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# A DEFENSE OF OLD ORIGINALISM

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# ARTICLES

## A DEFENSE OF OLD ORIGINALISM

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"We are all originalists now" has been a claim made with some frequency over the last ten years, and even though articles like Mitchell Berman's recent *Originalism is Bunk*[1] make it obvious that the claim is false, what does seem true is that originalism, as Berman himself asserts, "is now the prevailing approach to constitutional interpretation."[2] This state of affairs is unfortunate since most of the arguments in support of what is now called originalism are false. Indeed, they are not only false; they are not even really originalist, and thus they are false in precisely the same way that non-originalist arguments are. What I will try to show in this short essay is that the most influential arguments for and against originalism today are mistaken, and that they are mistaken for the same reason—they imagine an ideal of textual interpretation that can be formulated through an appeal to something other than or more than authorial intention. In fact, however, you can't do textual interpretation without some appeal to authorial intention and, perhaps more controversially, you can't (coherently and non-arbitrarily) think of yourself as still doing textual interpretation as soon as you appeal to something beyond authorial intention—for example, the original public meaning or evolving principles of justice.[3]

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1. Mitchell N. Berman, Originalism is Bunk 1 (July 10, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078933 (unpublished manuscript, on file with the Western New England Law Review).

2. *Id.* at 1 (internal quotation marks omitted) (quoting Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999)).

3. Steven Knapp and I began our defense of intentionalism with *Against Theory* in 1982 and continued with several other relevant articles. *See* Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982), *reprinted in* AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11 (W.J.T. Mitchell ed.,

## I. OLD ORIGINALISM V. NEW ORIGINALISM

Original public meaning is, in fact, a good place to begin this discussion because it is widely agreed that the shift "from original *intention* to original *meaning*"[4] (i.e., from the old originalism to the "New Originalism") has been responsible for originalism's increased popularity.[5] Indeed, Justice Scalia, no doubt the most influential new originalist, is at least as opposed to intentionalism as he is to the various forms of non-originalism. "What are we looking for when we construe a statute," Justice Scalia says (and he does not distinguish theoretically between statutes and the Constitution), is not "what the legislature *intended*" but "what it *said*."[6] And again, quoting Justice Frankfurter: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."[7]

These formulations—not what they intended but what they said, not what the authors intend but what the words mean—are

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1985) [hereinafter AGAINST THEORY]; Steven Knapp & Walter Benn Michaels, *A Reply to Our Critics*, 9 CRITICAL INQUIRY 790 (1983), *reprinted in* AGAINST THEORY, *supra*, at 95; Steven Knapp & Walter Benn Michaels, *A Reply to Richard Rorty: What Is Pragmatism?*, 11 CRITICAL INQUIRY 466 (1985), *reprinted in* AGAINST THEORY, *supra*, at 139; Steven Knapp & Walter Benn Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49 (1987); Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 187 (Gregory Leyh ed., 1992); Steven Knapp & Walter Benn Michaels, *Reply to George Wilson*, 19 CRITICAL INQUIRY 186 (1992); Steven Knapp & Walter Benn Michaels, *Reply to John Searle*, 25 NEW LITERARY HIST. 669 (1994); *see also* Steven Knapp, *Practice, Purpose, and Interpretive Controversy*, *in* PRAGMATISM IN LAW AND SOCIETY 323 (Michael Brint & William Weaver eds., 1991); Walter Benn Michaels, *The Fate of the Constitution*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 383 (Sanford Levinson & Steven Mailloux eds., 1988).

4. Barnett, *supra* note 2, at 620.

5. "Most originalists," as Jack Balkin has put it, "long [ago] abandoned original intention in favor of some form of original meaning originalism." Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 442 (2007). Most, but of course, not all; exceptions, in addition to Knapp and myself, would include Larry Alexander and Stanley Fish. *See* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 363 (Andrei Marmor ed., 1997); Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649-50 (2005).

6. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16 (Amy Gutmann ed., 1997).

