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Originalism, the Why and the What

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ORIGINALISM, THE WHY AND THE WHAT

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This paper is short and simple—like its author. It is short because its points can be made quickly, and I have elaborated on them at some length in many prior writings.[1] It is simple because the truth about interpretation, that its aim is to understand what an author or authors intended to communicate, is a simple truth. Indeed, as you read what follows, you will be trying to understand what I, in writing what follows, intend to get you to understand. And in doing so, you will be confirming my simple thesis. But I'm getting ahead of myself.

1. In all tenable theories about the nature of law, there is a place for the following story. We do not agree about what we ought to do, but we do agree that we need to settle the matter. So we designate a person or group of people to decide what norm or norms should govern us with respect to the matters in dispute.[2] That person might be a chief executive; that group might be a legislature or a constitutional convention. Regardless, their job in all cases is to come up with norms in order to settle what is to be done in some domain of social life.

2. Now, after this person or group has decided on the appropriate norms to govern the matter, they then must communicate to the rest of us what those norms are. For their job was not merely to settle the matter among themselves. It was to settle the matter for all of us. So they are faced with the following task: they must express the norms they have chosen in such a way that the rest of us understand what those norms are.

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1. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 131–232 (2008) [hereinafter ALEXANDER & SHERWIN, DEMYSTIFYING LEGAL REASONING]; LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 96–122 (2001) [hereinafter ALEXANDER & SHERWIN, THE RULE OF RULES]; Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*," *in* LAW AND INTERPRETATION (Andrei Marmor ed., 1995); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Larry Alexander, *Of Living Trees and Dead Hands*, 22 CANADIAN J.L. & JURISPRUDENCE 227 (2009); Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM 87, 87–98 (Grant Huscroft & Bradley W. Miller eds., 2011); Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139 (2010); Larry Alexander, *What Are Constitutions, and What Should (and Can) They Do?*, 28 SOC. PHIL. & POL'Y 1, 15–19 (2010).

2. *See, e.g.*, SCOTT SHAPIRO, LEGALITY (2011); ALEXANDER & SHERWIN, THE RULE OF RULES, *supra* note 1, at 11–36.

Because we cannot ascertain the norms they have in mind through telepathy, they must communicate them through symbols—orally, using sounds; in writing, using marks; through semaphore, using flags; by smoke signals, and so forth.

3. The job of the rest of us—the interpreters—is to discover what norms the group or person we tasked with choosing the norms actually chose. In other words, in Gricean terms,[3] our job is to determine the uptake the legislator(s) intended us to have. Why would we choose a legislator to come up with norms to settle what ought to be done if, after the legislator does so, we do not attempt to understand what the legislator is trying to communicate?

4. Here, then, is what follows from the foregoing: *The meaning of the norm that the legislative person or body has chosen and communicated symbolically is the meaning that person or body intends those symbols to communicate.* Whether we are talking about a constitutional provision, a statute, an administrative rule, an executive order, or a judicially promulgated rule, its meaning, *for purposes of the legal enterprise*, is its authorially intended meaning—in Gricean terms, its speaker's meaning.[4] Any meaning it is given other than its authorially intended meaning renders nonsensical the idea of designating its authors as having the authority to determine the norms to govern us. For the norms that they determined just *are* the norms that they are communicating, and the symbols that they choose for that purpose—*however aptly or inaptly*—must be deemed to mean what they intended them to mean, in order for the norms that they chose to govern us to succeed in governing us. That means we must seek the authorially intended meaning of the symbols, or the uptake the authors intended.

5. The meaning of a legal norm is just its authorially intended meaning. That is the simple truth of originalism. (I put to the side cases where the legal norm is a "standard" that must be given content by someone other than the legislator. Interpretation, properly called, ends with the determination that the legislator intended the norm to be a standard. Originalism gets one only to that point. Giving content to the standard is not interpretation, but is first-order reasoning. The legislator did not settle what ought to be done, but delegated that job to other decisionmakers.)

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3. Gricean refers to the principles of the linguistic philosophy of Paul Grice. *See generally* PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989).

