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Of Two Minds About Law and Minds

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Present-oriented interpretation is an interpretive approach to legal texts that assigns them the best meaning, in terms of contemporary social policy, that they could plausibly convey were they written today rather than at the actual times of their enactment. Steven Smith has recently argued that present-oriented interpretation is a view of law in which law is literally "mindless."[1] That is, present-oriented interpretation would have us be ruled by the fortuity of what present meanings the words of a text can bear, whereas, according to Smith, we should be ruled by what the enacting political authorities actually decided furthers the public good.

Although Smith's concerns about present-oriented interpretation in general are well taken, I shall argue that Smith is misleading in contrasting "mindless" present-oriented interpretation with the "mindful" originalism that he endorses. More specifically, I shall argue for two propositions: (1) Present-oriented interpretation is not completely mindless, and originalism is not completely mindful; both are mindless and mindful in similar ways. (2) Law will always connect with mind, but the tension between mindlessness and mindfulness in interpretive strategies is not illusory; rather, it reflects a tension within mind itself, the tension between reason and will. We want our law to be reasonable, but we must, in order to be reasonable, *decide* what reason requires. That means that our decisions — what we "will" — must carry force independent of the reasons they attempt to reflect. On the other hand, any decision about what reason requires may look unreasonable from our present perspective.

I

Here is a brief sketch of Smith's attack on present-oriented interpretation. Rule by past decisions of political authorities regarding the public good is "originalism." Rule by present decisions of political

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1. Smith, *Law Without Mind,* 88 MICH. L. REV. 104, 117 (1989).

authorities regarding the public good is "pragmatism." Both originalism and pragmatism as approaches to interpretation of legal texts have been subject to severe criticism, the former because it entrenches the decisions of past political authorities who may have only dimly or mistakenly perceived present needs and values, the latter because it entrenches no decisions of political authorities and thereby authoritatively "decides" nothing, depriving society of the values of repose and stability.

Present-oriented interpretation purports to steer a middle-way between originalism and pragmatism and appropriate the virtues of both without the vices of either. The present-oriented interpretivist would have us be ruled by the morally best meaning we could give legal texts on the assumption that they had been authored at the time of our decision. Engaging in present-oriented interpretation will provide us with originalism's constraint and pragmatism's responsiveness to present needs and values.

Smith cites Ronald Dworkin and T. Alexander Aleinikoff as examples of present-oriented interpretivists.[2] Dworkin would have courts take all the legal materials — the Constitution, statutes, regulations, and judicial decisions — and assume that they were all authored by the same lawgiver attempting to implement the morally best set of principles (by today's understanding) that "fit" with these materials. Aleinikoff restricts his application of present-oriented interpretation to statutes. He would have courts give statutes the morally best meaning that their words would carry today.

Smith discusses at some length one of Aleinikoff's examples, that of an immigration statute enacted in 1952 that excludes "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect."[3] If the question today is whether the statute excludes aliens who are homosexuals, the originalist would say "yes" because the enacting Congress would have so believed. The pragmatist on the other hand would consult present values, not the statute's language or the original Congress' intent (except as required by present values), and perhaps decide that the statute does not exclude homosexuals because it should not do so.[4] The present-oriented interpretivist, unlike the pragmatist,

2. *Id.* at 105 (citing R. DWORKIN, LAW'S EMPIRE (1986); Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988)).

3. Aleinikoff, *supra* note 2, at 48 (quoting Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163, 182 (1952)).

4. Of course, a sophisticated pragmatist would factor in statutory language in determining the best result because of possible reliance on the language and other reasons. But language and past history, while potentially relevant to the pragmatist's decision, are not material considerations for the pragmatist.

is constrained by the statute's language. If she shares the pragmatist's values and thinks it immoral or bad policy to exclude homosexuals, she would ask whether the contemporary meaning of the statutory terms such as "psychopathic personality" would perforce include homosexuals. If not, the present-oriented interpretivist would rule that the statute does not bar their entry.[5]

II

Smith argues that under present-oriented interpretation, legal texts represent no decision by any political authority, past or present. To engage in present-oriented interpretation of legal texts is, in a way, much like entrusting the fate of one's society to rule by entrails readings or something similarly "mindless." It is not impossible to accomplish. But surely one needs to ask, as Smith does, why we should ever entrust our fate to a mindless process.