7. *Id.* at 22-23 (internal quotation marks omitted) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (quoting Justice Oliver Wendell Holmes)).

helpful since they rule out not only what the authors used the words to mean ("original intentions"), but also what they were understood to mean by the readers (what is sometimes called "original understanding").[8] And for good reason. Whatever the merits of the original intentions, it is pretty clear that the actual original understanding of the text cannot possibly count as what we are looking for when we interpret it, precisely because it is itself an interpretation. To see this, we have only to imagine two different original understanders disagreeing. What are they disagreeing about? Not their understandings. They can agree that they have different understandings. What they disagree about is which one of their understandings correctly captures the meaning of the text. They disagree, in other words, about something that is utterly independent of their understandings of it. To put the point more concretely, we cannot possibly think that the original understanding of, say, the Cruel and Unusual Punishment Clause of the Eighth Amendment can tell us whether capital punishment is or is not constitutional because the mere possibility that the original understanders might themselves have disagreed about its meaning reminds us that they were in the same epistemological situation we are in. Of course, how they understood it might count as useful evidence of its meaning—but it cannot count as determining its meaning.

So if, as new originalists, we are interested in the text's public meaning, we are interested neither in what the authors meant by the words nor in what the readers understood by the words, but in the meaning of the words themselves. What is it that determines these meanings? The standard (indeed unavoidable) answer is that the meaning of the words is determined by the rules of the language. I may mean one thing by "cruel," and you may mean another, but what "cruel" actually means is what it means according to the rules of English. What determines the meaning of the text in this view, then, is neither the private, subjective meanings of the speakers nor the equally private, subjective understandings of the readers but, rather, the public and objective rules of the language. It is no accident that, at least according to Justice Alito, over the last few years, judges have invoked the dictionary definitions of dis-

8. For a helpful account of the different forms of originalism and a defense of what its author calls "Semantic Originalism," see Lawrence B. Solum, Semantic Originalism 2 (Ill. Pub. Law Research Paper No. 07-24, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

puted terms more than ever before in American legal history.[9] Dictionaries are the semantic rulebooks for languages. Or, at least, we have to *treat* dictionaries as the semantic rulebooks of the language if we are to make any sense of the claim that the meaning of the texts is determined by the meaning of the words, rather than by what the words are being used to mean.

A simple way to see the issue here is to ask whether we are to understand the dictionary meaning (or, more generally, the public meaning) of the word as *determining* what it means in the text or as providing *evidence* of what it means in the text. The first thesis is obviously the stronger one. It asks us to see semantic rules along the same lines that we see rules in games. If, for example, a lineman in a football game jumps offside, his premature movement is not evidence of his being offside; it is the thing itself. If a batter in a softball game hits a fair ball into the stands, it is not evidence that she hit a homerun; it is a homerun. We do not care whether she was trying to hit a homerun, or whether she even meant to swing; perhaps she was trying to check her swing, or perhaps she was just trying to hit a ball in the air to bring the winning run home from third. Perhaps, even, she wanted just to get the game over with and meant to swing and miss. It does not matter. We need have no interest in what she was trying to do in order to determine what she has done.

By the same token, if, like the new originalists, we are interested in what people said, not what they meant (what the batter did, not what she meant to do), then, to take the classic example, a statute that bans vehicles from the park bans not just cars driving through but military trucks mounted on a pedestal as a war memorial.[10] Both equally meet the dictionary definition—"any device or contrivance for carrying or conveying persons or objects."[11] And it not only bans the war memorial, it also bans any metaphors in a patriotic speech given in front of the war memorial—e.g., praise for our "lion-hearted troops." "Lion-hearted" here is the "vehicle"—"that word or term whose . . . literal meaning is applied in a figurative, nonliteral way"[12]—that expresses the tenor in the patriotic

9. *See* Posting of Robert VerBruggen to National Review Online, http://bench.nationalreview.com/post/?q=NGU4OWNjMGM3NjkyMjU5ZTg2NjhlZjlmMTZjYWMyZjk= (Dec. 4, 2008, 13:36 EST).

10. *See generally* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957).

11. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1584 (1999).

12. *Id.*

speaker's metaphor. The fact that the legislature meant to ban, say, only vehicles that were dangerous to pedestrians (not monuments or flowery orations) is as irrelevant as the fact that the batter meant to strike out.

