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An Analysis of the Theory of Original Intent

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AN ANALYSIS OF THE THEORY OF ORIGINAL INTENT

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I. INTRODUCTION

The meanings of many, perhaps most, constitutional and statutory rules are uncertain to one degree or another. Thus, judges often may reasonably disagree about the applications of such rules to specific fact situations. The possibility of reasonable interpretive disagreement entails the possibility that a judge will exercise interpretive discretion. But judicial discretion seems to involve judges in the creation of law rather than in its interpretation. Thus, judicial discretion seems incompatible with democratic procedures, at least where judges are not elected officials.

The theory of original intent is based upon the assumption that judicial discretion in the interpretation of laws subverts the democratic process. Originalists seek to guarantee completely determinate legal rules by eliminating the possibility of adjudicative discretion. In contexts in which the application of a legal rule is uncertain, the originalists recommend that judges apply the rule in accordance with the specific intentions of the rulemakers.

This essay states and evaluates the theory of original intent as a principle of judicial interpretation of legislative and constitutional rules,[1] and draws three conclusions. First, the objectives of the theory cannot be achieved by means of the principle of original intent. Second, in any case, those objectives themselves are based upon an inadequate understanding of the nature of legal rules and, consequently, cannot be

1. Thus, I do not restrict my attention to the use of the original intent principle in constitutional contexts.

achieved by any means. Third, the theory is based upon an inadequate understanding of the nature of a democratic order.

In Part II, I describe the interpretive problem to which the principle of original intent is proposed as an answer. Part III illustrates the principle of original intent as applied in three types of situations. Part IV evaluates the version of originalism set forth in Part III.

I state the principle of original intent in an idealized form. My specific characterization of the principle has not been advocated by any one member of the originalist tradition. However, I do think that my account brings out at least some of the implications of the underlying premises of that tradition.[2] Of course, there are inherent risks in evaluating an idealized account of any theory.[3] On the other hand, there are advantages too. For example, one is better able to focus upon themes and motivations common to a tradition as a whole. Analyzing the writings of every member of that tradition would be not only interminable,[4] but also less decisive.

II. To What Question Is the Theory of Original Intent an Answer?

A. The Concept of a Legal Rule

The theory of original intent is intended to assist the interpretation of certain kinds of normative rules.[5] Normative rules

2. I think that my account of the original intent principle captures at least part of the underlying philosophical picture of such writers as Edwin Meese, III, *Interpreting the Constitution*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13 (Jack N. Rakore ed. 1990); Lino A. Graglia, *How the Constitution Disappeared*, *in* INTERPRETING THE CONSTITUTION, *supra*, at 35; and RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). On the other hand, I do not regard Justice Scalia's recommendation to look to the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right" as an example of an original intent theory. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

3. Two of those risks are triviality and unfairness. If no one has, or would, hold the theory in that form, then any criticism of that form is probably uninteresting. And there is a risk of unfairness in attributing the weaknesses of an idealized account to those who would not accept its terms. I hope that I have not made either mistake.

4. Someone always asks, "But have you read X's latest article"?

5. A speaker of English can use the phrase "normative rule" in at least three ways. She can use it to refer to patterns of conduct conforming to normative rules, to forms of language expressing normative rules, or to normative rules themselves. I use the phrase "normative rule" in the third sense.

can be understood as types of propositions.[6] The class of propositions can be subdivided. One subclass is normative propositions. Normative propositions are propositions concerning human conduct. They can be expressed in at least the following forms: (1) in circumstances C, action A is obligatory; (2) in circumstances C, action A is impermissible; (3) in circumstances C, action A is permissible.[7] Normative propositions can be formulated, contemplated, proposed, opposed, criticized, debated, adopted, interpreted, modified, abandoned, and acted upon by humans in many other ways.

Legal rules can be understood as a subclass of the class of normative propositions. Legal rules can be expressed in at least one of the following forms: (1) in circumstances C, action A is legally obligatory; (2) in circumstances C, action A is legally impermissible; (3) in circumstances C, action A is legally permissible.[8]

B. The Linguistic Formulation of Legal Rules

Normative rules cannot be identified with their linguistic formulations. Consequently, legal rules cannot be identified with theirs. For example, the legal rule, "Assault is legally impermissible," can be expressed in any language that has sufficient semantic resources to express the thought. Obviously, none of the linguistic formulations of the assault rule should be identified with the rule itself. Nevertheless, courts in the United States must concern themselves with the linguistic formulations of legal rules in at least two contexts.

First, courts often are required to construe legal rules that are formulated in authoritative language. Constitutional rules, statutes, and administrative regulations are promulgated in official forms of language. Obviously, courts must pay attention to the linguistic expression of such rules.

Second, courts must focus upon linguistic expressions of rules even when applying common law rules. It is true that

6. Propositions can be understood as types of acts of thought. Types of acts of thought are distinct from specific acts of thought. Contrast, for example, Ralph's act of thinking that hydrogen is a constituent of water with Susan's act of thinking that hydrogen is a constituent of water. Each mental event is a distinct act of thought. Neither should be identified with the thought-type which it exemplifies, namely, the thought that hydrogen is a constituent of water.

7. I do not claim that this classification is exhaustive.

8. I do not claim that this classification is exhaustive.

common law rules are not expressed in authoritative forms of language. According to the traditional theory, common law rules are exemplified, but not completely disclosed, in any particular adjudicative result. Nevertheless, courts often publish opinions in which they try to justify their decisions. Other courts take into account the language of such judicial opinions in the course of applying common law rules.

The inevitable preoccupation of courts with the linguistic formulations of legal rules makes necessary the task of interpretation. By an interpretation of a legal rule, I mean a decision whether the rule, as linguistically expressed in a particular way, applies to a specific situation. A legal rule R applies to situation S if, and only if, condition C of R is satisfied by the facts of S. For example, the legal rule formulated as, "Driving a motor vehicle on a public road in excess of the posted speed limit is legally impermissible," applies to Susan's situation if, and only if, at that particular time and place, Susan drove a motor vehicle on a public road in excess of the posted speed limit.

C. Causes of Uncertainty in the Application of Legal Rules

1. Semantic Vagueness

Interpreting linguistic formulations of legal rules often is difficult and controversial. One cause of uncertainty is the semantic vagueness of linguistic formulations of rules. Sentences contain words, and words are vague to a greater or lesser extent. This concept of semantic vagueness can be made more precise in the following way.

The Medieval tradition distinguished categorematic from syncategorematic words and phrases.[9] A categorematic word or phrase can be applied to entities or states of affairs. For example, "horse," "vehicle," "is liable to," "indemnify," "constitutional," and "course of dealing" are categorematic terms. Syncategorematic words and phrases are terms which cannot be applied to things or states of affairs, such as "a," "the," "all," "at least one," "or," "and," "an," and "if."

Categorematic terms have both intensions and extensions.[10]

9. For a discussion of this distinction, see JOHN N. MARTIN, ELEMENTS OF FORMAL SEMANTICS 26-27 (1987).

10. This account is oversimplified insofar as it suggests that syncategorematic

The intension of a categorematic term is the meaning semantically tied to the term by the rules of language. For example, the intension of the term "horse" is the characteristic of being a horse. The intension of the term "is liable to" is the relation of being liable to someone. The extension of a term is the set of entities or states of affairs to which the term is applicable. For example, the extension of the term "horse" is the set of existing horses. The extension of the term "is liable to" is the set all pairs of persons where the first is liable to the second.

