ORIGINALISM, OR WHO IS FRED?

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If we want to know what it is that those who communicated through certain signs intended to communicate by those signs, we are engaged in the originalist project of interpretation. I'm tempted to say that no other projects compete with originalism on this view, at least if we are interpreting texts as intentional objects. Rather, those that appear to be competitors are either instances where we view the text other than as an intentional object—as, for example, when we study the handwriting and determine that it must have been a hot, muggy, enervating day in Philadelphia—or instances where we are still engaging in originalism but have switched our focus from those who actually authored the text to hypothetical authors or to other real authors who have appropriated the text for their own communicative purposes.

But this is all too abstract, so let me approach the topic from a different angle. Suppose we have formed a legal theory club. The club needs a charter, bylaws, rules, and so forth. Because Fred, a member, is someone who we believe is very good at figuring out what these rules should be, we ask him to determine those rules and to write them down.

In so doing, we have accepted a rule of recognition,[1] a groundnorm,[2] a preconstitutional rule,[3] or presupposition,[4] that Fred's determination of the club's rules shall be authoritative for the rest of the members. And when we consult and attempt to interpret the document Fred gives us, we are trying to discover what Fred determined.[5]

Such is the simple model of legal and constitutional interpretation: our constitutional presuppositions, which are just a set of norms we all share and are not themselves items to be inter-

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1. *See* H.L.A. HART, THE CONCEPT OF LAW 97-114 (1961).

2. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115-36 (Anders Wedberg trans., 1961).

3. *See* Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

4. *See* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION 145-61 (Sanford Levinson ed., 1995).

5. *See* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION 357, 360-63 (Andrei Marmor ed., 1995); Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279 (1992); Paul Campos, *Three Mistakes About Interpretation*, 92 MICH. L. REV. 388 (1993).

preted, select Fred as the person whose recorded determinations shall be authoritative.[6]

We may now compare our club's rules with the Constitution. Several questions arise. First, who is the analogue of Fred; that is, whose determinations are authoritative? Those who drafted a particular clause? The Constitutional Convention? The state ratifiers? There is no reason why one person or group cannot appropriate the actual writings of another and make them its own; judges do so regularly in adopting, as their own, opinions drafted by law clerks. And, if years later, the law clerk, in arguing before the judge, cites an opinion the clerk drafted as standing for a certain proposition because that is what the clerk meant by it, the judge can, in using the opinion, say that *she* meant something different by it, and that the latter is "the law."

Hence, one complication in our simple model is figuring out who Fred is in the constitutional scheme. Another is just an empirical problem: as the temporal and cultural gap between us and the Framers widens, it becomes increasingly difficult to figure out what they meant. Three other interesting theoretical problems remain: multiplicity of authors; facticity of determinations; and practical authority.

The problem of multiplicity of authors asks, if there are no group minds, how can there be group intentions? I think there cannot be; there can be only convergent individual intentions. Therefore, I think it quite possible that the constitutional Framers and legislatures have determined a lot less policy than appears to be the case from their agreement on language. For example, assume that three of us vote on term T, and one votes for it on the assumption that it means A, another votes for it on the assumption that it means B, and the third opposes it on any meaning. Because T gets two out of three votes, it becomes the rule, although the real answer to the question, what did *we* mean by T, is that there is no answer.[7]

The problem of facticity of determinations is even more basic because it applies even if our authority is a single person. It is often said in these discussions that norms of interpretation are

6. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988).

7. *See* Alexander, *supra* note 5, at 386-88.

logically prior to the meaning of legal texts,[8] or, put differently, that the meaning of legal texts is not a matter of fact, but a matter of value. We cannot tell what Fred meant for us to do without interpretive canons derived from some normative theory. There are no brute facts in the world corresponding to Fred's determinations.

Some make this point by referring to the varying levels of generality at which all authorial intentions can be characterized.[9] Others make the point by suggesting that we must *choose* between a term's referent and its definition, or between a concept and a particular conception, even if the author in his own mind did not make such a distinction.[10] Still others say that interpretive fidelity demands that we give the term a meaning that varies with the context, even if the author would have been quite surprised by the meaning.[11]

I believe all of these suggestions stem at bottom from skepticism over the facticity of intentions. Suppose I ask you to bring me curry powder for a dinner party I'm throwing, and I give you a check with which to pay for the powder. In one case, you return with curry powder, having deducted $2,500 from my checking account. You explain that there is a worldwide shortage of curry powder and that this was the last bottle in town. In the second case, the price has risen to $10 from its normal $3. Had I known this, I would have changed menus. In the third case, you purchase molé sauce and tell me that, if I acquire a preference for molé over curry, I will be much happier in life. You also remind me that happiness was my reason for requesting curry powder in the first place. I want to say that you have not followed my request in the first and third cases, but you have in the second, even if I would have changed plans had I known the price was $10. Those skeptics I am discussing deny that there is a fact in the world that determines the answer to the question, what did I in-

8. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 411 (1989); Scott Brewer, Note, *Figuring the Law: Holism and Tropological Inference in Legal Interpretation*, 97 YALE L.J. 823 (1988).

9. *See, e.g.*, Paul Brest, *The Intentions of the Adopters Are in the Eyes of the Beholder, in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 17 (Eugene W. Hickok Jr. ed., 1991).

10. *See* Alexander, *supra* note 5, at 366-70; *see also* Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 B.Y.U. L. REV. 715, 733 (criticizing manipulation of levels of generality).

11. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); *see also* Alexander, *supra* note 5, at 371-75.

tend for you to do with respect to curry powder, molé sauce, and money.[12] Ultimately, for them, the answer is determined by a value-based theory of interpretation.