The absurdity of this result is, of course, a practical problem. It has led virtually every interpretive theorist away from the strong thesis—the thesis that the meaning of the text is determined by the rules of the language. Or, more precisely, it has encouraged many theorists to treat the strong thesis (the public rules determine the meaning) and the weak thesis (the public rules provide evidence of what the meaning might be) as if they were identical. Thus, Justice Scalia approvingly cites Chief Justice Taney, asserting that "[t]he law as it passed is the will of the majority of both houses . . . and we must gather their intention from the language there used"[13]—the weak thesis—and then a page later goes on himself to "reject [on principle] intent of the legislature as the proper criterion of the law"—the strong thesis.[14] If we are rejecting their intent, why are we trying to gather their intention? But this confusion can be sorted out, and the main point is not, after all, that the two theses should not be confused or even that the strong one leads to absurd results. The main point is, setting aside the practical problems, that the strong thesis is theoretically incoherent.

Why? Because without some appeal to the intentions of the authors, the choice of which rulebook to use—meaning which set of semantic conventions to invoke— is entirely arbitrary. The basic idea of the appeal to the public rules of the language is that texts written in English should be interpreted according to the rules of English, not according to the subjective intentions of the people who authored the text or the equally subjective understanding of the people who first read the text. But how do we know that the Constitution was written in English? How do we know it wasn't written in, say, Schmenglish (which, let us imagine, we have just invented and which looks just like English but has an entirely different set of semantic conventions)? There is, of course, a good answer to this question—Schmenglish did not even exist in the eighteenth century; how could the authors of the Constitution have used it? But this eminently sensible response is not available to a strong new originalist position, since the whole point of that posi-

13. Scalia, *supra* note 6, at 30 (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 14 (1845)).

14. *Id.* at 31.

tion is that we are not supposed to care about what the authors meant to be doing. Furthermore, the common sense fallback position here—that what the speakers are trying to do is dispositive with respect to what language they are speaking, but not with respect to what they are saying—is equally unacceptable. On what non-arbitrary principle are we supposed to care about their intentions long enough to know that they were intending to mean something in English but then stop caring about their intentions the minute it comes to trying to figure out what it was they were actually intending to mean?

Both for practical and theoretical reasons, then, the weak new originalist thesis is preferable to the strong one. But the problem with the weak new originalist thesis is that it is not an alternative to intentionalism; it *is* intentionalism. When, for example, Justice Scalia writes in *District of Columbia v. Heller* that, in interpreting the Second Amendment, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning,'"[15] he is no longer proposing that we should pay attention to the original public meaning as opposed to the original intended meaning. He is claiming that the original public meaning *is* the original intended meaning. That is the force of "was written to be" and "were used in." To say that the words of the Constitution "were used in" the ordinary way is not to give an account of what the words mean instead of what the authors intend; it is to give an account of what the authors intended the words to mean.

This does not, of course, mean that Justice Scalia is right; he may be entirely mistaken about how the authors of the Constitution used their words and phrases. But, setting aside the irrelevant question of whether he has the correct account of the authors' intentions, the point here is that the theoretical autonomy of the new originalist position—the focus on original public meaning as an improvement over original intended meaning—has disappeared. And the new originalist strategy for restoring it—the appeal to the public rules of the language—is undone by its inability to justify its preference for the public meaning according to the rules of late eighteenth-century English. In fact, the public meaning of early twenty-first-century English would do just as well and would be just

15. District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (alteration in original) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

as relevant. If we are not going to use the rules the authors used, why not use our own rules instead? More generally, if we are not using the rules the authors originally used, why should we continue to think of ourselves as originalists? Either we use the rules they chose, or we use the rules we choose. Either the new originalism is identical to the old originalism or it is not any kind of originalism at all.

