

## Articles

### TELEPATHIC LAW

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The debate between originalists (of the authorially-intended-meaning variety) and their opponents usually has two strands. One strand has to do with what interpreting a text is. Originalists like me—a group that includes Paul Campos,<sup>1</sup> Stanley Fish,<sup>2</sup> Steven Knapp,<sup>3</sup> Walter Benn Michaels,<sup>4</sup> and Sai Prakash<sup>5</sup>—argue that when one is interpreting a text, as opposed to doing other things with it, one is necessarily seeking its author's or authors' intended meaning. After all, a text is just a code, a set of symbols—sounds, marks, flags, puffs of smoke, pictures, etc.—selected by an author to convey an idea to a specific audience. No set of symbols self-declares the code that it is. It may look like twenty-first century American English as prescribed by Merriam-Webster and *Strunk & White*. But it may be a different code. It may be Esperanto, or it may be a code in French keyed to a certain American novel. It may be nineteenth century South African English, or Australian English. It may be a Martian language that perhaps uses the spaces between the marks as its letters. Or it may not be a code at all, but marks made by wind and rain, a leaky pen, or monkeys on typewriters. All of these are logical possibilities. For originalists like me, however, one can only successfully interpret a text by determining what code it is, which itself is determined by

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1. Paul Campos, *Three Mistakes About Interpretation*, 92 MICH. L. REV. 388 (1993).

2. Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005).

3. Steven Knapp & Walter Benn Michaels, *Not A Matter of Interpretation*, 42 SAN DIEGO L. REV. 651 (2005).

4. *Id.*; see also Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21 (2009).

5. Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

authorial intent. An author or authors can be more or less skilled at making clear to his or their intended audience what code is being used. For if the audience doesn't know what code is being used, the uptake intended by the author will fail to occur.

The originalist (of my stripe) derives from this point a corollary: If you derive any meaning from a text other than the authorially-intended one, you are not interpreting *that* text. Rather, you are imagining it to be a different text. You are imagining it either to have been written by authors other than its actual authors, or to have been written in a different context (with different concerns and goals) from its actual context, or to have been employing a code other than the code actually employed. You can "interpret" *The Waste Land* by imagining its author to have been e. e. cummings or Eminem and not T. S. Eliot. You can imagine "Meet me at the bank" to have been uttered by a fly fisherman rather than a banker. And you can imagine the Equal Protection Clause to have been written by Ronald Dworkin, John Rawls, William O. Douglas, or Anthony Kennedy rather than by the post-Civil War Congress. All that is possible, but it is not interpretation. It is re-authoring, appropriating someone else's symbols for one's own purposes, like the kidnapper who cuts out the letters for his ransom note from a magazine.

At this point the opponents of originalism usually respond with a loud "Sez who?" Who are we originalists to legislate the meaning of "meaning" or "interpretation"? You can call what we nonoriginalists do with texts non-interpretation or re-authoring, but we call it interpretation, and you have no authority to dictate that we are misusing the term.

At this point the debate between originalists and their opponents stalemates. The strand concerning what interpreting a text really is has run its course, and the nonoriginalists have remained unmoved. They have demurred to the originalists' claim that to interpret a text just *is* to ascertain its authorially-intended meaning, and that other approaches amount to re-authorings rather than interpretations.

Originalists regarding legal texts may then switch to a different strand of the debate. They may argue that the reason we should seek the actual authors' intended meaning is that the actual authors possessed the legal authority to promulgate norms, and their texts just *are* their communications of the norms they intended to promulgate. If we ignore their intended

meanings in favor of any of the infinite possible meanings someone else might have intended through this set of symbols, then we are ignoring the legal norms promulgated by those with legal authority in favor of norms promulgated by persons who lack that authority. If, for example, Congress has the legal authority to make federal statutory law, then to ignore the congressionally-intended meaning of a federal statute in favor of a meaning that was not congressionally intended is to construct a federal law that lacks constitutional authorization. So, too, if the ratifiers of the Constitution and its amendments are the persons with authority to make and change constitutional norms, then to “interpret” the Constitution as if it had been authored by someone other than its ratifiers is to make constitutional “law” without authority to do so.