A categorematic term is semantically vague if its extension is uncertain to at least some degree. That is, a term is semantically vague if there is at least one possible situation in which proficient speakers of the language could reasonably differ over the question whether the term applies to the situation. For example, the term "vehicle" is vague because proficient speakers of English could reasonably disagree over the question of whether a pair of roller skates is a vehicle.

Semantic vagueness is a matter of degree; the extensions of some categorematic terms are less certain than others. For example, the term "awesome," as used by young people, is more vague than the term "rational number,"[11] as used by mathematical logicians. In general, the degree of vagueness of a categorematic term is a function of the number of kinds of controversial cases which could arise.

The linguistic formulation of a legal rule is vague if it contains at least one vague categorematic word or phrase. The degree of vagueness of the linguistic formulation of a rule is a function of the degrees of vagueness of its constituent categorematic terms. Consider, for example, a legal rule formulated as, "Operating a vehicle in any city park is legally impermissible."[12] The rule is vague, in part, because the constituent categorematic term "vehicle" is vague. Is pushing a baby buggy in a city park a violation? What about riding a bicycle, a scooter, roller skates, or playing with a toy boat in the park pond? Other causes of vagueness are the terms "operating" and "city

words are not semantically tied to senses. *See, e.g.*, C.I. LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION 78-82 (1946).

11. A rational number is a number which is expressible as a quotient m/n, where m and n are integers and n does not equal 0.

12. I take this example from H.L.A. HART, THE CONCEPT OF LAW 123-27 (1961). *See also* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

park." Is sitting behind the wheel in a parked car "operating" the vehicle? There might be uncertainty as to the location of a park boundary. There might be uncertainty as to whether a park owned by the county or state is a "city" park.

Of course, there are many examples of vague legal rules. Is a statutory prohibition of abortion a violation of the rule, "A governmental act which denies a person due process of law is legally impermissible"?[13] Is a corporate charter a contract within the meaning of the rule, "A state action which impairs the obligation of a contract is legally impermissible"?[14] Is recreational elk hunting a privilege or immunity within the meaning of the rule, "A state action which denies to a nonresident any privilege or immunity extended to the state's own citizens is legally impermissible"?[15] Is the act of picketing on a public sidewalk while holding a sign criticizing the President of the United States a violation of an ordinance providing, "The act of conducting oneself in a public place in a manner which is likely to annoy passersby is legally impermissible"?[16] Obviously, the list could be expanded indefinitely.

Thus, one difficulty in interpreting legal rules is the vagueness of their linguistic formulations. And vagueness causes uncertainty in application.

2. *Semantic Ambiguity*

Sometimes uncertainty in the application of legal rules is caused by ambiguity rather than by vagueness. A word or phrase is ambiguous if it is semantically tied by the rules of language to more than one intension and if the formulation of the rule does not make clear which intension has been invoked. A linguistic formulation of a legal rule is ambiguous if it contains at least one ambiguous word or phrase.

Ambiguity infects many English categorematic terms. Consider, for example, the word "intend." Imagine a person, P, who does an act, A, which has as a consequence event C. In one sense of the word "intend," P intends C if, and only if, P foresees that C probably will result from A. In a second sense, P intends C if, and only if, P foresees that C probably will re-

13. *See* Roe v. Wade, 410 U.S. 113 (1973).
14. *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
15. *See* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978).
16. *See* Coates v. Cincinnati, 402 U.S. 611 (1971).

sult from A, and P's main purpose in doing A is to bring C about. In a third sense, P intends C if, and only if, P foresees that C probably will result from A, and even though it is not the case that P's main purpose in doing A is to bring C about, P is pleased by the awareness that C will probably result from A.

Now consider a legal rule formulated as, "A governmental action, A, which has a disparate impact, D, upon women, was done with the intention of causing the disparate impact and was not done in order to accomplish an important governmental objective in a substantially necessary way is legally impermissible."[17] This formulation is ambiguous to the extent it is unclear which sense of "intention" the rule invokes.

Ambiguity may also infect syncategorematic terms. Consider the word "if." It can be used by English speakers to mean "if and only if." That is, sometimes a speaker asserting "Q if P" means to assert that P is both a necessary and a sufficient condition for Q. On the other hand, sometimes a speaker asserting "Q if P" means to assert only that P is a necessary condition for Q. The first occurrence of "if" in the following statement exemplifies this type of ambiguity: "A use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property."[18]

Another example of syncategorematic ambiguity is the word "and." An assertion of the form "P and Q" may mean at least the following things in English: (1) P and Q are distinct propositions and both P and Q are true; (2) P and Q are distinct propositions and either P is true or Q is true or, both P and Q are true; (3) P and Q are distinct propositions and either P is true or Q or true, but not both P and Q are true; or (4) P and Q are not distinct propositions, which means that saying "Q" is just another way of saying "P." Now consider the legal rule, "A governmental action inflicting a cruel and unusual punishment is legally impermissible."[19] Obviously, the syncategorematic term "and" is ambiguous in this context.

17. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

18. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (citation omitted).

19. *See* U.S. CONST. amend. VIII.

3. *Amphiboly*

Some linguistic formulations of legal rules are ambiguous, not because they contain ambiguous terms, but rather because the grammatical construction of the sentence is ambiguous. Such formulations are amphibolous.[20] Consider, for example, the rule, "Killing an escaped convict with a knife is legally permissible."[21] Obviously, this sentence can be interpreted in at least two ways. On the one hand, it might be understood as, "The act of using a knife to kill an escaped convict is legally permissible." On the other hand, it might be taken to mean, "The act of killing an escaped convict who has a knife in her possession is legally permissible."

A common example of amphiboly is the use of sentences of the form, "all F are not G." Sometimes this is used to mean "not every F is G but some F are G." On the other hand, sometimes it is used to mean "every F is not G." Consider, for example, the sentence, "Every law that places the mentally retarded in a special class is not presumptively irrational."[22] What this means depends upon whether one takes it as an instance of the schema "not every F is G but some F are G," on the one hand, or as an instance of the schema "every F is not G," on the other.

4. *Unreasonableness of Applications to Apparently Clear Cases*

Sometimes uncertainty in the application of legal rules results, not from semantic vagueness or ambiguity, but from the apparent unreasonableness of applying a rule to what seems to be a semantically clear case of the rule. This concept of a semantically clear case of a linguistic formulation of a legal rule can be clarified in the following way. A paradigm case of a categorematic word or phrase is a thing or situation that is close to the core of the term's extension, as opposed to being near the uncertain boundary of the extension. A paradigm case of a term T is something about which one can truthfully say, "If *any*thing is a T, *that* certainly is." Now suppose that the linguistic formulation of a rule, R, contains certain categorematic

20. *See* DANIEL BONEVAC, THE ART AND SCIENCE OF LOGIC 93-95 (1990).

21. Compare Aristotle's, "I wish that you the enemy may capture." Aristotle, *Sophistical Refutations 166°7, reprinted in* THE COMPLETE WORKS OF ARISTOTLE 280 (Jonathan Barnes ed., Princeton Univ. Press 1984) (n.d.).

22. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

terms. Suppose, further, that there is a factual situation, S, which contains as constituents paradigm cases of these categorematic terms. In other words, assume that, with respect to S, there is no question of R's semantic vagueness. In addition, suppose that R contains no semantic ambiguities. Then S is a semantically clear case of R.

But if a situation is a semantically clear case of a rule, how could there be uncertainty in applying the rule to that situation? One cause of uncertainty is the possibility of justifiably believing that applying a rule to a semantically clear case would violate principles of reasonableness and fairness.[23]

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23. Aristotle was aware of this kind of interpretive problem:

> The same thing, then, is just and equitable, and while both are good the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite . . . .

Aristotle, *Nicomachean Ethics*, Bk.V, ch.10, $1137^{b}10$-$1137^{b}28$, *reprinted in* THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., 1941) (n.d.). Aquinas makes a similar point:

> [E]very law is directed to the common welfare of men, and derives the force and nature of law accordingly. Hence the jurist says: "By no reason of law, or favour of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which have been enacted for the welfare of man." Now it happens often that the observance of some point of law conduces to the common good in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Therefore if a case arise in which the observance of that law would be hurtful to the general welfare, it should not be observed. For instance, if in a beseiged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule: but if it were to happen that the enemy are in pursuit of certain citizens who are defenders of the city, it would be a great injury to the city, if the gates were not opened to them: and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common good, which the lawgiver had in view.

Consider again the ordinance, "Operating a vehicle in any city park is legally impermissible." Imagine a driver of an ambulance being arrested for driving into a city park in order to help a heart attack victim. Suppose that the ordinance contains no exceptions for emergency vehicles. Surely an ambulance is a paradigm case of the term, "vehicle." Yet, just as surely, one could justifiably believe that principles of reasonableness and fairness preclude application of the ordinance.

Another example of this sort of uncertainty arises under the First Amendment. Consider a constitutional rule formulated as, "A governmental action which prohibits the free exercise of religion is legally impermissible."[24] Imagine a clear case of persons practicing a religion requiring weekly human sacrifice. Suppose that members of this religious group are prosecuted under a statute prohibiting murder and that, in defense, they claim that the statute is unconstitutional. Surely a judge could justifiably believe that it is unreasonable to apply the constitutional rule to this semantically clear case.[25]

D. The Question Which the Theory of Original Intent Is Intended to Answer

I can now state the question which the theory of original intent is intended to answer. I have argued that there are at least four factors which make uncertain the interpretation of linguistic formulations of legal rules: semantic vagueness,[26] ambiguity,[27] amphiboly,[28] and unreasonableness of application to semantically clear cases.[29] I shall refer to interpretive contexts involving one or more of these factors as interpretively uncertain contexts. In such situations one can justifiably ask, "How should judges apply the rule"? The theory of original intent proposes an answer to this question.

Thomas Aquinas, THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS, Part I, Second Part, Question 96, Art. 6 (Robert M. Hutchins et al. eds., 1952) (n.d.).

24. *See* U.S. CONST. amend. I.

25. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1184 (2d ed. 1988).

26. *See supra* Part II.C.1.

27. *See supra* Part II.C.2.

28. *See supra* Part II.C.3.

29. *See supra* Part II.C.4.

III. What Is the Theory of Original Intent?

A. Underlying Motivations and the General Proposal

I have argued that interpretations of linguistic formulations of legal rules must often be made under conditions of interpretive uncertainty. Such uncertainty makes possible judicial discretion. I shall say that judges have adjudicative discretion in interpretating the linguistic formulation of a legal rule if, and only if, the context is interpretively uncertain, and there is no legal rule that forces the resolution of the uncertainty in a unique way. Interpretive contexts involving adjudicative discretion permit judges to invoke their own moral principles.

It is this possibility—judges applying their own moral principles—which concerns originalists. Originalists believe that legal rules should be created by legislatures and courts should limit themselves to applying those rules. They believe that the citizens of a democracy should create their own laws, through the agency of their elected representatives, and that allowing unelected judges to create laws through the exercise of adjudicative discretion would subvert the democratic process. Thus, proponents of the theory of original intent want to eliminate the possibility of such discretion. In particular, they recommend a standard of interpretation whose consistent application, they believe, would eliminate the legal possibility of adjudicative discretion.[30]

The standard of interpretation recommended by originalists requires that in interpretively uncertain contexts, judges apply the relevant legal rule in accordance with the specific intentions of the rulemaker. With this standard, the originalist seeks to prevent the satisfaction of the second condition of my analysis of "adjudicative discretion." Originalists recognize the inevitability of interpretive uncertainty and recommend the application of their principle in precisely such cases. According to their standard of interpretation, judges are never legally authorized to use adjudicative discretion and, hence, are never legally justified in relying upon their own moral beliefs in interpreting legal rules.

The claim that judges should never exercise adjudicative discretion is logically tied to a certain conception of the nature of legal rules. The originalist conceives of legal rules as existing

30. I use the adjective "legal" because, of course, any law can be disobeyed.

in what might be called "completely determinate form" from the date of enactment. I shall say that a linguistic formulation of a legal rule, R, is completely determinate if, and only if, given any conceivable situation S, R, as enacted, is either certainly applicable to S or certainly not applicable to S. Originalists are committed to this theory because, if rules do not exist in completely determinate form from the date of enactment, then judges would be forced to use adjudicative discretion.

Do original intent advocates recommend their principle for all kinds of legal rules? Of course, they recommend it for the interpretation of constitutional and statutory rules. Such rules are products of the democratic process. According to traditional democratic theory, constitutional and statutory rules are chosen by "the people." Permitting judges to create law would subvert the democratic process. The people have given authoritative directions. Judges must confine themselves to following directions; they must not give directions.

But what about common law rules? Although not expressed in authoritative forms of language, they are articulated in the words of judicial opinions. Do original intent proponents recommend their principle for the application of common law rules? It seems that they should not, at least if they are to be consistent with their theory. Original intent proponents ought to oppose the practice of common law rule-making. Common law rules are created by judges rather than by legislators. There would be no point in trying to ascertain the intent of the rulemakers in common law contexts because they are not part of the democratic process at all. Thus, I shall assume that proponents of the original intent theory recommend their principle only for authoritatively formulated rules.

B. Application of the Original Intent Theory

Of course, this formulation of the original intent proposal is too general to be of much help. Two questions immediately come to mind. First, what sense of "intent" is invoked by the theory? Second, how should such intent be identified in particular cases? These questions will be addressed in the context of the application of original intent to three types of situations. In order to achieve some clarity about the original intent theory, I shall proceed in stages, beginning with a very simple

kind of situation, then moving on to consider more complicated and more realistic situations.

1. *Case of a Single Rulemaker Who Left Accurate Records*

I begin with the case of a single rulemaker who left accurate records of her thoughts on the legal rule in question. What should the theory of original intent say about such a case?

a. *Who Is the Rulemaker?*

One of the first questions the originalist should address is, "Who is the rulemaker"? There are at least two alternatives: the person who drafted the rule or the person legally responsible for enacting the rule. Of course, if the same person performed both tasks, then there is no problem. But what if each task was performed by different persons?[31]

An argument for identifying the drafter as the rulemaker is that the person responsible for the linguistic form of the rule should best understand it. Presumably, that person carefully chose certain words, rather than others, to accomplish specific objectives. Consider the analogy of an engineer designing a machine. Surely, she is best able to say what the machine can do and why she designed it that way. On the other hand, an argument for identifying the rulemaker as the person who enacted the rule is that her action made the proposed rule legally effective.

