaning is at issue…. Original intention is thus best applied to the purposes and decision of its authors, the framers.\(^3\)

In contrast, “[u]nderstanding … may be used more broadly to cover the impressions and interpretations of the Constitution formed by its original readers—the citizens, polemicists, and convention delegates who participated in one way or another in ratification.”

The importance of maintaining the distinction, according to Rakove, depends on the different purposes originalism is conceived to serve. If the purpose of recovering original meaning is a strategy of interpretation, i.e., to illuminate “what a term meant, or why a given provision was adopted, without treating its original meaning as dispositive,”\(^4\) the distinction may be more lax. On the other hand, if originalism is meant to be a rule a law—i.e., original meaning is binding when making a contemporary constitutional decision—the distinction must be maintained rigorously. Originalism, understood as binding on constitutional adjudicators, insists that original meaning should prevail—regardless of intervening revisions, deviations, and the judicial doctrine \textit{stare decisis}—because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787-88. The Constitution deprives its supremacy, in other words, from a direct expression of popular sovereignty, superior in authority to all subsequent legal acts resting only on the weaker foundations of representation.\(^5\)

\(^3\) \textit{Ibid.}, at 8.

\(^4\) \textit{Ibid.}

\(^5\) \textit{Ibid.}, at 9.
In contrast, originalism as a democratic principle of rule of law requires a strict distinction, because “the understanding of the ratifiers is the preeminent and arguable sole source for reconstructing original meaning.”

*The Foundations of Originalism*

While Rakove’s main purpose in delineating these terms is to highlight how the historian and the jurist might approach the issue of original meaning with different questions and purposes, I intend to argue that the originalist failure to maintain the distinction between understanding and intention is necessary to mask a tension in between the interpretive and jurisprudential foundations upon which originalism rests. According to Gregory Bassham, until the legal realist movement in the early twentieth century, originalism – the view that a written constitution, or any other legal instrument, should be interpreted so as to fit the intention of its makers – was “axiomatic.” Originalism’s entrenchment rested on two distinguishable motivations, one jurisprudential and one semantic:

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7 Gregory Bassham, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 4 (1992). Bassham may be incorrect regarding how long intentionalism was embedded in the American tradition, because, although using passages from the founding and their intellectual predecessors equating meaning with intent, Bassham fails to recognize the ambiguity in the concept of “intent” or “intention” pointed out by H. Jefferson Powell and others. See H. Jefferson Powell, “The Original Understanding of Original Intent,” in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT*, 53-115 (Jack N. Rakove, ed., 1990). According to Powell, “the ‘intent’ or ‘intention’ of a document could denote either the meaning that the drafters wished to communicate or the meaning the reader was warranted in deriving from the text.” *Ibid.*, at 58. Powell argues that early constitutional interpreters did indeed focus on “original intent” but understood this as “the ‘intentions’ of the sovereign parties to the constitutional compact, as evidenced in the Constitution’s language and discerned through structural methods of interpretation…”. *Ibid.*, at 88. Still, this “constitutional hermeneutic” became, “remotely and rhetorically, the precursor of modern intentionalism.” *Ibid.*, at 75. All I need for my purposes is that intentionalism had become axiomatic by the beginning decades of the twentieth century and as a result of the persuasiveness of the pictures that Bassham credits for it. It does not matter, for my argument, whether the roots of modern intentionalism date to the founding and ratification or only to the early nineteenth century. My argument merely
In part, this may reflect the sheer momentum of a doctrine so long and so firmly established in the American constitutional tradition. A deeper explanation, however, would advert to two pictures, one jurisprudential and one semantic, that have long powerfully shaped Western conception of law and legal practice and that continue to exert a strong attraction for many today.¹⁸

The two pictures explaining originalism deep hold were the jurisprudential image of judge as mere agent of a higher authority and a semantic picture that equates the meaning of a text with the author’s intent, so that any method of Constitutional interpretation must be centrally concerned with recovering those intentions.