What do nonoriginalists say in response to *this* argument, an argument advanced by Rick Kay,<sup>6</sup> Steve Smith,<sup>7</sup> and me?<sup>8</sup> They typically do not deny that Congress is the body authorized to make federal statutes, or that the ratifiers are persons with authority to make and amend the Constitution. Rather, they concede this, but then go on to argue that the authority to make statutory or constitutional law is the authority to make the *texts*—the set of symbols—but *not* the authority to determine what those symbols mean.

Now, to repeat a point made earlier, it is true that the text—the symbols—of statutes and the Constitution *could* have been used to convey all sorts of meanings other than those authorially-intended. And it may well be true that frequently the symbols lawmaking authorities choose are better suited to convey meanings different from what they intend. All of that is true, but for originalists it is beside the point, which is that the authors of those symbols were the ones possessed of authority to make and change the law, making the meanings *they* intended for their symbols to convey “the law.” Nonoriginalists, however, must deny that such authority extends beyond the authority to

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6. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009); see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

7. See Steven D. Smith, *The Maker-Meaning Nexus* (unpublished manuscript) (on file with author).

8. See Larry Alexander, *What Are Constitutions, and What Should (and Can) They Do?*, 28 SOC. PHIL. & POL’Y (forthcoming 2011).

promulgate the symbols. For them, the symbols are “the law,” not what they were meant to symbolize.

To see the oddity of this nonoriginalist view, however, engage in the following thought experiment. Lawmakers, we assume, try to communicate their intended meanings as clearly as they can. However, because of linguistic imprecision, variations of usage, and the passage of time, they inevitably fall short.

Suppose, however, our lawmakers could convey the norms they intend for us to follow telepathically. They would not need to promulgate any text. They would agree on those norms among themselves—telepathically perhaps—and then convey the agreed upon norms to the rest of us telepathically. Of course, each of us might carry a “text” of such norms in our minds. But the “text” in one person’s mind could differ from the “text” in another’s mind. What is key is that however the norms were represented in people’s minds, everyone would understand precisely what those norms require in each conceivable circumstance of application.

What objection could one have to law promulgation through (perfect) telepathy? For the originalist, this scenario is one of perfection. No more messy fallible texts to be misunderstood. Such texts were imperfect media for transmitting the lawmakers’ determinations to the populace. Telepathy is a great improvement, for it results in no one misunderstanding what the law requires.

How would nonoriginalists react to law promulgation through telepathy? If they would welcome it, then it seems that they have no quarrel with originalists. So if they have a quarrel, they must object to telepathic law. But why?

One possible objection would be that lawmakers can never anticipate all possible applications of their norms. Their intended meaning will be uncertain, even to them, in some range of applications. Therefore, even if telepathic communication were possible, perfect understanding of what the communicated norms required in all situations would not be possible.

That is a point originalists should concede. Lawmakers’ intended meanings will be equivocal, even to the lawmakers

themselves, in some range of possible cases.<sup>9</sup> And perfect communication of those intended meanings will do nothing to solve that problem. The other side of that coin, however, is that in the remaining cases the authorially-intended meaning can determine outcomes. So telepathic communication would be useful for those cases. Therefore, unless one wishes to deny the existence of *general* intended meanings—that when I say “green things,” I intend to refer to a vast multitude of items that are green in various hues and not just the particular green elm I have in mind when I make the statement<sup>10</sup>—the fact of some range of indeterminacy or uncertainty does not defeat the utility of telepathically communicating lawmakers’ intended meanings.

The other possible objection would be based on the fallibility of the lawmakers. Even if we are sure how they intended their norms to apply, we may know reasons that they did not know—because of their historical or cultural setting, their factual ignorance, or their prejudices—why their intended applications are undesirable.

I shall consider below the possibility of giving interpreters the legal authority to deviate from the intended meaning of the lawmakers. Here, however, I wish to comment more generally on arguments from fallibility.