## II. OLD ORIGINALISM V. NON-ORIGINALISM

But, of course, the demonstration that new originalism (insofar as it really is new) is really just a form of non-originalism does not register as a problem for theorists who share the new originalist desire to refuse intentionalism (but who do so precisely because they also want to refuse originalism). Indeed, non-originalists like Berman are obviously in agreement with new originalists like Justice Scalia about the commitment to invoking linguistic rules other than those employed by the actual authors, and they have an advantage over new originalists in at least recognizing that to do so is to repudiate originalism.[16] Why does this count as an advantage? Because it alerts them to the necessity of coming up with some other account of why the rules they invoke are preferable to the ones the author invoked. Thus, in *Originalism is Bunk*, Berman invokes the speech act distinction between "utterer's meaning" and "utterance meaning," giving the example of an announcement that the deadline for submitting applications for free tickets to "the Rolling Stones' . . . latest farewell tour" is "12:00 a.m. Thursday."[17] By "12:00 a.m." the speaker means noon but, of course, "the dictionary meaning of '12:00 a.m.' is midnight."[18] The dictionary meaning ("utterance meaning") is, of course, the public meaning, which Justice Scalia would be required (but unable) to defend on the grounds that it was the original meaning. Berman, in effect, sees that it must be defended on some other grounds. He sees, in other words, that you need public meaning if you are going to escape intended meaning but that you cannot choose public meaning over intended meaning on the grounds that public meaning is more original.

Berman here is actually more sympathetic to intentionalism than Justice Scalia. He thinks what the speaker intended does count as a possible correct interpretation of the utterance but not as

16. *See* Berman, *supra* note 1, at 51.
17. *Id.* at 41, 43 (emphasis omitted).
18. *Id.*

a necessarily correct interpretation, or rather, as he puts it, not as a "better interpretation."[19] If, for example, the phrase "12:00 a.m." were used to mean "noon" by a friend who was telling you when to meet him for lunch then, since what you wanted to know was when he would show up at the restaurant, the meaning he intended would be better than the public meaning. But in the context of a public announcement, Berman argues, "I can interpret that utterance to mean that entries are . . . [due by] midnight . . . . And I can continue to believe that is the better interpretation even after I learn that the author meant to require that applications be submitted . . . twelve hours later."[20] It is "better," not because it is more or less original, but because it better serves the requirements of public communication.

Here, as we have noted, the non-originalist critique of intentionalism relies on the same scenario that the new originalist critique relies on. That is, it relies on the idea that an interpreter can treat the text as if it had been produced by some set of rules other than the rules it was in fact produced by, other than, that is, the rules the author actually used. And this is obviously true. Indeed, as we have already begun to see, it is infinitely true. There is no limit to the number of languages we could invent that could include the sentence "the application is due at 12:00 a.m.," and there is correspondingly no limit to the number of meanings that sentence could have. This is both an opportunity and a problem for non-originalists. It is an opportunity because the whole point of non-originalism is to make possible more than one meaning; it is a problem because Berman, like virtually all non-originalists (and, indeed, like Justice Scalia), is not at all enamored of the idea that "once we untether meaning from authorial intention, a text can mean . . . anything at all."[21] He thinks that view is "plainly mistaken."[22] Why? Because he also thinks that non-originalists, while disagreeing with the intentionalist idea that the text's meaning is determined by its author, can "agree that the text's meaning depends upon the language that the author intended to employ."[23] So we cannot just go around making up semantic rules to interpret the text; we have to use the rules of the language that the author was using. Indeed, he also thinks that we "must . . . be sensitive to the category of utter-

19. *Id.* at 51.
20. *Id.* at 50-51.
21. *Id.* at 51.
22. *Id.*
23. *Id.* at 46.

ance she intended to make (a poem, a law, an advertisement, etc.)."[24] His idea, then, is that a text can mean anything that the rules of the language it is written in allow it to mean, plus the "category of utterance" it is supposed to be—not just one thing (the intended meaning) but also not just "anything at all."[25]

But, as we have already seen, this will not work. Why? Because we can have no non-arbitrary reason for committing ourselves to the importance of the author's intention with respect to the language she was using but then ignoring it with respect to the statements she was using the language to make. Once, in other words, we interest ourselves in some set of semantic rules other than the ones the author was actually using (by "12:00 a.m." she meant "noon"; but in English "12:00 a.m." means "midnight"), we have no non-arbitrary way of preferring the meaning in English to the meaning in Schmenglish or any other language we might imagine. They are all languages that she was not speaking, using rules that she was not using. So there is an important sense in that we are free to do anything at all—even if we do not want to—since whatever we do, it will not involve interpreting her speech act.