How should the originalist decide the question? Apparently there is considerable disagreement over the issue in the originalist tradition.[32] But it seems to me that the original intent proponent should identify the rulemaker as the person legally responsible for enacting the rule. The originalist's underlying theory of democracy—the people make their own

31. And, of course, this is the more usual situation in a legislature, where bills often are drafted by staff attorneys.

32. For example, with respect to the matter of Constitutional interpretation, Meese argues that the intentions of those participating in the Constitutional Convention are relevant. *See generally* Meese *supra*, note 2. On the other hand, Richard S. Kay argues that the Framers' intentions are irrelevant and that the relevant intentions are those persons in the various special ratifying conventions of the individual states. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988). For a general discussion of the distinction between framers' and ratifiers' intentions, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, *in* Interpreting the Constitution, *supra* note 2, at 117.

rules—mandates this choice of rulemaker. Proposed rules are not law until they are duly adopted by the people or their elected representatives. If anyone else makes law, then the people do not truly govern themselves. Thus, I shall assume that the ideal theory of original intent should identify the rulemaker as the person who enacted the rule.

b. In What Sense Is "Intent" Intended?

The originalist recommends that rules invoked in interpretatively uncertain contexts be construed in accordance with the intentions of the rulemaker. In exactly what sense is "intentions" used here?

There are at least seven ways in which a rulemaker's intentions might be implicated in formulating a rule: (1) the rulemaker may intend to create a linguistic formulation of a legal rule, as opposed to performing some other mental act such as rehearsing an example of an English sentence in order to improve her pronunciation; (2) she may intend to choose certain words rather than others; (3) she may intend to accomplish, or at least promote, certain purposes; (4) she may intend to assign certain semantic intensions to the categorematic and syncategorematic words and phrases she chooses; (5) she may intend the linguistic formulation to be understood as having a particular grammatical structure as opposed to others; (6) she may intend the rule to apply to certain types of situations; or (7) she may intend the rule to not apply to certain types of situations.

The originalist is surely concerned with "intent" in the first two senses. That is, she assumes, with respect to any particular rule, that the rulemaker intended to create a legal rule and intended to use the words contained in its formulation. But this concern does not serve to distinguish the originalist theory from any other theory of legal interpretation. Every interpretive theory assumes the same.[33]

What about the third sense? The originalist assumes that the rulemaker had in mind specific objectives which she intended the rule to promote. She naturally wants to know what those intentions were. Identifying them might resolve interpretively uncertain contexts. But again, this concern does not

33. Perhaps I overstate the point. For all I know, there may be interpretive theories which deny that humans have intentions at all.

distinguish the original intent theory from many other theories of legal interpretation. For example, natural law theory recommends that the purposes of laws be considered in their interpretation. But natural law theory allows for judicial discretion.[34] So, further inquiry is necessary to descriptively isolate the original intent theory.

The originalist is primarily concerned with the last four senses. She assumes that the rulemaker assigned semantic intensions to the constituent categorematic and syncategorematic terms and wants to know what those assignments are. She assumes that the rulemaker intended a particular grammatical structure and wants to identify it. She assumes that the rulemaker intended the rule to apply to a set of hypothetical situations and wants to identify them. Finally, she assumes that the rulemaker intended the rule not to apply to a set of hypothetical situations and wants to know what they are.

c. Statement of the Original Intent Principle as Applied to Such Cases

So, what does this come to? Suppose that the rulemaker enacted a rule in linguistic form L. In addition, suppose the following: (1) she intended to formulate and enact a legal rule; (2) she intended to choose the words contained in L; (3) she intended L to promote certain objectives; (4) she intended to assign certain semantic intensions to the categorematic and syncategorematic terms in L; (5) she intended that L be understood as having a particular grammatical structure, GS; (6) she intended L to apply at least to certain types of situations; (7) she intended L to not apply to other types of situations; (8) she accurately recorded all of this information into what I shall call the intent records associated with L; and (9) these records are available to any judge charged with the task of interpreting L. Given these conditions, the original intent principle requires any judge interpreting L in an interpretatively uncertain context to construe L in accordance with these seven suppositions.

d. Interpretive Uncertainties

Would the use of this principle resolve all interpretive uncertainties? Consider the example of the hypothetical ordi-

34. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 269, 286-90 (1980).

nance, L, formulated as, "Operating a vehicle in any city park is legally impermissible." Suppose that our hypothetical rulemaker enacted L and left in accessible form accurate records of all the thoughts she had with respect to L as she considered it.

Suppose that a judge must construe L in an interpretively uncertain context. This means that the interpretation of L is uncertain for one or more of the following reasons: (1) L is semantically vague; (2) L is ambiguous; (3) L is amphibolous; or (4) it would be apparently unreasonable to apply L to a semantically clear case. I shall discuss these alternatives in order.

(1) A Rule Is Semantically Vague

In such a case, the question is whether L should be applied to a situation where the interpretive uncertainty is caused by the semantic vagueness of at least one categorematic term in L. According to the original intent principle, the judge should turn to the intent records. Let H be the characteristic of the instant situation that is responsible for the interpretive uncertainty. For example, suppose that H is the characteristic of riding on roller skates and that there is no statutory definition of "vehicle." Then there are at least three possibilities.

First, H is not mentioned in the intent records associated with L. That is, H is not mentioned in the set of situations which the rulemaker intended to fall within the scope of L, nor is H mentioned in the set of situations which the rulemaker intended to fall outside the scope of L. Thus, in terms of the example, the characteristic of riding on roller skates is not mentioned in the intent records at all.

Second, H is mentioned in the set of situations which the rulemaker intended to fall inside the scope of L. Thus, the characteristic of riding on roller skates is mentioned in the intent records as one of the properties to whose instances L applies.

Third, H is mentioned in the set of situations which the rulemaker intended to fall outside the scope of L. Thus, the property of riding on roller skates is mentioned in the intent records as one of the properties to whose instances L does not apply.

(a) Uncertain Characteristic Is Not Mentioned in the Intent Records

Consider the first possibility. The feature of riding on roller skates is not mentioned in the intent records at all. What should the original intent principle recommend? There are at least four alternatives.

First, the principle might require that the rule never be applied in such a case. Thus, if the feature of riding on roller skates is not mentioned in the intent records, then L should never be applied to any situation involving roller skates.

Second, the principle might require that the rule always be applied in such cases. Thus, if the feature of riding on roller skates is not mentioned in the intent records, then L should be applied to every roller skate situation.

Third, the principle might require that the rule be applied in accordance with the deductive consequences of the statements contained in the intent records. Thus, if those statements deductively entail the proposition that the rule should be applied in the instant case, then the rule should be applied. On the other hand, if those statements deductively entail the proposition that the rule should not be applied in the instant case, then the rule should not be applied.

Fourth, the principle might require that the rule be applied in accordance with what the rulemaker would have decided if she had thought about the matter at all. I shall call this alternative the counter-factual interpretive method.[35] Thus, if the rulemaker did not consider whether L should be applied to a roller skate situation but would have applied the rule had she thought of it, then the rule should be applied. On the other hand, if the rulemaker would not have applied the rule, then the rule should not be applied.