It is, of course, true that lawmakers are fallible creatures of their time and place, their understanding of the world, and so on. Any norms they promulgate will therefore be fallible. And some will quite possibly have very undesirable consequences when faithfully applied. Yet to make such an argument against following lawmakers’ intended norms is to make an argument against law. For law is a human artifact. Even a legal system that lacked legislation and that purported to follow the “natural law” or the “moral law,” in order to count as a *legal* system, would require *authorities* to determine what the natural law or moral law required. Those authorities would be fallible, but their determinations would be authoritative (else they would not be authorities). And the meanings of their determinations would be what *they* intended them to mean—meanings they might wish to communicate, if they could, through telepathy rather than through imperfect texts.

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9. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 115–16 (2001).

10. See *id.* at 112–14.

If nonoriginalists would have no cogent objection to telepathic law, then their nonoriginalism perhaps stems from the fact that lawmakers communicate their norms through texts rather than through telepathy. Yet it is hard to see why the search for authorially-intended meanings should be abandoned just because of the possibility of error in ascertaining those meanings. The authorially-intended meaning of a legal text can be misunderstood, but so what?

Finally, nonoriginalists may object to giving *absolute* lawmaking authority to the lawmakers who authored the text in question. Originalism, however, is not an answer to who has lawmaking authority. Its position is that *whoever* has lawmaking authority, it is *their* intended meaning that governs. If their intended meaning does not govern, then they necessarily lack lawmaking authority. Originalists can happily concede that the authority of one set of lawmakers—say, the Constitution’s ratifiers—might be limited by the authority of another set—say, the Supreme Court justices who placed a misinterpretation of the ratifiers’ intended meaning in a now well-entrenched precedent, or who determined that the ratifiers’ intended meaning was “too unjust.” Originalists qua originalists have no position on the allocation of legal authority in any particular legal system. But notice that even in a system such as that hypothesized, the intended meaning of one set of authorities (the ratifiers) is trumped by the intended meaning of another set of authorities (the Supreme Court). The different authorially-intended meanings can be lexically ordered in terms of their relative authority. But in no sense can they be intelligibly *combined*—blended, averaged, or the like—into a meaning that is no one’s intended meaning. (Such combinations are incoherent; they are like “combining” *pi*, green, and the Civil War.<sup>11</sup> And even if it was possible, which it is not, it would render the resulting law a “mindless” product.)<sup>12</sup> Authorially-intended meanings are still the basis of the law, and telepathic communication thereof would still be desirable.

Finally, one might argue as follows: Authorities have the ability to make law only if they truly are authorities. The ratifiers of the Constitution were the makers of our fundamental law only

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11. See LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 213–14 (2008).

12. See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 109, 117 (1989).

if they had authority to do so. And they had that authority only if we, today, at this moment, accept that they did. If we no longer accept their authority to make fundamental law, then they lack that authority, even if our predecessors accepted their authority. But why then, we might ask, should we accept their authority? And should we not predicate our acceptance of their authority on the normative desirability of the Constitution they made rather than to attribute authority to them sight unseen? Telepathic communication of *their* norms is of consequence only if *they* have authority to govern us by those norms.

The points are correct. But notice that they do nothing to undermine originalism, which is agnostic regarding who the authorities—the lawmakers—are. For the originalist says that whomever we accept as authorities to make law, constitutional or otherwise, it is their intended meanings that count.

If we do not like the product of the 1789 constitutional ratifiers, we might urge acceptance of our own, much better document. If we succeed, then *our* document—a code conveying *our* intended meanings—will be the supreme law of the land. Or, to recur to the first strand of originalism, we might retain the parchment version in the National Archives but urge others to accept that it be read as if it had been written by John Rawls, Ronald Dworkin, Larry Tribe, or Oprah. It will then mean what *those* folks would have intended it to mean. Although it is decidedly odd to have one person or group of persons author the symbols of a legal communication, and then look to another person or group and ask what *they* would have meant had *they* authored those symbols, it is surely possible to do so.