The point here is not an epistemological one. It is not, in other words, that authorial intention provides constraints on interpreters that Berman's non-originalism does not. Indeed, properly understood, the debate between originalism and non-originalism has nothing to do with constraints—even though both sides constantly put this forward as the main issue. Constraints are irrelevant because the debate is about *what* the interpreter is trying to figure out, not about *how* to figure it out. And even the strongest originalist claim—the text means what its authors intended it to mean—obviously imposes no limits on what interpreters can think the authors intended. Indeed, originalists can and often do have completely opposed accounts of what authors intended, neither of which will be rendered more persuasive by the reminder that they are looking for the original intended meaning. They already know that; what they do not know is what the original intended meaning was.

The advantage of originalism, then, is just that it tells us what we are looking for and thus allows us to distinguish between debates over which of our beliefs about the text's meaning are true and debates over which of our beliefs about what we would like it

24. *Id.*
25. *Id.* at 46, 51.

to mean are, to use Berman's word, "better."[26] Berman argues that we should think of interpretation "as an effort to attribute to a text the meaning that would best serve . . . [the] interpreter's reasons for engaging in the activity of interpretation, or would best serve her (possibly inchoate or not wholly conscious) criteria for success."[27] Sometimes, he thinks, this will involve the author's intention (success counts as figuring out what the author means); sometimes it will not (success counts as "secur[ing] good outcomes" regardless of what the author meant).[28] But it is easy to see how the search for good outcomes makes disagreement over the meaning of the text disappear. Suppose my reason for interpreting the Fourteenth Amendment is to establish racial justice by making sure that all races are fairly (i.e., proportionately) represented at my university. Suppose your reason for interpreting it is to establish racial justice by making sure that no one's race is used against him (proportion does not matter). We each think (correctly) that our interpretation is the one that best supports our sense of social justice. But of course, the fact that the two are equally successful (the fact that we are both right) is the problem not the solution, and once we accept the criterion of success in relation to our reasons, it makes no sense whatsoever for us to understand ourselves as disagreeing about the meaning of the text. What we are disagreeing about is how we should understand racial justice. And we do not need the Fourteenth Amendment to have that disagreement—which is just to say that we are not really disagreeing about the meaning of the Fourteenth Amendment.

Indeed, our debate only makes sense as a debate if it is *not* about what the Constitution means. For if it were true that the Constitution did not mean only what its authors intended and that our beliefs and desires played a role in determining its meaning, then we could never describe different interpreters coming up with different meanings as disagreeing. What would they be disagreeing about? The Constitution really would mean different things to each interpreter, and there would be no contradiction in its doing so—that is the whole point of insisting that the beliefs and desires of the readers play a role in determining the meaning of the text. In fact, that is the whole point of non-originalism. Berman tries to avoid this problem by insisting "that disagreement [does not] necessarily

26. *Id.* at 51.
27. *Id.* at 52.
28. *Id.* at 52-53.

hav[e] anything to do with authorial intentions: We can sensibly argue both about what our goals should be and about how they will be best served"—which is certainly true.[29] But, as we have just seen, either our arguments about what our goals should be are not arguments about what the Constitution means (in which case our arguments make sense, but they have nothing to do with interpretation), or our arguments really are about what the Constitution means, in which case they do have to do with interpretation but do not have anything to do with our goals.

## III. THE LIMITS OF ORIGINALISM

But even if the theoretical arguments on behalf of intentionalism were accepted, it might still be argued that the practical obstacles are insuperable: How can we know with any confidence other people's subjective mental states? How, with respect especially to the Constitution, can we know if its many authors had the same mental states? How can we even decide (taking into account the problem of the ratifiers) who its many authors are? Not only does originalism not help us solve our interpretive problems, it seems to create new ones. So why should we embrace an interpretive theory that makes things worse?

The first answer, of course, is that we have no choice. New originalism and non-originalism are not really theories about what texts mean; they are ideas about what to do when we do not know, do not care, or do not want to be stuck with what the text means but are nevertheless committed to the proposition that we should always and increasingly do what the text tells us to do. From a functionalist perspective, in other words, the argument would be that when you are increasingly committed to redescribing political differences as legal ones (so that you can seek to resolve them through the appeal not to what the people want but to what the relevant document says the law requires) something that calls itself interpretive theory is necessarily going to get a lot of play. Here we might have the germ of a consequentialist argument in favor of intentionalism—it cannot help us figure out the meaning of the Constitution but it might push us in the direction of a political culture less committed to imagining that our own ideas of social justice must be enshrined in a text written by very different people a long time ago. In the meantime, however (and at the risk of delaying the revolution), it is worth pointing out that some of the practical objec-