Which alternative should the originalist choose? The first two alternatives have the virtue of eliminating adjudicative discretion. But at the same time, they have the vice of being foolishly mechanical, even from the viewpoint of the originalist. It is likely that such an approach would often contradict the intentions of the rulemaker in the sense that she would have op-

35. I use the term "counter-factual" because the method requires the judge to ascertain the intentions which the rule-maker did not have but would have had if she had thought of particular situations.

posed the results of either mechanistic method had she anticipated them. In general, it seems that neither of the first two alternatives could yield adjudicative results matching the rulemaker's counter-factual intentions.

What about the third alternative, applying the rule in accordance with the deductive consequences of the statements in the intent records? One problem is that no one could specifically intend all of the deductive consequences of her statements. For any proposition, there is an indefinitely large number of deductive consequences. It is unreasonable to say that anyone ever understands, much less accepts, all of the deductive consequences of any of her statements.

A second difficulty with the proposal is that the directive to identify all the deductive consequences of a statement is indeterminate unless one specifies some particular system of deductive derivation. There are many such systems and they are not all mutually compatible.[36]

But there is a more basic difficulty with the deductive consequences proposal. It could never be used without begging the very issue at hand. Consider our example. The question is whether the term "vehicle" should be construed to include roller skates. The deductive consequences proposal is that the ordinance should be applied to roller skate situations if, and only if, the proposition "all vehicles are covered by the ordinance," entails the proposition, "all roller skates are covered by the ordinance." But the conclusion cannot be derived from the premise without the supporting premise, "all roller skates are vehicles," and that is the very issue at hand. Thus, the originalist cannot accept the deductive consequences proposal.

This leaves the originalist with the fourth alternative: the rule should be applied in accordance with the counter-factual intentions of the rulemaker. That is, the rule should be applied in accordance with what the rulemaker would have thought about the situation had she thought about it.

How should the judge go about ascertaining the counter-factual intentions of the rulemaker? One might suggest that the judge should consult the rulemaker if she is available. But this suggestion is inconsistent with the originalist's underlying premises. The originalist pictures the rule as existing in com-

36. For a discussion of this general point, see SUSAN HAACK, PHILOSOPHY OF LOGICS 152-215 (1978).

pletely determinate form from the moment of enactment. Allowing judges to consult the rulemaker after the date of enactment would create a risk that the rulemaker would say something about the situation she would not have said at the time of enactment. Indeed, it seems inevitable that the rulemaker would respond differently after the enactment, even with the greatest possible degree of good faith on her part. How could she be sure that what she says today about the application of the rule is consistent with what she would have thought had she thought about the situation at all?

The originalist should confine the judge to whatever historical records relating to the counter-factual intentions of the rulemaker are available. Perhaps the rulemaker left other writings which relate to the interpretive issue. Of course, those writings should predate the enactment of the rule. Perhaps third persons who knew the rulemaker left their own records relating to the question of what the rulemaker would have said.

The above discussion can be summarized as follows. In cases in which H is not mentioned at all in the intent records, the judge should decide the case in accordance with the counter-factual intentions of the rulemaker. That is, the judge should interpret the rule as the rulemaker would have interpreted it had she thought about the interpretive question at hand.

(b) Uncertain Characteristic Is Intended to Fall Within the Rule

In this case, the uncertain feature H is mentioned in the set of situations which the rulemaker intended to fall within the scope of the rule. With respect to our example, the characteristic of riding on roller skates would be mentioned in the intent records as one of the properties to whose instances L applies. Are any interpretive uncertainties possible here?

It seems that there are. Suppose, for example, that in the situation at hand, a person is arrested for pulling his three-year-old child on a homemade device consisting of a small piece of plywood fastened to four roller skates on its bottom. Suppose that the intent records contain the written statement, "I intend that the ordinance L apply to all cases of persons riding on roller skates." Is it certain that L should be applied here? It seems not. Perhaps the reason that the rulemaker in-

cluded roller skates within the scope of L was a concern that persons riding on roller skates create a risk of physical injury to others. Should L be applied to situations involving roller skates even when there is no such risk? Perhaps it should, perhaps not. But the question is reasonably debatable.

What does the original intent principle prescribe for such cases? The originalist can borrow from the discussion of the first possibility and say that in such cases a judge must try to ascertain the counter-factual intentions of the rulemaker and construe the rule in accordance with those counter-factual intentions. Thus, L should be applied to the case of a baby riding on the plywood wagon if, and only if, the rulemaker would have decided that the rule should apply to such a case had she thought of it.

Notice that the intent records themselves contain linguistic statements. Hence, those statements inevitably cause exactly the same kinds of interpretive uncertainties as do linguistic formulations of legal rules themselves. The intent records associated with any particular legal rule are legal rules themselves which, in turn, require analysis under the original intent principle. Indeed, the intent records must be understood as incorporated in the linguistic formulation of the legal rule itself.

(c) Uncertain Characteristic Is Intended to Fall Outside the Rule

In this case, the uncertain characteristic feature H is mentioned in the set of situations which the rulemaker intended to fall outside the scope of V. Here, the property of riding on roller skates is mentioned in the intent records as one of the properties to whose instances L does not apply. What about the possibility of interpretive uncertainties?

It seems that there are such possibilities. Suppose, for example, that the intent records contain the statement, "I intend that L should not be applied to any cases of roller skate riding." Suppose that since the enactment of V, the recreation industry has developed jet-propelled roller skates which can be ridden at speeds of ninety miles per hour. Is it certain that L should not be applied to such cases? Perhaps the rulemaker decided to take roller skates outside the scope of L because she did not consider roller skating a serious safety hazard. Is it certain that she would have thought the same about roller

blades or jet-propelled roller skates had she thought about such cases?

Again, it seems that the original intent principle should be understood as requiring judges to construe the rule in such cases in accordance with the counter-factual intentions of the rulemaker. Thus, roller-blading and jet-propelled roller skating should be exempted from the ordinance if, and only if, the rulemaker would have exempted them.

In addition, we see again that the written statements contained in the intent records inevitably raise the same kinds of interpretive uncertainties as the original rule raises. Thus, those records themselves must be examined under the original intent principle. To the extent that intent records are available for the interpretation of legal rules, the records themselves must be treated as linguistic components of the rules.

(d) Summary of Interpreting a Vague Rule

What does the original intent principle dictate for cases of interpretive uncertainty caused by semantic vagueness? The matter can be stated algorithmically. Let R be a linguistic formulation of a legal rule. Suppose that a judge must construe R in an interpretively uncertain context, where the uncertainty is caused by semantic vagueness. Let H be the characteristic of the situation at hand with respect to which R is semantically vague. How should the judge act? First, if H is not mentioned in the intent records, then the judge must interpret R in accordance with the counter-factual intentions of the rulemaker. Second, if H is mentioned in the intent records, and if there is no interpretive uncertainty in those records with respect to H, then she must interpret R in accordance with the dictates of the records. Finally, if H is mentioned in the intent records, and if there is interpretive uncertainty in the records with respect to H, then she must interpret R in accordance with the counter-factual intentions of the rulemaker.

(2) The Other Causes of Interpretive Uncertainty

Now suppose that a judge must construe L in an interpretively uncertain context which is uncertain for some reason other than semantic vagueness. That is, the context is such that either L is ambiguous, L is amphibolous, or it would be arguably unreasonable to apply L to a semantically clear case.