Note, however, that if a constitution's normative virtues must be traded off against the virtues of wide acceptance and stability, then we might find the optimum attainable constitution is the one that assumes ultimate legal authority resides in the 1789 ratifiers. And if so, then their original meaning would be our fundamental law, and telepathy from them would be a boon.

And the nonoriginalist's response is. . . ?

## APPENDIX: THE CONTRIBUTION THESIS

The claim is often made that the authorially-intended meaning of an authoritative legal text, like a constitution or a statute, *contributes* to its legal meaning but is *not identical* to it. Let us put aside authoritative but erroneous interpretations (mistaken precedents). Those create conflicts of authority that are orthogonal to this issue. Likewise, let us put aside standards of judicial review and burdens of proof, which bear on legal meaning in adjudication but not on legal meaning *per se*. If those matters are put aside, is not the authorially-intended meaning identical to the legal meaning?

There are two related views that deny this. One, associated with Philip Bobbitt,<sup>13</sup> holds that arguments from authorially-intended meaning—original meaning—are only one of several *modalities* of legal argument. There are, on an equal footing with arguments from the original meaning, arguments from text, precedent, justice, and prudence.

The modalities argument is a nest of confusions. First, the fact that lawyers argue for their favored outcome by invoking whichever of these factors seems to favor their position does not mean *the law* is nothing but the argumentative practice of invoking these disparate considerations. Presumably, when lawyers invoke text, justice, or original meaning, they claim that the factor they invoke, *not their practice of invoking it*, is the law.

Second, the law cannot be all of these modalities simultaneously. Indeed, the law can only be one of them, for the modalities Bobbitt (and others) identify cannot coherently be combined. Some of them could be lexically ordered, so that precedent could trump original meaning, or vice versa. Or extreme injustice might trump both. (Injustice *per se* could not, as law exists to settle authoritatively what justice requires.) But there is no sensible way one can nonlexically “combine” precedent, original meaning, and justice, for example. That would be like combining *pi*, green, and the Civil War.<sup>14</sup>

If there were these several modalities, and if as I have argued, they are uncombinable, then when two opposed

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13. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); *see also* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 3–42 (1991).

14. I invoked this trope in the text at note 11 *supra*.



lawyers invoke different modalities as constituting “the law,” either they are arguing past each other, or else they are urging the court to choose, perhaps for this case only, their favored modality. I say “for this case only” because the various modalities are supposed to persist despite not being determinative in particular cases.

In truth, each modality represents a different legal system. In constitutional law, each modality represents a different Constitution. In the original meaning modality, the Constitution is the set of norms intended by the framers and ratifiers of 1787, 1868, and so on. In the modality of precedent, the Constitution is the set of norms that Supreme Court decisions have established, presumably because the Court viewed those norms at the time they were announced as consistent with the Constitution’s original meaning. In the justice modality, the Constitution consists of those norms that the “interpreter” believes justice requires. It is the Constitution as if it had been written by—pick your favorite—Ronald Dworkin, John Rawls, Robert Nozick, John Stuart Mill, and so on. Because these modalities cannot be coherently combined, and because it is incredible to believe that advocates are invoking a modality—a Constitution—and asking the court to choose it for this case only, the modalities conception collapses.

My suspicion is that the appearance of several modalities is produced for the following reasons. First, the original meaning and erroneous judicial accounts of that original meaning that are embodied in precedents create two conflicting sources of legal authority. Second, considerations of justice cannot, as I have said, be combined with original meaning or precedent. Nor can justice compete with original meaning given that the purpose of having authoritative legal texts and tribunals is to settle authoritatively what justice requires. At most, considerations of justice can be invoked when an authoritative *standard* needs to be given content, or invoked as *evidence* of original meaning. All of the other modalities mentioned by Bobbitt and others, can, I believe, be shown to be derivative of original meaning or precedent.