4. I regard speaker's meaning as primary and Gricean utterance meaning as derivative and secondary. Indeed, utterance meanings are just what most speakers intend by particular symbols. They are time, place, and audience relative. And if one's audience knows that you use particular symbols nonstandardly—the audience knows you are speaking in code, or using an idiolect, or are "misusing" the symbols (because you believe that their standard meaning is something other than what it is)—than those symbols mean to the audience what you intended them to mean; for you have succeeded in getting the uptake you intended, which shows that the symbols you used were apt given your audience. To have utterance meaning defeat speaker's meaning would render lawmaking "mindless."

(a) The authorially intended meaning (the Gricean speaker's meaning)[5] is not the same thing as the authorially intended applications. The latter are evidence, and often strong evidence, of the former, but the two are not the same thing.

(b) The authorially intended meaning might turn on the authors' reference—the thing they are referring to—rather than their criteria or "sense"—their definition of that thing. Such might be the case where their norms refer to "poisons" or to "death." On the other hand, the authorially intended meanings of some norms might elevate sense over reference—as, for example, if a premodern statute forbade taking "fish" from a bay, and the legislators thought of whales as fish.[6]

(c) Authorially intended meaning is not the "original public meaning" (OPM), whatever the latter is. OPM either reduces to authorially intended meaning or, if at odds with it, undermines the legal enterprise. OPM is supposed to be the meaning that would be inferred by a hypothetical reasonable person existing contemporaneously with the promulgation of the norm. For OPM proponents, that hypothetical person's uptake is the meaning of the norm. However, that hypothetical person cannot be nonarbitrarily constructed: Is the person a he or a she? Does he or she live in the city or the country? How much education and of which kind has he or she had? How much information does he or she possess about the law in question and the reasons behind its promulgation, etc.? Moreover, even if that hypothetical person could be nonarbitrarily constructed, the meaning *that* person should be seeking is the authorially intended meaning. (That follows from the points made earlier.) Presumably, then, advocates of OPM are positing a failure to discover the authorially intended meaning and the substitution of a different norm from the norm that the legislators chose to enact. But why have legislators if we are going to ignore their enacted norms and substitute instead norms that a hypothetical person would have mistakenly thought the legislators enacted?

(d) The motivations behind OPM seem to be two.[7] One is a sense that it is somehow unfair to declare that the enacted norm is different from what a reasonable person at the time of enactment would have thought it to be.[8] But that concern is confused. If we discover today that a norm has a different meaning from what people in the past took it to mean, there is no unfairness in correcting course and going with the new meaning. No one is going to be punished for a reasonable misunderstanding by a hypothetical person. Nor does it follow that flesh and blood people will be punished for

5. *See* GRICE, *supra* note 3, at 117–37.

6. *See, e.g.*, ALEXANDER & SHERWIN, DEMYSTIFYING LEGAL REASONING, *supra* note 1, at 148–49.

7. I have heard a third motivation voiced, namely, a concern that the authors might have a secret intended meaning that they wish to conceal from their audience. That concern rests upon a confusion, however. The authorially intended meaning just *is* the audience uptake that the authors intend. A secret authorially intended meaning is an impossibility.

8. In the case of the Constitution, if the reasonable person at the time of enactment is a ratifier, then his or her understanding *is* germane. But that is because he or she is really the author of the Constitution.

or prejudiced by reasonable misunderstandings. (We have doctrines to deal with reasonable misinterpretations.) Although it is probably a rare event when a later interpreter has better evidence of the authorially intended meaning than the legislator's contemporaries, it can and probably does happen. And there is nothing unfair about declaring the interpretations of reasonable contemporaries to have been mistaken.

(e) The other principal motivation behind OPM is to avoid the problem of attributing a single authorially intended meaning to a law that is the product of a multimember body. Unlike the fairness "problem," collective authorship *is* a problem for authorially intended meaning. On occasion, there will be little or no shared meaning behind a shared set of symbols. A simple example can stand in for all the cases. Suppose there are three legislators, and they enact laws by majority vote. The text of the law they vote on reads, "There shall be no meetings by the bank." Legislator A votes "aye" and believes that "bank" refers to the river bank. He is in favor because he thinks meetings there are hazardous due to frequent flooding. Legislator B votes "aye" and believes "bank" refers to the town's financial institution. She is in favor because meetings there interfere with the bank's customers' comings and goings. And let us suppose, for whatever reasons, legislator A would have voted "no" had he believed "bank" referred to the financial institution, and legislator B would have voted "no" had she believed "bank" referred to the river bank. Legislator C, a libertarian, votes "no" and would vote "no" on either meaning of "bank." The law passes two to one. What does it forbid?