I shall abbreviate the analysis of these cases by invoking my discussion of the case of semantic vagueness. Either the intent records address the interpretive question or they do not. If the records address the issue, and if they do not themselves raise any question of interpretive uncertainty, then the judge must interpret the rule in accordance with the written manifestation of the rulemaker's intent. If the intent records address the question, but themselves raise an issue of interpretive uncertainty, then the judge must interpret the rule in accordance with the counter-factual intentions of the rulemaker. If the intent records do not address the issue, then the rulemaker's counter-factual intentions must be followed.

2. *Case of a Single Rulemaker Who Either Left No Intent Records, Left Incomplete Records, or Left Records Which Cannot be Trusted*

a. *Description of the Rulemaking Situation*

I now consider more realistic cases involving single rulemakers. There are at least three possibilities. First, the rulemaker may have left no intent records at all. Second, she may have left intent records that are incomplete in the sense that they do not contain every thought she had while thinking about the rule in question. Finally, the intent records cannot be trusted, either because the rulemaker unintentionally misrepresented her real intentions, or because she intentionally misrepresented them.

b. *What Does the Principle of Original Intent Require in Such Cases?*

Consider the first possibility, that the rulemaker left no intent records at all. Of course, we cannot assume that an absence of records means that the rulemaker had no intentions about the meaning of the rule. As for the rulemaker's intentions, there are at least three possibilities as to why she left no intent records. First, she may have thought about it and decided how it should be resolved. Second, she may not have thought about the interpretive issue. Finally, she may have thought about it but did not decide how it should be resolved.

What does the principle of original intent require when there are no intent records? In cases where the rulemaker thought about the interpretive issue and decided how it should

be resolved, the judge should construe the rule in accordance with the actual intentions of the rulemaker. On the other hand, where the rulemaker did not consider the interpretive issue at all, or considered, but did not resolve it, the judge should construe the rule in accordance with the rulemaker's counter-factual intentions. Of course, given the lack of intent records it will often be very difficult to do this with accuracy or certainty.

In cases of the second kind, where the intent records are incomplete, the judge should construe the rule in accordance with the rulemaker's actual intentions, if she had them. If the rulemaker did not consider the interpretive issue at all, or considered it but did not resolve it, then the judge should construe the rule with the rulemaker's counter-factual intentions.

Finally, consider the possibility that the intent records cannot be trusted, either because the rulemaker unintentionally misdescribed her intentions or because she deliberately did so. If the rulemaker did consider the interpretive issue and resolved it, then the judge should construe the rule in accordance with the rulemaker's actual intentions, regardless of what the intent records say. On the other hand, if the rulemaker either considered the issue but did not resolve it or did not consider the issue at all, then the judge should construe the rule in accordance with the rulemaker's counter-factual intentions, regardless, again, of what the intent records say.

3. *Case of an Assembly of Rulemakers Whose Intent Records Are Incomplete or Untrustworthy*

a. *Description of the Rulemaking Situation*

Consider a situation which is much more realistic than the three situations already discussed. Suppose that a judge must construe a linguistic formulation, L, of a legal rule in an interpretively uncertain context and that L was enacted by an assembly of rulemakers. Suppose that the intent records for any particular member of the assembly may be nonexistent, incomplete, or either unintentionally or deliberately inaccurate. What does the original intent principle prescribe for such a case?

b. *Questions Already Addressed*

The problem of ascertaining the intentions, with respect to

the interpretive issue at hand, of any particular member of the assembly is identical with the problem of ascertaining the intent of a single rulemaker. For each rulemaker, an originalist judge should identify the actual intentions of that person for the question at hand, if there were actual intentions, or identify the counter-factual intentions of that person, if there were no actual intentions.

c. New Questions

Some of the questions raised by the case of an assembly of rulemakers are new. The major question concerns the appropriate method for identifying the "collective intent" of the assembly. Let L be a linguistic formulation of a legal rule enacted by a majority vote of the assembly. Suppose that a judge must construe L in an interpretatively uncertain context. Let U be the situation at hand about which there is interpretive uncertainty. Suppose that the judge has read all available intent records and has tried to ascertain, for each rulemaker, K, K's actual, or at least counter-factual, intent with respect to the relation between L and U. That is, for each K, the judge has decided either that K intended L to apply to U, or that K intended L to not apply to U. Suppose, finally, that the judge has a record of how each rulemaker voted. How should the judge resolve the interpretive uncertainty?

Should the judge take into account the intentions of the rulemakers who voted against L? It seems not. The originalist wants to identify the intentions of the rulemaker. With respect to a group of rulemakers governed by the principle of majority rule, those voting against the rule in question cannot be deemed rule*makers*. Thus, the intentions of any rulemaker who voted against L are irrelevant.[37]

This leaves the judge with the intentions of those rulemakers who voted for L. Let N be the number of votes necessary for enacting L, and let Q be the number of rulemakers who voted for L. Obviously, Q is greater than, or equal to, N. The judge could reach one of at least three conclusions about the intent of the assembly. First, Q of the rulemakers who voted for L agreed, either actually or counter-factually, as to the interpre-

37. One originalist who agrees with this is Richard Kay. *See* Kay, *supra* note 32, at 248. The intentions of the dissenters may, however, be helpful in understanding the intentions of the majority. *Id.*

tation of L with respect to situations of type U. Second, at least N, but less than Q, of the rulemakers voting for L agreed, either actually or counter-factually, as to the interpretation of L in such situations. Finally, less than N of the rulemakers voting for L agreed, either actually or counter-factually, as to the interpretation of L in such situations.

What should the judge do in the first situation, where all rulemakers voting for the rule agreed about the meaning of L in this situation? It seems that she should regard the situation as a sufficient condition for construing L in accordance with the intentions of the Q rulemakers who voted for L.

The judge should do the same for the second situation, where not all rulemakers voting for L, but more rulemakers than are necessary to pass it, agree on the interpretive issue. Even though not all the rulemakers voting for L agreed as to the interpretation of L with respect to U, the number of those who did agree was sufficient to enact L. Hence, the judge should regard the second situation as a sufficient condition for construing L in accordance with the intentions of those rulemakers.

What about the third situation, where the number of rulemakers who agree on the interpretive issue is less than the number of votes needed to enact L? There are at least three alternatives. First, the judge might exercise her own discretion. Second, she might go along with the intentions of the greatest number of rulemakers who agreed on the interpretive issue. Third, she might rule in accordance with the intentions of the proponent or proponents of L.

The first alternative is precluded by the originalist principle that judges are never justified in exercising their discretion. What about the choice between the second and third alternatives? Suppose that the number of rulemakers who voted for L and agreed on the interpretive issue is greater than the number of proponents of L. I think that the originalist principle requires that in the event of a conflict between the intentions of the proponents and the intentions of the greatest number of rulemakers voting for L and agreeing on the issue, a judge should rule in accordance with the intentions of the greatest number. Granted, the number of such rulemakers is less than N, but it is closer to N than the number of any other subgroup of rulemakers who voted for L. The basic theme of

the originalist principle is that rules should be construed in accordance with the intentions of the rule*makers*. Those in the majority group are *closer* to being rulemakers, with respect to the interpretive issue at hand, than members of smaller groups.