The Jurisprudential Justification

The first justification motivating originalism is that it satisfies the jurisprudential requirements invoked by the image of “judges as politically subordinate officials.”¹⁹ First, originalism satisfies the requirement of the doctrine of separation of powers that the judiciary act in virtue of, and only in accordance with, legislative and/or constitutional authority.¹⁰

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¹⁸ Bassham, supra note 7, at 4. See also Daniel A. Farber, The Original Debate: A Guide for the Perplexed, 49 OHIO ST. L.J. 1085, 1097. Like Bassham, Daniel Farber identifies that originalism rests on a jurisprudential argument and a semantic argument: “The first [normative argument for originalism] is that legitimate authority in a democracy must be based on majority rule. Hence, a court is only justified in overruling one majority decision on the basis of another, even more authoritative, majority decision. In exercising judicial review, a judge is merely doing the will of the majority as contained in the Constitution, and the judge’s job is simply to understand that majority will. The second argument is more general: that the job of the judge is to interpret legal documents like the Constitution, and that interpreting any document is simply a matter of determining the author’s intentions." Farber mentions a third argument for originalism -- the lack of a principled alternative -- not relevant to my analysis.

¹⁹ Bassham, supra note 7, at 4.

¹⁰ For example, Keith Whittington, in defending originalism, has noted that one argument for the authority of originalism “depends on the distinction between the judicial and legislative function”: “According to originalists, the legislature is charged with making law, but the judiciary is supposed to be limited to applying preexisting law. Grounded in the textual separation of the “judicial power” from the “legislative powers,” this originalist argument would exclude the more explicit modern use of extraconstitutional sources to create principles to guide the nation. It would also exclude any interpretive strategy that does not seek to understand the
articulates this argument for originalism: “If judges get their authority from the Constitution, and the Constitution gets its authority from the majority vote of the ratifiers, then the role of the judge is to carry out the will of the ratifiers.”\footnote{Farber, supra note 8, at 1098. See Federalist 78.} Moreover, originalism satisfies the further requirement that the democratic principles of our system of government inherently favor judicial restraint and deference to majority will. Whittington justifies originalism based on this majoritarian argument: the authority of originalism is rooted in “the contention that judges should accept the right of popular majorities to have their political way through their elected representatives in most instances, given that the American system is primarily republican in nature.”\footnote{Whittington, CONSTITUTIONAL INTERPRETATION, supra note 10, at 43.} According to Whittington, originalism fosters this majoritarianism first by advocating a theory of judicial restraint, then restricting proper judicial action to what is, by definition, majoritarian, because the action is “in the name of prior, popularly approved law.”\footnote{Ibid.} As Robert Bork, in his seminal essay “Neutral Principles and Some First Amendment Problems,” says: “no argument that is both coherent and respectable can be made supporting a Supreme Court that ‘chooses fundamental values’ because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”\footnote{Robert H. Bork, Neutral Principles and Some First Amendment Problems, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, 197-226, 201 (Jack N. Rakove, ed., 1990); see also J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5-8 (1980), cited in Farber, supra note 8, at 1098 (articulating the majoritarian basis of originalism, though purpose and intent of the actual lawmakers. Deviating from the intent of the Constitution would be tantamount to creating a new fundamental law from the bench, thereby exceeding the judicial role by creating constitutional law instead of merely elaborating and applying it. Without being constrained to the interpretation and application of previously created law, the judiciary would subvert the place of the elected and accountable representatives in favor of the forceful imposition of the will of a legal aristocracy. Keith E. Whittington, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 40 (1999) [hereinafter, “Whittington, CONSTITUTIONAL INTERPRETATION”].}
The Semantic Justification

The second explanation of originalism’s longstanding grip is that it also satisfied a semantic theory, with “strong roots in our legal culture,”\textsuperscript{15} that “for centuries served as the standard account of how words achieve sense and reference:”

verbal meaning is, focally, what philosophers of language now call speaker’s meaning: “that meaning which the persons or persons, who make use of the words, intended to convey to others, whether he used them correctly, skillfully, logically or not. The influence of this traditional picture of linguistic meaning is evident in the ancient theory, apparently accepted by Aristotle and Aquinas, and expounded most influentially in modern times by Locke, that “Words in their primary or immediate Signification, stand for nothing but the Ideas in the Mind of him that uses them.”\textsuperscript{16}