29. *Id.* at 53.

tions to intentionalism are not so insuperable, and that, even when they are at their most insuperable, there are workarounds.[30]

A standard new originalist worry—for example, that "we simply do not" know very much about "the semantic intentions of the Framers"[31] and that, more generally, "the original intent of the authors" may be "unrecoverable"[32]—is in some sense obviously true, but in another sense deeply misleading. The obviously true part is that it sometimes will be unrecoverable. The misleading part is the idea that intent, because it is in the minds of the authors, is something that is both hard to get and possible to do without—which is the point of new originalism. But without reference to the minds of authors there would be no interpretation at all. For example, the minute that we treat a text as a text, we are making judgments about what was going on in the minds of its authors (that they were writing a text), and we do the same thing when we treat it as written in a particular language for a particular purpose or in a particular tone. What, for example, is the difference between an ironic remark and a non-ironic one? They are likely to look exactly the same—"let's be serious," to use an old Derridean example[33]—but, of course, they do not mean the same thing. Indeed, we are inclined to say that when someone is speaking ironically he means exactly the opposite of what he seems to say. But this judgment is incomprehensible without some recourse to the speaker's intent (he does not really mean it). And, of course, it is not just the ironic statement that requires an account of the author's mental state—the non-ironic one does too (he does really mean it). Deciding whether or not any utterance is ironic is not a matter of choosing between an intended meaning and a public meaning, which is what the New Originalists think they are doing. It is a matter of choosing between two intended meanings. And we do this all the time, whenever we are interpreting any speech act, whether written or spoken. So there is nothing intrinsically unrecoverable about the relevant intentions, and there is no alternative to the attempt to recover them: all speech acts are either ironic or not; all decisions

30. Indeed the history of interpretive theory with respect to the Constitution could much more easily be understood as a history of these workarounds rather than as the history of competing theories that it characteristically understands itself to be.

31. Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 149 (2007).

32. Posting of Bruce Boyden to Concurring Opinions, http://www.concurringopinions.com/archives/legal_theory/ (Mar. 12, 2008, 18:48 EST).

33. JACQUES DERRIDA, LIMITED INC 34 (Gerald Graff ed., 1988) (internal quotation marks omitted).

about which they are, are decisions that necessarily consider their authors' intentions.[34]

And, of course, sometimes those decisions will be wrong. Indeed, when it comes to texts written by legislative bodies, often a long time ago, those decisions may very often be wrong. From this perspective (or, rather, in light of this problem), what I earlier called weak textualism[35] can be understood as a rule of interpretation designed to provide a kind of epistemological workaround. The point is made indirectly but sharply by Adrian Vermeule when he argues that intentionalists might—without contradicting their intentionalism—adopt rules restricting judges from taking legislative history, or, by extension, the records of the Framers' debates, into account in their efforts to determine the meaning of a law.[36] The argument would be the empirical one—that judges (untrained in

34. Furthermore, to claim that the author's subjective intention is what we are looking for is not to claim that we are looking for something private and independent of the speech act. We are looking for what the author means by the words she uses, not for something she means independent of the words she uses. We could say, like Justice Scalia does, that we are looking for her expressed intention, except that Scalia thinks there might also be an unexpressed intention. He thinks, in other words, that if the writer does not express her meaning by following the rules that all the interpreters know (the rules of the language), her intention is unexpressed. But while a writer who follows rules that interpreters do not know (the rules of some other language) may well fail to communicate what she means, it does not follow that she has failed to express what she means. I may express myself in perfect and entirely standard English, but if I am talking to people who do not speak English, I will certainly fail to communicate with them. No one, however, would argue that I have failed to express myself. Indeed, although you can fail to communicate in many different ways, you can only fail to express yourself in one—by not producing a speech act.