The costs of denying the facticity of intention are quite high, however. If I have in mind green Fords when I ban vehicles in the park, but I have never seen a blue Acura, then those who deny the facticity of my intentions will deny that there is any fact of the matter regarding whether I have banned blue Acuras. Indeed, if there is no fact of the matter about what authors determine for a world that they can never see perfectly accurately, then can there be a fact of the matter about even such things as what language they were using?[13]

The third theoretical problem, the problem of practical authority, raises the question why we should ever let another's determinations of what ought to be done preempt our own. This problem is not just one of constitutionalism; it is *the* problem of law.[14] And the existence of the problem does not depend upon whether the practical authority is a majority or a minority, or whether it is contemporaneous or is separated from us by 200 years and a lot of cultural change.

Now I believe there are answers to this question, although they are paradoxical at best.[15] Even so, much of the resistance to original intent theories of constitutional law is really a resistance to all practical authority. The wills of the Framers get pushed aside or better yet equated with reason, which is of course reason as we now see it.[16] The Framers' determinations are no different from ours after all. Or we grant them authority to pick the marks on the page but not the authority to determine what those marks mean. Whatever marks they put down will somehow come to mean what *we* want them to.

Let me return to where I started. Originalism in constitutional law is Fred determining the rules for our club. If there is some fact of the matter based upon Fred's psychological states about what he determined those rules should be, and he intended that

12. *See* Alexander, *supra* note 5, at 376-78.

13. *See id.* at 378-39.

14. *See* Larry Alexander, *The Constitution as Law*, 6 CONST. COMMENTARY 103 (1989); Larry Alexander, *Of Two Minds About Law and Minds*, 88 MICH. L. REV. 2443 (1990) [hereinafter *Of Two Minds*].

15. *See* Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695 (1991); Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5 (1990).

16. *See Of Two Minds*, *supra* note 14, at 2447-48; Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 48-53 (1989).

the document he gives us communicate those determinations, then our rules *are* the determinations Fred recorded in that document. In all theories of constitutional interpretation, the model remains the same. As our preconstitutional norms change, only Fred's identity changes. And although our preconstitutional norms can change the identity of Fred—say, from the Constitutional Convention to the state ratifiers to a hypothetical average user of English in 1787 (or in 1995)—and can limit Fred's authority in various ways—say, by treating the authoritative Constitution as that document in the National Archives minus the Second Amendment—we cannot eliminate Fred—some Fred—altogether.

So once we have determined who Fred is in our constitutional scheme—whose determinations are supremely authoritative—it follows tautologically that Fred's determinations are supremely authoritative. It is redundant to speak of that Fred's *original* determinations.

Now, the Framers might be Fred. Or the Ratifiers might be Fred. Or an average speaker of English in 1787 might be Fred, except when a 1787 dictionary and grammar do not produce single answers or produce absurd ones, in which case the Framers

or the ratifiers might be Fred. So it all boils down to, "Who is Fred?"[17]

17. Here is a thumbnail account of constitutionalism that provides a context for the "Who is Fred?" problem:

1. We have a state of moral uncertainty. Either we disagree about certain moral norms, or we agree about them at a certain level of generality but disagree about what they demand at a more concrete level.
2. We need to resolve this moral uncertainty by accepting as authoritative certain methods for resolving the uncertainty.
3. A particular set of norms of authority—norms that prescribe the authoritative practice referred to in 2., that is, preconstitutional norms, presuppositions, rules of recognition, groundnorms—becomes accepted, because we all agree that it is the morally best such norm upon which we can agree in our state of moral uncertainty.
4. That norm of authority describes "Fred." For purposes of resolving our moral uncertainty, Fred might be the actual determinations of what ought to be done by the Framers, or by the ratifiers, or by the public (what the words in their context would have meant to an average person at the time of ratification), and so on.
5. Because 4. might be uncertain, our norms of authority might designate an authoritative interpreter—for example, the Supreme Court. The norms of authority would also resolve the question when and over whom the authoritative interpreter is authoritative (for example, does the President have to follow the Court in cases on all fours with the case the Court has decided?).
6. Because an interpretation of 4. per 5. might differ from a later understanding of 4., we also need norms of authority for resolving the conflict between precedent and Fred—for example, Fred trumps precedent, precedent trumps Fred, or Fred trumps precedent, but only under certain circumstances. (If precedent can trump Fred, then we really have two Freds—Fred the interpreted and Fred the interpreter—and our norms of authority dictate how these Fred versus Fred conflicts should be resolved.)
7. Our norms of authority could limit Fred's and the interpreter's authority on substantive grounds—for example, the Constitution or constitutional precedents are authoritative unless they are too unjust. In this way *justice can enter as a limit on authoritative practices.*
8. *But, justice cannot be weighed in the balance alongside authoritative practices because justice and authoritative practices are norms of different ontological types.* Justice belongs to the realm of *morality.* Authoritative practices are posited, and the contents of their prescriptions are *matters of fact.*
9. One *can* ask whether one should follow Fred or follow justice. But if one does so one confronts the paradox of authority: Fred's authority was a morally required response to moral uncertainty. That is, we all agreed, whatever our moral views, that it was morally better to have Fred and Fred's authority to deal with moral uncertainty than to have no moral authority. If we now ask whether we morally ought to follow Fred or follow morality, the latter will be what we morally ought to do, but morality also dictated that there be Fred.
10. We have a constitutional crisis if we cease to agree over our norms of authority, that is, over who Fred is. That seems to be our current situation. We do not agree about whose Constitution is authoritative, or about the authority of precedent, the role of substantive morality, and so forth.
11. *But,* we may have a second order norm of authority that we all do agree upon that resolves first order disagreement about norms of authority. That rule might be, "Whatever the Supreme Court decides about who Fred is is authoritative." In this case, the real Fred for the rest of us is the Supreme Court, though for the Supreme Court, Fred is someone else.