This semantic picture justifies originalism in virtue of the nature of the Constitution as a written document: given the identity of the text and author intent, the fact that the Constitution is a legal text requires an originalist interpretive method.\textsuperscript{17} According to Whittington, the nature of a

\textsuperscript{15} Farber, supra note 8, at 1100.
\textsuperscript{16} Bassham, supra note 7, at 5 (footnotes omitted).
\textsuperscript{17} See Thomas Gray, The Constitution as Scripture, 37 STAN. L. REV. 1, 14 (1984), cited in Farber, supra note 8, at 1101 (‘The Constitution is, among other things, a legal document, and it is on the Constitution’s status as written law that justification of the practice of judicial review has largely rested. As Edwin Corwin once wrote, ‘The first and most obvious fact about the Constitution of the United States is that it is a document.’ Justice Black began his lectures on constitutional interpretation by saying, ‘It is of paramount importance to me that our country has a written constitution.’ With words like these, contemporary constitutional interpreters hark
written constitution dictates an originalist interpretive method as a result of the general nature of writing, \textit{viz.}, that “all writing and especially legal writing carries the intent of the author.”\textsuperscript{18} And, later, he says: “Originalists can … stand on the theoretical arguments that hold that all texts, and especially legal texts, carry a knowable, authoritative meaning corresponding to the original intent of the writer.”\textsuperscript{19}

\textit{A Crack in the Foundations}

Thus far I have aimed to show that originalism claims to be jointly supported by a theory of judicial authority on the one hand and as a theory of meaning on the other. In this section, I will argue that these two foundations for originalism are in tension with each other and that this tension is masked by the failure of originalists to maintain a rigorous distinction between the terms intention and understanding.

Under the foundation of originalism rooted in a democratic theory of judicial authority, the separation of powers and our republican form of government require judicial deference to majorities and limits judicial authority to act to those actions taken pursuant to authority granted through majoritarian laws. To express the requirements of rule of law demanded by this democratic justification of originalism, the central concept of original meaning must be ratifier understanding. As Rakove explains the connection:

\begin{quote}
The Constitution deprives its supremacy … from a direct expression of popular sovereignty, superior in authority to all subsequent legal acts resting only on the weaker foundations of representation. If this becomes the premise of interpretation, it follows that the understanding of the ratifiers is the preeminent and arguable sole source for reconstructing original meaning.\textsuperscript{20}
\end{quote}

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back to John Marshall’s original argument for judicial review in \textit{Marbury v. Madison}, an argument permeated with reliance on the ‘\textit{writtenness}’ of the Constitution.”).\textsuperscript{18}
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\footnotesize\textsuperscript{18} Whittington, \textit{supra} note 10, at 50.
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\footnotesize\textsuperscript{19} \textit{Ibid.}, at 63.
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\footnotesize\textsuperscript{20} Rakove, \textit{supra} note 1, at 9 (my emphasis).
\end{flushright}
The tension arises in the cracks of originalism’s twin justification, because, unlike the
democratic justification, under the semantic justification, the preeminent source for
reconstructing original meaning is authorial intent, i.e., drafter’s intent. Originalists, including
Whittington, rely on the argument that a written text is identical to authorial intent but then want
to make the relevant “authorial intent” the understanding of the ratifiers. This shift to ratifiers as
the normatively significant agent undoes the semantic theory upon originalism is intended to
rely. It obfuscates the structure of the argument to switch indiscriminately between authorial
intent and ratifier “intent,” even if the language of “intent” is used in both situations. The
assumption is that intentionalism requires identifying the relevant author and that the ratifiers
count as authors because of the significance of their role in making the Constitution law. But
only in a loose and superficial sense can these readers be said to be “authors.”