I would say that despite the appearance of being meaningful, the law has no authorially intended meaning. It is gibberish.[9] Each of the legislators has an authorially intended meaning; but because the law requires at least two authors, the law itself has no authorially intended meaning.[10]

But here's the point. OPM cannot help here. For suppose the hypothetical reasonable person knows all the facts. He or she is going to come to the same conclusion as I just did, namely, that the so-called law is gibberish.

6. To say that the meaning of a law is its authorially intended meaning is not to say that discovering that meaning will be an easy matter. Sometimes it will be, but sometimes it won't. Indeed, sometimes it will be difficult for the author herself to determine her intended meaning. That difficulty will typically arise in cases where what appears to be the originally intended meaning of a law has an unforeseen application that is at odds with the purpose behind the law. If the author of the law is asked what meaning she intended with respect to such a case, she might respond in one of four ways:

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9. *See* ALEXANDER & SHERWIN, DEMYSTIFYING LEGAL REASONING, *supra* note 1, at 171–73.

10. Richard Ekins has argued that legislatures and their procedures can be structured in ways that prevent such failures of authorially intended meaning. *See generally* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012). That may be true, but not all legislative bodies are so structured.

(a) I intended the law to cover such a case, even though I didn't foresee it, because I intended the law to be a bright-line rule, and I realized it would be overinclusive to some extent. Indeed, because I intended the law to be a bright-line rule, I would not have amended it even if I had foreseen this application.

(b) I intended the law to cover this kind of case because I did not foresee the perniciousness of this application. But now that I see that this application is pernicious, I regret having intended the law to cover it. Nonetheless, although I now regret it, my intended meaning does cover it.

(c) The application of the law in this case is so pernicious or absurd that I surely did not intend its meaning to cover this case. (Consider the hypothetical of the boss who orders a subordinate "to remove all the ashtrays" because an important client is coming who abhors smoking. The boss is unaware that there are some ashtrays built into the walls. The subordinate duly rips those out, leaving gaping holes.[11] The boss might truthfully say, "I didn't intend *that*" by my instruction.)

(d) Finally, there will possibly be some cases where the author cannot say what she intended with respect to the unforeseen application.

7. The last point raises one of the great philosophical mysteries about following authorial intent, whether by the interpreter or by the author herself. That is the so-called Kripkenstein problem. How can we infer from the finite content of the author's mind at the time of the utterance the norm that will make it true that something is the intended meaning in an indefinite number of future applications?[12] I offer no solution to this much-debated philosophical puzzle. But I am confident that although I cannot explain them, there are truths about intended meanings that cover an indefinite number of applications not present in the mind of the author at the time of the utterance.

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Authorially intended meanings are what originalism is properly seeking. And that quest is properly the job of anyone who must interpret the promulgations of legal authorities. To ignore their authorially intended meanings is to undermine the enterprise that the authorities are engaged in, which is to settle for us the norms that should guide us. For that reason, originalism of the authorially intended meanings variety is really the only game in town.[13]

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11. Kent Greenawalt gives a similar hypothetical in which a manager tells a subordinate to shut the manager's door and the subordinate does so in the face of the company's president, who was on his way to see the manager. KENT GREENAWALT, LAW AND OBJECTIVITY 13–16 (1992); *see also* ALEXANDER & SHERWIN, DEMYSTIFYING LEGAL REASONING, *supra* note 1, at 141–45 (giving other similar examples).

12. *See* ALEXANDER & SHERWIN, DEMYSTIFYING LEGAL REASONING, *supra* note 1, at 160–65.

13. Of course, we can ignore the authorially intended meanings if we don't like them, in which case *we* have become the authors of the legal norms, not those whose symbols we might appropriate to convey *our* meanings. That describes a revolution, a change of the rule

of recognition, albeit a peaceful one. *See* Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 175 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).