I agree with much of Smith's criticism of present-oriented interpretation.[6] Indeed, Smith's point would be strengthened by asking of present-oriented interpretivists why they would stick to the language chosen by the authors of the text. For example, Dworkin would interpret an American statute to be the best it could be *in English.* But why should we be bound to English? Why not assume the marks on the text's pages are Esperanto or indeed some language we made up, so that the statute is as good a statute as we could have wanted? If the authors cannot bind us to the original meaning, why should they be able to bind us to the original language?

III

The preceding reductio illustrates two points that suggest that Smith has not identified the precise shortcoming of present-oriented interpretation. First, the problem with present-oriented interpretation that Smith identifies is not that it detaches law from the intentions of political authorities; the problem is, rather, that present-oriented interpretation detaches laws from one particular intention, the authorities' intended meaning. The authorities who authored the text intended to enact certain marks. They intended those marks to be symbols in a

5. *See* Smith, *supra* note 1, at 107-08.

6. Indeed, I have made essentially the same criticism in my previous discussions of Ronald Dworkin's legal philosophy. Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law,* 6 LAW & PHIL. 419 (1987). I have asked why we should be governed by law that represents neither rules that authorities decided upon nor political/moral principles that we presently hold to be correct, but rather, as Dworkin would have it, by law that represents the best principles that fit with past acts of authorities.

particular language. And they intended to convey a specific meaning through that language. Present-oriented interpretivists would focus on the second of these intentions (intended language) and make that intention authoritative, as opposed to originalists, who would make a third intention (intended meaning) authoritative.[7] Present-oriented interpretivists view law as an intentional delegation to the mindless procedure of linguistic evolution.[8] *Both* types of interpretivists, however, refer to (different) authorial intentions.

The second point is that the intentions of the authors operate at an indefinite number of levels of abstraction. This is a point that is now quite commonplace in debates over interpretation, but it is an important one nonetheless. The originalist is not merely one who would have us be bound by authorial intentions. She would have us be bound by those intentions characterized in a relatively concrete rather than an abstract manner.

But this point shows the originalist to be vulnerable to an objection very similar to the one Smith levels against the present-oriented interpretivist. The originalist argues that we should be bound by the concrete intentions of the political authorities who authored the legal texts. But why should we be bound by the authorities' concrete intentions rather than their abstract intentions, which, at the most abstract level, were the intentions to achieve good and just government? The authorities saw no conflict between their concrete and abstract intentions. Their concrete intentions furthered their abstract intentions, or so they believed. If time, circumstances, or a reassessment of facts or values leads us to conclude that a conflict exists between the authorities' concrete intentions and their abstract intentions, why should we honor the former rather than the latter?

The point can be put in terms quite similar to Smith's. The authorities' concrete intentions are what they have collectively decided upon ("will") as means to advance their most abstract intentions (to do what is just and good — "reason"). From the authorities' perspective, "will" and "reason" are joined. From our present point of view, however, what was willed may be at odds with what reason dictates.[9]

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7. *See generally* Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 115-18 (1989); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416-17 (1989).

8. Of course, not all linguistic evolution is mindless. The change in meaning of words that refer to "natural kinds" arguably reflects a better understanding of the reality to which those words refer. *See* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 291-301 (1985).

9. *See generally* Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 6-7 (1981); Alexander, *Painting Without the Numbers:*

If so, then the originalist would have us be governed by "unreasoned will." And is the originalist's "unreasoned will" any better than the present-oriented interpretivist's "mindless law"?