I will first examine the concept of “authorial intent” from the point of view of
intentionalism, then I will consider the originalist claim that ratifiers can count as authors of the
Constitution. From an intentionalist perspective, it is philosophically confused to count as
relevant the intentions of those who were not capable, even in principle, of participating in the
creation of the text and the expression of ideas through it. To use Rakove’s words, “[i]ntention
connotes purpose and forethought, and it is accordingly best applied to those actors whose
decisions produced the constitutional language whose meaning is at issue….“ 21 For the same
reasons, Bassham rejects the view of originalism, when it focuses on ratifier understanding, as a
theory of meaning:

The problem with treating originalism simply as a theory of constitutional
meaning is that some originalists clearly hold that it is not so much the original
meaning of constitutional language that is now binding as it is the original
intentions or understandings of those who drafted or ratified that language….. [I]t

21 Ibid., at 8.
is at best misleading to describe something as part of the “meaning” of a text unless there is at least some colorable basis in the text for the expression of that meaning…. [I]t seems decidedly strained to describe such allegedly binding but wholly extratextual intentions as somehow part of the Constitution’s original “meaning.”

We can see this more clearly by considering the example that is most often used to elucidate and support the semantic picture of intentionalism, an example that Whittington himself uses. In the example, we are supposed to imagine a pedestrian taking a stroll on the beach who comes across the first stanza of Woodsworth’s “A Slumber did my Spirit Seal.” It will seem to our pedestrian that this is a good case of intentionless meaning; he can recognize it as writing, understand what it means, and can even recognize it as a lyric, all without reference to an author or intentions.

However, now, imagine that, as our ambler continues on, a wave washes up on shore and, after receding, leaves the second stanza. Now, intention will seem to matter immensely in trying to make sense of what has occurred: was it a freak coincidence created by the mechanistic sea? Woodsworth’s ghost? a scientific experiment? As our pedestrian ponders explanation after explanation, they will fall into two categories: he will either assume some agent capable of intentions (the living sea, the haunting Woodsworth, etc.), or he will dismiss the marks as nonintentional effects of some mechanical process (erosion, percolation, etc.). The conclusion to

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22 Bassham, *supra* note 7, at 18-19 (some emphasis added).
24 A slumber did my spirit seal;
I had no human fears:
She seemed a thing that could not feel
The touch of earthly years.
25 No motion has she now, no force;
She neither hears nor sees;
Rolled round in earth’s diurnal course,
With rocks, and stones, and trees.
be drawn from this example, according to Whittington, is that “[w]ithout an intentional agent behind the marks, the very concept of a text or of interpretation becomes nonsensical.”

But now imagine the example somewhat differently. Imagine that while our pedestrian is scratching his head trying to explain these marks, a literary theorist passes by and offers to help. The literary theorist helps the pedestrian, not by explaining the source of the text, but by giving his interpretation of the poem. In this case, there might be reason for the pedestrian to accept this interpretation—perhaps he feels he should defer to the theorist’s expertise on these matters—but we cannot say that the literary theorist is the intentional agent who has locked in the meaning of the poem, we cannot say that he is the author of the text. The point is the same in the case of constitutional interpretation: we may have reasons for deferring to something other than authorial intent, e.g., our theories of judicial authority and of democracy, but we cannot say that that deference is grounded in an intentionalist theory of meaning. The intentionalist requirement of an agent breathing life into barren marks requires an agent who played some role in the production of the language expressed in the text.

Once we get clear on our terms, Whittington’s reliance on the semantic picture of intentionalism becomes quite strained. His argument ultimately amounts to the following:

(1) In order for a text to be meaningful (and subject to interpretation), it must have an intentional author.

(2) Therefore, the goal of interpretation is to realize the author’s intent.

(3) Given our principles of judicial restraint and democracy, we should defer to the ratifier's interpretation of the Constitution, when we are trying to interpret Constitutional provisions.

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26 Whittington, supra note 10, at 94.
Therefore, it is ratifier “intent” that matters.