IV. Evaluation of the Original Intent Principle

A. Epistemological Problems

Recall that the goal of originalism is the articulation of a principle of legal interpretation which will preclude the legal possibility of judicial discretion and ensure that legal rules are completely determinate when enacted. I shall begin by asking whether a judge trying to follow the original intent principle would have epistemological problems which would preclude the accomplishment of these two objectives.[38] Proving the existence of such problems would show that the originalist project cannot be carried out. And showing that the project cannot be carried out would support a dialectical criticism.[39]

1. Case of a Single Rulemaker Who Left Accurate Records

An originalist judge would have epistemological problems even with the single rulemaker who left accurate records. Suppose that L is the linguistic formulation of the legal rule in question and that H is the feature of the present situation with respect to which L is interpretively uncertain. In general, no matter how linguistically detailed L is, interpretive uncertainties will inevitably arise.

The original intent principle requires a judge to review the intent records of the rulemaker. Either the records address the interpretive issue or they do not. If they do not address the

38. None of my criticisms of the original intent theory depend upon the claim that linguistic communication is impossible. Thus, my criticisms are not subject to the defense of originalism made by Kay to the effect that, in general, linguistic communication successfully occurs. *See* Kay, *supra* note 29, at 20. I agree that it generally succeeds.

39. A dialectical criticism is an argument that takes a particular recommendation at face value, in the sense that it does not challenge the merits of the underlying assumptions of the recommendation, and purports to show that the recommendation cannot achieve its objectives. A dialectical critic is an internal critic in the sense that she enters into the structure of a theory and claims that the theory is self-contradictory or otherwise unsuited to achieve the purposes of its creators. The epistemological difficulties inherent in originalism have often been discussed. *See, e.g.*, Brest, *supra* note 10, at 7.

issue, then, given our assumptions about this ideal case, it follows that the rulemaker did not consider H. Hence, the judge must construe L in accordance with the counter-factual intentions of the rulemaker. If the records do address the issue, and if they do not themselves raise any question of interpretive uncertainty, then the judge must interpret L in accordance with this expression of the rulemaker's intent. But if the records address the interpretive issue and themselves raise a question of interpretive uncertainty, then the judge must intepret L in accordance with the rulemaker's counter-factual intentions.

The main epistemological difficulty inheres in the requirement of identifying the counter-factual intentions of the rulemaker. There are at least two problems with this prescription. One problem is that in every case of interpretive uncertainty, a judge must apply the law in accordance with the intentions of the rulemakers. Now, whatever may be the logical status of the concept of counter-factual intention, there is a sense in which counter-factual intentions are not *intentions* at all. They are, if anything, *possible* intentions in the sense that they are intentions which a rulemaker *would* have had if she had considered a particular issue. The move from *actual* intentions to *counter-factual* intentions is a radical one for the originalist. The originalist's picture is transformed from one of a rulemaker *actually intending* that a rule be construed in a certain way into one of a rulemaker *hypothetically intending* that a rule be construed in a certain way. The originalist moves from the realm of *actuality* to the realm of *possibility*. With this move from actual to hypothetical facts, the originalist gives up altogether on her basic picture.

The second problem is that counter-factual intentions cannot be identified with certainty. In the absence of some method guaranteeing certainty, the interpreting judge will inevitably permit, even if unconsciously, her own moral principles to mold her judgments. In the absence of knowing with certainty what a particular rulemaker would have said about a certain issue, it is natural for a judge to think, "Well, if this rulemaker were a reasonable person, where 'reasonable' means thinking like I do, then she would have decided *this*."

But such uses of the originalist principle would subvert the principle's own objectives. The interpreting judge would use her own moral discretion. In addition, the claim that legal rules exist in completely determinate form from their date of

enactment would have been abandoned. Thus, it is unlikely that the originalist project can be carried out, even with respect to this idealized case of a single rulemaker.

2. *Case of a Single-Rule Maker Who Either Left No Intent Records, Left Incomplete Records, or Left Records Which Cannot Be Trusted*

There are even greater epistemological difficulties in the case where a rulemaker either left no intent records, left incomplete records, or left untrustworthy records. In addition to the problems inherent in ascertaining the counter-factual intentions of the rulemaker, there are the additional problems caused by these additional possibilities. If the originalist proposal cannot be adequately carried through for the idealized case of a single-rulemaker then, a fortiori, it cannot be carried through for this more realistic case of a single rulemaker.

3. *Case of an Assembly of Rulemakers Whose Intent Records may be Incomplete or Untrustworthy*

In the case of an assembly of rulemakers, the originalist encounters all of the epistemological problems mentioned in connection with the two single-rulemaker cases. In addition, she must deal with the problems caused by the necessity of taking into account the intentions of more than one rulemaker.

Consider the case of an assembly which must have a requisite number of votes, N, in order to enact the new rule. The new difficulty arises in cases in which the judge concludes that less than N of the rulemakers who voted for the rule in question agreed, either actually or counter-factually, about the interpretation of the rule in the interpretive context at hand. In such a case, the original intent principle requires the judge to construe the rule in accordance with the intentions of the greatest number of rulemakers who voted for the rule and who agreed, either actually or counter-factually, about the issue. But this approach concedes that the rule in question is indeterminate in such a context. For, no matter how many rulemakers agreed on the interpretive question, if their number is less than N, then the intent of the rulemakers has not been identified. It has not been identified because there is no collective intent of the rule*makers*.

To concede that it is possible for a legal rule to be less than

completely determinate at the moment of enactment requires giving up the main objective of originalism. The possibility of indeterminate rules entails the proposition that it is not necessarily the case that all legal rules are completely determinate. But if it is not the case that all legal rules are necessarily determinate then there is necessarily room for judicial discretion.

B. *Could Linguistic Formulations of Legal Rules Be Completely Determinate?*

I have argued that epistemological difficulties inherent in ascertaining legislative intentions make unlikely the possibility that the originalist can achieve her objectives by means of the principle of original intent.[40] I now turn to an evaluation of the objectives themselves, beginning with the first: Are completely determinate legal rules possible? Can *any* reasonable method of legal interpretation guarantee the enactment of completely determinate rules?

I use the adjective "reasonable" to summarily rule out uninteresting methods, such as ruling in favor of all plaintiffs whose last names begin with a letter between "a" and "m." Note, however, that even adjudicative methods like these inevitably raise interpretive uncertainties. What about plaintiffs who have no last name? What about plaintiffs who spell their last names in idiosyncratic alphabets? What about co-plaintiffs whose claims must stand or fall together, but whose last names begin with letters from the opposite ends of the alphabet? What about litigants who are simultaneously defendants and plaintiffs on counterclaims?

It seems that no linguistic formulation of a legal rule could be completely determinate. Recall the definition of "completely determinate." A linguistic formulation of a legal rule, R, is completely determinate if, and only if, given any possible situation, S, R is either certainly applicable to H or certainly not applicable to S. No matter how elaborately detailed the linguistic formulation of R, interpretively uncertain contexts involving R are inevitable.

It might help to imagine a rulemaker deliberately trying to formulate a completely determinate R. She would think of as many hypothetical situations as she could. For each situation,

40. *See supra* note 1.

she would decide whether R should apply. If she decides that R should apply, then she would add to the linguistic formulation of R a set of words stating that R applies to that hypothetical situation. On the other hand, if she decides that R should not apply to the situation, then she would add to the linguistic formulation of R a set of words stating that R does not apply.