The other view that denies that the original meaning of legal texts is identical to their legal meaning is somewhat more elusive. Mitch Berman holds that even if the original meaning of a legal text is X, and even if no one holds that “the law” arises

from something other than that legal text, we might have strong legal intuitions that the law is not X.

Berman gives as an example whether John McCain, who was born in the then American territory of the Panama Canal Zone, was a “natural born citizen” as the Constitution requires for eligibility for the presidency.<sup>15</sup> He argues that we might have strong intuitions that McCain was eligible as a matter of constitutional law, and that those intuitions might persist even if we were to discover that the original meaning of the constitutional clause made McCain ineligible.

In another paper, Berman fleshes this idea out a good deal more.<sup>16</sup> He asks us to imagine that the Equal Protection Clause’s original meaning dealt only with the state’s provision of legal protection, not with when the laws themselves were relevantly unequal. He asks us then to imagine that soon after the Fourteenth Amendment’s ratification, people, including lawyers, judges, and legislators, started assuming that the original meaning of the Clause went well beyond protection and extended to unjust discrimination in the content of the laws. There was never an authoritative Supreme Court holding to this effect. There were lots of dicta in Court opinions supporting this broader notion of equal protection, however, and legislators routinely invoked the broader notion to argue against the passage of various laws.

Berman then asks us to imagine that after a long period in which almost the entire legal community held this expansive view of the Equal Protection Clause—again without any Supreme Court decision directly on point—a judge were to discover conclusive evidence of the original, narrow meaning of the clause. According to Berman, it would be in bounds to argue that the narrow meaning was not “the law,” and that the more expansive meaning was.

Now I think Berman is just plain wrong here. Remember that originally, people assumed (mistakenly) that the broad meaning was the originally intended one. Their original error merely ramified over time. To see why Berman’s view is mistaken, compare his example with this one. Suppose the state

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15. Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizen Clause*, in ORIGINALISM IN PERSPECTIVE (G. Huscroft & B. Miller eds., forthcoming).

16. Unpublished paper on file with author.

legislature enacts a statute of limitation of three years for some business tort. Suppose further that lawyers and judges thereafter fail actually to look up the statute of limitations in the statute books. They instead begin assuming that it is two years, perhaps because two years is standard for other torts and because other states make it two years for the particular tort in question. There is never an actual holding by a court that this state's statute of limitation is two years, but one can find plenty of dicta to that effect. And lawyers routinely refuse to bring tort suits because they all believe the suits are barred by a two-year limitation.

Now suppose that one day a tort lawyer is thumbing through the statute books and discovers that the statute of limitations for the business tort is three years, not two. Or at least that is what the statute says. This lawyer has a client who suffered this tort more than two but less than three years ago. So he brings suit. The defendant demurs, invoking the well known "two year statute of limitations." The judge is about to rule for the defendant, when the plaintiff's lawyer produces the statute. Assume that defendants cannot claim any prejudice if the statute of limitations turns out to be three years rather than two. Would the judge be correct to say that despite the statute, the *real* statute of limitations is two years? I believe that not even Berman would support this. However, I can see no relevant difference between this example and his.

My hunch is that the legal intuitions argument gets whatever force it has in cases where the original meaning is unclear and where we think considerations of policy or justice strongly favor one possible meaning over the other. That explains whatever force Berman's examples have. On the other hand, where the mistakenly assumed original meaning is viewed as neutral or as undesirable, the "legal intuition" view has no purchase. Most people, for example, probably wish that the Fourteenth Amendment had not granted birthright U.S. citizenship to the children of aliens temporarily or illegally in the country. No other country does this, and there are no good reasons to do it. Still, almost everyone assumes and has assumed for a long time that the Fourteenth Amendment dictates this result. If we now become convinced by scholars like Peter Schuck and Rogers Smith<sup>17</sup> that this interpretation is

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17. See PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

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erroneous—that “subject to the jurisdiction”<sup>18</sup> was intended to mean “subject to the *exclusive* jurisdiction”—would we still want to say that the new interpretation was not the law? I think not.

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18. See U.S. CONST., amend. XIV, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).