What is odd is that Whittington himself seems to recognize a version of this error in non-originalist thinkers, but does not see that he falls prey to the same mistake. Whittington begins his point by emphasizing just how integrated text and authorial intent is:

The written text is identical to the author’s intent; there can be no logical separation between them and thus no space for an autonomous text capable of adopting new contexts. [W]riting presupposes an intentional agent who can give it meaning. The text is not inherently meaningful but requires active intelligence to breathe life into barren marks….27

But, then, he somewhat oddly continues:

In fact, textuality is meaningful only if the originating agent is not truly absent from the text. A “text” that is completely autonomous of its writer ceases to be a text at all; that is, it can no longer be interpreted as a meaningful sign. The creative “reader” can write a new text atop the old…, but such acts cannot be regarded as interpretation and bear no relation to the original text.28

Elsewhere, Whittington states: “The key point for an originalist … is that the meaning of a text derives from the author, not from the reader. An interpreter may succeed or fail in understanding a text, but the original meaning is the meaning to be interpreted.”29 What is mysterious about these passages is how Whittington can recognize that a reader writing “a new text atop the old” bears “no relation to the original text,” but does not see that favoring the ratifier’s interpretation over and against the drafter’s intentions for the text (especially when drafter intent and ratifier understanding diverge30) leads to the same results. It makes no difference (for an intentionalist theory of meaning) whether this “creative ‘reader’” was separated by months or centuries from

27 Ibid.
28 Ibid.
30 For example, according to recent historical evidence, the drafters’ intent for the Fourteenth Amendment was to incorporate the Bill of Rights against the states, but ratifier understanding would not have concluded such an effect. See Bassham, supra note 7, at 35 and references therein.
the originating authors. If what matters from a semantic point of view is the original intentions of the author, from that standpoint (alone) it does not seem to matter whether the interpreter’s reading we privilege over author’s intent is a ratifier or a modern-day, “living Constitution” theorist.

Whittington argues that the Constitutional ratifier is an “author” in virtue of his significant role in making the Constitution the important document that it is today:

As the founders themselves noted, the constitutional text is meaningless unless and until it is ratified. It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals. This is not to say the history of the drafting process is irrelevant—it may provide important clues as to how the text was understood at the time and the meaningful choices that particular textual language embodied—but it is not uniquely important to the recovery of the original meaning of the Constitution. 31

Presumably, Whittington is referencing the (arguably) paradigmatic version of this argument by Madison:

[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be treated as the Oracular guide in expounding the Constitution. As the instrument came from them, it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity, were breathed into it by the voice of the people, speaking through the several State Conventions. 32

In order for the role the ratifiers have played in our constitutional history to be sufficient to convert them from readers into “authors,” originalism must conflate not only “intention” and “understanding” but also “authority” and “meaning” as well. When Madison says that the people breathed “life and validity” into the Constitution, from a philosophy of language point of view, the people gave the text authority, not meaning. There is nothing intrinsic to the notion of meaning or the concept of a text that transforms the reader into an author based on the authority

31 Ibid.
the reader possesses. Legal contracts only have authority in virtue of courts enforcing them, but this authority does not transform the judiciary into the author of legal contracts, in any meaningful sense.

**Conclusion**

What I have aimed to show is that originalist equivocation in the use of the terms “intention” and “understanding” has allowed originalism to appear more persuasive than what it actually is. While this thesis, if true, does a lot to clarify the originalism debate, I should be clear about its limited scope. My argument does not completely undermine originalism. Instead, it forces originalism to make a choice regarding the foundations upon which it will rest. It can either focus on drafter intent as the preeminent source of original meaning, thereby providing a theory of constitutional meaning and, therefore, a theory of constitutional interpretation. The consequence of taking this route is that it undermines originalist claims to the judiciary acting in a purely democratic and majoritarian fashion. Alternatively, it can abandon its claim to providing a theory of meaning and interpretation and recognize instead that it is providing a normative theory of judicial restraint and adjudication, purely as a rule of law.\(^{33}\) Once this choice is made, the debate can proceed along a more precise and effective path.

\(^{33}\) This seems to be the direction in which originalism is going. See Farber, *supra* note 8, at 1102 (“On the whole, the earlier, majoritarian argument for originalism seems stronger than the argument based on the primacy of authorial intent. The problem is not just that the primacy of intent is disputable, but that even attempting to define precisely what we mean by authorial intent is very difficult, even apart from the special problems of attributing a unified authorial intention to a document like the Constitution.”); Bassham, *supra* note 7, at 18-21 (concluding that the best way to understand originalism is as a theory of constitutional adjudication, not as a theory of meaning or interpretation).