More generally, the same kind of analysis explains the irrelevance of the kinds of mistakes that anti-intentionalists often cite (e.g., using the wrong word) as counter-examples to the claim that the speech act means what the speaker means by it. If, say, twenty years ago, I had used the word "disinterested" to mean "uninterested" because I thought that in standard English (i.e., if you looked it up in the dictionary) it meant "uninterested," I would have been mistaken. Actually, it meant "impartial." But a correct interpretation would still have involved figuring out the semantic rules I was in fact using rather than some semantic rules I was not using, including even the ones I myself hoped I was using. In other words, the fact that I was wrong to identify the conventions that I was using as the conventions of English does not mean that it would make sense to interpret my utterance as if I really had been using the conventions of English. And, of course, because the relevant rules are always the rules the speaker or writer is in fact using, the right meaning twenty years ago is now well on its way to becoming the wrong meaning. English is just the name for a prevailing set of rules, not a determining one.

35. Weak textualism being the claim that the text itself is the best evidence of what its authors meant by it. *See supra* note 14 and accompanying text.

36. *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

historical research, lost in conflicting data, etc.) are more likely to get the correct account of what the authors intended by ignoring such evidence. As Vermeule points out, an intentionalism that accepted this empirical argument would look practically indistinguishable from textualism.[37] But the two would remain entirely different from the standpoint of their theoretical claims, and the difference would be precisely the one between the strong textualism committed to what the authors said instead of what they meant, and the weak textualism committed to what the authors said as the best evidence of what they meant.

Vermeule's position here is obviously different from Justice Scalia's, at least insofar as Justice Scalia objects "to the use of legislative history on principle," given his rejection of the "intent of the legislature as the proper criterion of the law."[38] But Justice Scalia himself takes a slightly but significantly different position when he says that instead of "look[ing] for subjective legislative intent," we should be looking for "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law."[39] This is not what the text says as opposed to what it is intended to mean (strong textualism); and it is also not what the text says as evidence of what it is intended to mean (weak textualism). It is what the text would mean if the people who wrote it meant what they would mean if they were following the rules of the language as commonly understood. It is, in other words, a hypothetical intent, existing in the mind of a hypothetical speaker and inscribed on the pages of a hypothetical text. And what it does is provide an ontological version of the epistemological workaround. Where Vermeule urges

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37. *Id.* at 82. Vermeule argues that

> Given certain empirical and institutional assumptions . . . the intentionalist and the textualist might . . . agree upon a rule excluding legislative history. The intentionalist would agree because, on particular empirical premises, the rule would minimize . . . erroneous determinations of legislative intent . . . . The textualist would agree because, on the same premises, the rule would minimize erroneous determinations of ordinary textual meaning . . . .

*Id.*

38. Scalia, *supra* note 6, at 31. Vermeule himself believes that he is not required to take a position on the relative merits of intentionalism versus textualism because his support for plain meaning is compatible with both. This seems to me doubtful, if only because without the appeal to intentionalism, it is hard for Vermeule to answer William Eskridge's criticism that "Vermeule has no metric for determining whether an interpretation is good or bad." William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2053 (2006) (reviewing VERMEULE, *supra* note 36). Or, at least, no metric that is compatible with his originalism.

39. Scalia, *supra* note 6, at 17.

judges to limit themselves to the text itself as evidence of actual authorial intent (on the grounds that this is their best chance of figuring out what the intent was), Justice Scalia, in effect, proposes to treat the text as evidence of an authorial intent that need never have been actual and probably was not on the grounds that it does not really matter what their actual intent was.[40]

But, of course, not only is this hypothetical intentionalism not a kind of textualism, it is not a kind of originalism either. Here, the difference between Justice Scalia and avowedly non-originalists like Berman is just that. Where Justice Scalia asks what the text would mean if it had been written by his hypothetical plain meaner, Berman asks what it would mean if it were written by us. So we cannot really prefer new originalism to non-originalism on the grounds that it is looking for what the Constitution originally meant; after all, the hypothetical plain meaner is just hypothetical.[41] A choice between them would have to be made according to some consequentialist criterion. On behalf of Justice Scalia, one might perhaps say that his non-originalism has the advantage of fixing the Constitution's meaning (since the hypothetical writers always stay the same), but one could also say that non-originalism has the advantage of not fixing it (since we change). The argument here, in other words, would not be about which is a better method of interpreting the Constitution but about whether it is better to have a Constitution that always means the same thing or one that does not.[42]

Another way to put it would be to say that both new originalism and non-originalism can only be rescued from their theoretical contradictions (first, their inability to say even what language the text is in without relying on authorial intention and second—when they realize the force of the first problem and bring the author back—their inability to find a principled justification for accepting

40. *See supra* text accompanying notes 13-14.