IV

The pragmatist, who advocates that we should always follow "reason" (or, in the language of authorial intent, the most abstract characterization of that intent), might appear now to have the upper hand in this jurisprudential debate. And surely there is something unassailable in the prescription to follow reason. But there is also something quite assailable in it. For reason itself will dictate that we be able to *decide* issues of governance, resolve them, which means that we cannot continually revisit the reasonableness of the resolution we *will.* Reasonable law, the law of the pragmatist, requires authority, rules, decisions — "will."[10] It is as bad to be ruled by reason without will as it is to be ruled by will without reason. The pragmatist may (pragmatically) opt for originalism.[11]

Indeed — and here we come full circle — if the pragmatist has "reason" to opt for originalism's version of "will" because rule of law virtues must figure in the pragmatist's calculations, the pragmatist might have stronger reason to opt for the "mindless law" of present-oriented interpretation. Adverting to the political authorities' intention to couch its will in a particular language — the authoritative intention for present-oriented interpretation — may serve the rule-of-law virtues better than adverting to the authorities' intended concrete meaning.[12] After all, languages change very slowly. Present dictionary meanings will likely be both close to the authors' original meanings and at the same time much more accessible to those persons who must seek guidance from and be constrained by the law. (Of course, we can always ask whether, if a word has changed meanings, it really is the same word that the authors chose or is instead a new and unchosen word represented by the chosen symbols. However we answer this question, the point remains that making the word's present dic-

Noninterpretive Judicial Review, 8 U. DAYTON L. REV. 447, 452 (1983); Alexander, *The Constitution as Law,* 6 CONST. COMMENT. 103, 112-13 (1989).

10. *See* Alexander, *The Constitution as Law, supra* note 9, at 108-10; Alexander, *Constrained by Precedent,* 63 S. CAL. L. REV. 1, 48-53 (1989).

11. *See* Alexander, *Constrained by Precedent, supra* note 10, at 48-53.

12. Smith misleadingly characterizes present-oriented interpretation as divorced from the collective decision, the "mind," that underlies the text. Smith, *supra* note 1, at 111-12, 115. But the choice of particular words in a particular language as the instruments for achieving policy goals, which is the significant choice for the present-oriented interpreter, is itself the product of a mindful collective decision. Present-oriented interpretation is not any more mindless than originalism. Its focus is merely on a different authorial intention.

tionary meaning authoritative may serve the rule of law considerations better than making its originally intended meaning authoritative.)

The real difficulty with present-oriented interpretation, aside from the potential conflict with reason which it shares with originalism, is one pointed out by Smith. The outcome of present-oriented interpretation depends upon the fortuity of the authors' choice of words, a choice that at the time may have been a matter merely of style or taste or perhaps chance, not a matter of substance.[13] Of course, originalism faces a similar difficulty when an unforeseen change in circumstances or an improved understanding of the world leads one to view the originally intended result as perverse.[14] In a sense, both originalism and present-oriented interpretation are vulnerable to fortuities, albeit different ones.

That is the nature of our jurisprudential dilemma. Dworkin's particular version of law without mind is not a way out, a point on which Smith and I agree. I reject Dworkin's theory of law, not because it is mindless, but because, as I argue elsewhere, it serves *neither* reason *nor* the rule of law virtues.[15] On the other hand, Aleinikoff's version of present-oriented interpretation does serve rule-of-law virtues, though it must confront the problem of fortuitous language choice that Smith identifies.[16] In any event, laws always connect with minds at some point. The real issue is that laws *with* mind present us with a paradox, the "will" aspect of mind and the "reason" aspect being both complementary and antagonistic. And we ourselves are of two minds about this.

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13. *Id.* at 115-16.

14. *See* Moore, *supra* note 8, at 291-301.

15. *See supra* note 6.

16. Smith, *supra* note 1, at 115-16.