DEFINING ORIGINALISM

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I have learned a great deal from listening to the other panelists address whether originalism is possible, or even desirable. I will address the question, "What Is Originalism?" Implicit in my remarks is the distinction between what it is and what it ought to be. I think it is possible to describe what originalism is and leave the normative question of whether we ought to have it to others.

If we were to start with something that looks like a definition of originalism, we might say that a conception of originalism, or a definition of originalism, is something like the following: Prescriptive language is to be understood by reference to evidence of the actual, contemporaneous mental states of the inscribers of the language at issue.

Next we need to establish what kinds of theories or accounts we are offering. Although it may seem self-evident, one of the things that goes on in a fair number of discussions of originalism is the failure to distinguish adequately between descriptive accounts and prescriptive accounts. If one accepts something like reference to evidence of actual, contemporaneous mental states of the authors as the definition of originalism, then we must inquire whether this process of interpretation is in fact employed within a particular domain.

For example, descriptively, do judges behave according to this definition of originalism in looking at items of law? Do literary critics behave similarly when studying items of poetry or prose? Do grocery shoppers read the instructions on shopping lists looking for evidence of the inscribers' mental states?

In contrast, a prescriptive inquiry would seek to determine how judges, literary critics, or supermarket customers ought to behave when interpreting language. Again, although this distinction is obvious, it may be worthwhile emphasizing that as we talk about the question of what one ought to do, we could be seeking to determine the nature of current practice.

When we think about what originalism seeks to establish, a more important question arises: of what is originalism a theory? The first possibility is that originalism is a theory of language. We

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might believe that originalism is a necessary feature of language use, and that language cannot be understood except by reference to the actual, contemporaneous mental states of those who use it. Under this point of view, the words that are used are but evidence of what the inscriber meant to convey, not necessarily what the words appear to mean.

Yet if language is originalist in this sense, it is hard to imagine why a word or a phrase is a piece of evidence of one intention rather than another intention. That is, except by virtue of the way in which the thing that is evidence can be evidence of "something" rather than "something else." Then, for language to be evidence of "something" rather than "something else," it must have some independent capacity without circular reference to the subject of which it is evidence. To put it somewhat more simply, the ability of language to be evidence of something presupposes that language, according to rules of language or according to conventions of language, can carry meaning.

If language itself can carry meaning, however, then it turns out that as a descriptive account of language, originalism is not plausible. That is, originalism as an account of the nature of language is neither descriptively plausible nor prescriptively plausible.

Somewhat more plausible is originalism as an account of law. We could say it is a feature of law that legal language—language appearing in various items that have legal import or legal effect—is to be understood according to the definition set forth above.

As a descriptive claim, once again this assertion is false. Consider, for example, the moderately well-accepted, although admittedly controversial, objective theory of contracts, according to which contractual language is to be understood based upon the conventional meaning of contractual terms rather than according to the mental states of the contracting parties.[1] Another example is the common law of defamation, under which defamatory utterances that have a certain reputation-damaging effect may result in legal liability, regardless of the mental state of the user of that language.

More obvious and much more current are various accounts of statutory interpretation that would use a textualist or plain mean-

1. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.9 (1990). The famous case involving the two ships Peerless, Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864), often is used to illustrate the dichotomy between the subjective and objective schools.

ing approach. Implicit in having a so-called textualist or so-called plain meaning account of statutory interpretation is the view that, at least in some legal domains, originalism is not to be used.[2] Thus, when we think descriptively about the nature of law, it may be that originalism is not a requisite feature of that practice; nor is the rejection of originalism an essential feature of that practice. The large and increasing number of constitutional doctrines in which constitutional import turns on the intentions of legislatures or other state actors[3] illustrate that intentions, rather than the use of particular language, can be the determining factor.

If originalism is not a necessary feature of language, and if originalism is not even a necessary feature of the very idea of law, then originalism is not a necessary function or a necessary feature of trying to understand or make sense of that collection of constraining marks on a printed page that we might call the Constitution. To put it that way is not to say anything, and it is not my intention to say anything about whether or when we would want to use originalism to understand a constitution. But once we understand that as a question of constitutional interpretation, nothing about originalism is obligatory as a matter of language or necessary to the very idea of having something that we call a constitution, it turns out that we are then engaged in a range of political, moral, social, and institutional design questions to which there is more than one answer.

In that sense, part of what I am saying is, broadly speaking, a continuation of the legal realist project—although not in a way that is commonly thought. That is, one of the lessons of legal realism is a continuing skepticism about the tendency of legal actors, lawyers, judges, and legal scholars to disguise in the lan-

2. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (stating that originalism comprises three separate fundamental methods, the first being textualism); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1345 (1989) (stating that the originalists and textualists are distinguished by the fact that an originalist may disregard the plain meaning of the text when it is not in accordance with the Framers' intent).

3. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 57, 61 (1985) (holding unconstitutional an Alabama statute authorizing prayer in public schools based on the state's failure to present any evidence that the statute was enacted, at least in part, for a secular rather than a religious purpose); Washington v. Davis, 426 U.S. 229, 246-48 (1976) (holding that disproportionate impact alone generally does not constitute a due process violation when the targeted practice is facially neutral and there is no evidence of an invidious purpose to discriminate).

guage of necessity what are in fact political, social, moral, economic, philosophical, or policy choices.[4]

Nowhere is this tendency more apparent than in the many discussions of originalism. This tendency is due, in part, to the fall of both the proponents and opponents of originalism into the trap that the legal realists have warned us against. Opponents argue that originalism is impossible. Proponents argue that originalism is necessary. In this continuing battle between impossibility and necessity there is far less discussion than there ought to be about originalism as a contingent feature of institutional design, which may or may not, at certain times and in certain places, based upon certain particular political, moral, and philosophical presuppositions, be desirable.

4. *See, e.g.*, WILFRED E. RUMBLE, JR., AMERICAN LEGAL REALISM (1968) (discussing the skepticism at the core of legal realism); *see also* G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972) (providing a history of the legal, intellectual, and social developments which gave rise to legal realism).