41. It is worthwhile remembering why we cannot say it is at least closer to the original meaning. If we did, then we would be intentionalists. So, while what a reasonable eighteenth-century person would have understood the Constitution to mean may well in fact be either close to or, for that matter, identical to the original meaning, that is a consequentialist virtue made theoretically irrelevant by non-originalism's own anti-intentionalist premises.

42. Actually this is not quite the right way to put it since we have no criterion of identity that makes sense of the idea that when the meaning of a text changes, it still counts as the same text. But setting aside that problem (which in itself is fatal to the idea that the meaning of a text can change), the point here is only that choosing between a meaning that is fixed and one that is not would in no way involve choosing between theories of interpretation.

authorial intention with respect to language and genre but not meaning) if we imagine them as sets of rules not for reading the Constitution but for rewriting it. This is a formulation that new originalists would no doubt find unacceptable, but a non-originalist like Berman might take in stride since he already thinks of the distinction between reading a text and writing one as itself somewhat tenuous. Currently, he thinks, "we are . . . enmeshed in a set of cultural understandings that treat interpreting a text and authoring it as nonidentical (even if the precise nature or contours of the difference are not clear)," and he thus thinks that we are "not free, psychologically or phenomenologically, to offer interpretations that would serve to efface . . . the interpretation/authorship distinction."[43]

In fact, the difference between attributing meaning to some marks and noises and trying to figure out the meaning someone else attributed to those marks and noises is quite clear and would no doubt be clear in any culture that distinguished between persons. Nevertheless, this comparative willingness to elide the distinction between reading and writing suggests the possibility of another kind of workaround, one in which we understand ourselves as continually rewriting the text but as doing so in an orderly way, paying attention both to what previous authors have done and to the "argumentative culture" of our own society.[44] Hence we are not stuck with just the original meaning (or, if we cannot figure that out, with no meaning), but we are also not abandoned to the rampant subjectivism of just any meaning.

This is a version of the position that was championed for many years by Stanley Fish, who was once, as Berman notes, "a proponent of reader-response criticism" but who is now, as Berman also notes, a die-hard intentionalist—so there is hope for Berman too.[45] The basic idea of Fish's "community of interpretation" was that readers of texts were actually best understood as writers of them, but that their activities as writers were significantly constrained by the beliefs and practices of the professional cultures (literary or legal) in which they operated.[46] Hence the meaning of texts could

43. Berman, *supra* note 1, at 54.

44. *Id.*

45. *Id.* at 37 n.102.

46. STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14 (1980) ("Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties.").

and did change, but there were always standards of acceptability, albeit not always the same standards. Yet as we have already seen, the issue of constraints is completely irrelevant, which is just to say that originalists can easily acknowledge that the processes of earning "public acceptance" described by Berman and (back in the day) by Fish give you constraints.[47] The originalist point is that they just do not give you constraints on interpretation. Indeed, they have nothing to do with interpretation. Rules for writing texts are not rules for reading them. More strongly, you can at least have rules for writing texts but you cannot really have rules for reading them. "Try to figure out what the authors intended" is not a rule; it is not even a recommendation—it is just a description.

## CONCLUSION

Another way to put all of this is just to say that what I am describing as intentionalism's coherence is purchased at the expense of its utility. Hence my skepticism about the whole field of legal interpretation, which is to say, about the idea that legal problems—even problems in constitutional law—can be usefully addressed by coming up with the best theory of interpretation. Indeed—especially with respect to the Constitution—that skepticism could be extended, as I have suggested above, to the substitution of legal interpretation for political persuasion in modern American life. Every declaration that "choosing a Supreme Court nominee" is "[t]he most important decision a president ever makes"[48] counts as a kind of tribute to the world in which theories of interpretation have increasingly come to function not just as proxies but as replacements for theories of social justice. But that, of course, is another topic.

47. *Id.* at 167-73; Berman, *supra* note 1, at 54.

48. Anna Quindlen, *The 2008 Bench Press: The Most Important Decision a President Ever Makes? It's Choosing a Supreme Court Nominee. Voters, Take Note*, NEWSWEEK, May 12, 2008, at 64.