There are at least two reasons she could never articulate R in a completely determinate form. First, being human, she could not think of all possible hypothetical situations. Suppose that she has considered a finite number of hypothetical situations. There will always be at least one possible situation which is not identical with any of the others. Second, the hypothetical situations she does consider and incorporate into R are necessarily formulated in words. Those linguistic formulations themselves inevitably give rise to interpretive uncertainties.

If formulating completely determinate rules is impossible then, in one sense, whenever a judge interprets R in an interpretively uncertain context, R is modified. Suppose that, in an interpretively uncertain context, a judge decides how R should be construed in a situation S. Thereafter, R must be understood as incorporating S either positively—R applies to S— or negatively—R does not apply to S. Of course, the extent to which this modification of R binds other courts depends upon the relationships between those other courts and the judge who construed R. In addition, the incorporation of H into R will itself inevitably be subject to interpretive uncertainties. But the main point is that there is a sense in which R has been changed.

It might be asserted that, in such cases, R does not get changed or elaborated at all. Rather, it might be argued, the interpreting judge simply determines what R required from its very beginning. But this is implausible. Think of a nonlegal situation involving a person's efforts to govern her own conduct by a rule. Suppose, for example, that I decide that, from now on, I shall treat other persons with cheerfulness. Suppose that on that occasion, I do nothing more than decide in favor of cheerfulness and do not think about any specific situations that might arise with respect to my new rule. Suppose that several days later, I meet an acquaintance whose spouse has recently died. As I approach this friend I wonder what my new maxim calls for in this situation. Is cheerfulness appropriate here? Now, no matter how I choose to construe my maxim in

this situation it is obvious that I *elaborate* or *add to* the rule in doing so. There is no clear sense in which my maxim *already* required whatever I decided to do in that case. I continue to *make* the rule as long as I continue to live with it.

Of course, adding to my maxim in this way does not mean that I replace the original maxim with another. The failure to recognize the difference between elaborating on a rule and replacing a rule gives rise to interpretive theories which characterize every act of rule-interpretation as a replacing of one rule with another. Of course, it is possible, under the guise of rule interpretation, for a would-be interpreter to substitute a new rule for the original one. For example, I might say that I have "re-interpreted" my rule about cheerfulness to mean that I should brush my teeth after every meal. But that would not be a case of *interpretation* at all. Interpreting a rule is one thing; replacing a rule is another. Through the process of interpretation, a rule is constructed, not obliterated.

The impossibility of completely determinate linguistic formulations of legal rules can also be shown by invoking the nature of normative rules themselves. Such rules are humanly contrived means for achieving purposes. Let O be an objective and R a linguistic formulation of a rule intended by its maker to achieve or promote O. There are an indefinite number of possible situations in which one could ask, "How should O be achieved or promoted by R *here*"? No human rulemaker could anticipate all possible situations. Hence, no linguistic formulation of a normative rule could be completely determinate.

C. *Can the Legal Possibility of Adjudicative Discretion Be Eliminated?*

The originalist's second objective is the elimination of the legal possibility of adjudicative discretion. I shall argue that this is impossible. If completely determinate linguistic formulations of legal rules are impossible, then judges construing such formulations inevitably exercise adjudicative discretion. For, a judge who must construe a rule in an interpretatively uncertain context must decide *something* and, by hypothesis, that *something*, whatever it turns out to be, is not part of the rule as enacted. Hence, the judge must exercise discretion.

The necessity of adjudicative discretion can also be seen by considering again the nature of a normative rule. A normative

rule is a means for achieving or promoting some objective. Sometimes the objective is incorporated in the linguistic formulation of the rule—as in "Treat others with justice"—and sometimes it is not—as in "Bring your vehicle to a full stop at any stop sign before proceeding through the intersection." In general, any objective can be pursued with alternative means. And, in general, persons often reasonably disagree as to which means, in particular circumstances are best for promoting a particular objective. Now, some linguistic formulations of rules specify some of the means the rulemaker intends to be followed in promoting her ultimate objective. But as we have seen, it is impossible for any rulemaker to exhaustively specify all possible means in all possible situations. Hence, in contexts in which the linguistic formulation of a rule does not unambiguously designate a particular means for promoting the rule's ultimate objective, the interpreter must exercise discretion and choose the means she thinks most appropriate in the circumstances.

The degree of indeterminacy of a rule is inversely related to its degree of available adjudicative discretion. The less determinate a legal rule, the greater the degree of available adjudicative discretion. This relationship can be expressed in terms of the objectives which rules are intended to achieve or promote. Let R be a linguistic formulation of a legal rule and O be R's ultimate objective. Then R's degree of determinacy is a function of the number of interpretive contexts which a judge construing R must consider when analyzing the relationship between that context and O. The greater the number of such occasions, the less determinate the rule.

D. Inadequacy of Originalism's Underlying Theory of Democracy

The originalist believes that legal rules are made by "the people" and that the only appropriate role for judges is the nondiscretionary application of rules to particular situations. If my criticisms of originalism are correct, then this conception of democracy must be abandoned. Judges are necessarily involved in making laws. The task of adjudicative interpretation inevitably involves the discretionary elaboration of rules. Although legal rules formulated in authoritative language are born in rule-making assemblies, they are modified through a lifetime of adjudicative interpretation. The naive dichotomy

between "making" and "applying" legal rules is inadequate. I do not mean to say that there is nothing at all to the distinction. But it must be articulated in a more sophisticated way.

What that more sophisticated way is I shall not discuss here, except to say that I think the best account is the natural law theory.[41] According to the natural law conception of democracy, legislative and constitutional rules exist against a background of normative moral and political principles. The moral legitimacy, and, indeed, the very meaning, of the rules is a function of the relations between those rules and the underlying normative principles. Rulemakers should understand that they play only a part, albeit a very important part, in the process of governing society by rules. Those engaged in the process of interpreting and applying authoritatively expressed rules are inevitably involved in the elaboration of the very meaning of those rules. The class of such persons includes not only judges but law enforcement officials, lawyers, and even ordinary citizens insofar as their practices and customs determine the meaning of the law. A rulemaker should understand that her acts of enactment succeed, at best, only in launching vessels of words down the river of history. What those vessels will be filled with by later interpreters is beyond her control.

Of course, later interpreters are subject to the semantic limitations of the original formulations of the rules. For example, it would be contrary to the principles of democratic order for a judge to interpret a rule formulated as, "A contract without consideration is unenforceable," as meaning, "It is unlawful for a person with a blood alcohol content of greater than .08% to operate a motor vehicle." But, as I have argued, there is much room for adjudicative discretion within the conventional boundaries of the semantic meanings of words. A rulemaker should accept the inevitability of adjudicative discretion as an inherent part of a democratic order. If she wants to limit such discretion she always can formulate the rule with greater linguistic precision.

V. Conclusion

These considerations suggest that our democratic order would be better served by an interpretive principle making the

41. For an illuminating version of the natural law account, see generally Finnis, *supra* note 34.

legislative history of statutory and constitutional rules legally inadmissible. Such a principle would eliminate searches of legislative histories which are incomplete and sometimes contain deliberate misstatements of legislative intent. It would encourage legislators to use language with greater precision. And it would serve the originalist's objective of reducing adjudicative discretion, although, of course, there is no way to eliminate such discretion altogether.