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## FORMALISM IN CONSTITUTIONAL THEORY

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## **Formalism in Constitutional Theory**

Cass R. Sunstein\*

### **Abstract**

*In law – and in many other social activities, including music, art, and literature – reasonable people can and do argue over the best conception of interpretation. Intended meaning is unquestionably one candidate, but there are others. To choose among plausible accounts of what interpretation entails, judges and lawyers need to think about the world and to look outward, rather than to pretend that definitions can solve the problem. They need to ask which approach would make our constitutional order better rather than worse.*

In law, what does it mean to “interpret” a text, including the Constitution? There are some things that cannot be counted as interpretation. If a judge engages in freestanding moral theory and ignores the text, she is not interpreting it. If she reads it backwards, and tries to make sense out of it that way, she is probably making some kind of joke. At the same time, there is nothing that interpretation just is. Some people think that it is best to follow intended meaning. Others are committed to the original public meaning. Others favor some kind of moral reading – an idea that can itself take multiple forms, and that on certain assumptions might even entail use of intended meaning or original public meaning. The choice among plausible accounts of interpretation requires people to resort to their own arguments, external to the text, typically in the form of claims about what will make a constitutional order better rather than worse.<sup>1</sup>

In response to an essay of mine on this topic, Richard Ekins has produced nearly 10,000 words on interpretation, largely in defense of his claim is that interpretation just is an effort to uncover intended meaning.<sup>2</sup> Ekins has obviously

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<sup>1</sup> A superb discussion is Adrian Vermeule, *Interpretive Choice*, 75 *NYU L Rev* 74 (2000).

<sup>2</sup> Richard Ekins, *Objects of Interpretation*, *Constitutional Commentary* (forthcoming 2016). His essay is a reply to Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 *Constitutional Commentary* 193 (2015).

thought long and hard about this topic, and his essay bristles with both intelligence and learning. Moreover, his view is shared by other intelligent people. But in my view, Ekins is making a simple error, which is to try to resolve difficult questions in legal theory with a language lesson. Long ago, H.L.A. Hart discussed this error under the name of formalism, and I think that Elkin is engaged in that kind of formalism here.<sup>3</sup>

A few examples, taken from familiar disputes about particular constitutional provisions: Do affirmative action programs run afoul of the constitutional commitment to “equal protection”? Do bans on commercial advertising violate the protection of “freedom of speech”? Does the grant of “executive power” to the president forbid the creation of independent regulatory agencies? In each of these cases, it is certainly possible to offer an understanding of these terms that produces a “yes” answer. But that understanding is not compulsory. Speakers of the English language need not accept it.<sup>4</sup> (I expect that Ekins would agree on that count.)

The word “interpretation” is analogous, certainly in the context of constitutional law. I have noted that there are some things that cannot count as interpretation, but the term itself does not permit us to choose among radically different understandings, and it does not require us to settle on intended meaning. I confess that I am deeply puzzled that anyone could think otherwise. Ronald Dworkin has offered a sustained account of interpretation, suggesting that it is an effort to offer the best constructive account of the relevant materials in law (and elsewhere).<sup>5</sup> Dworkin may be wrong on some things, or on many things, but the English language hardly rules his view out of bounds. When he rejects an account of interpretation akin to that defended by Ekins, he is not displaying confusion about the meaning of words. He has not failed to understand the meaning of the word “interpretation.”

The overwhelming majority of members of the Supreme Court, now and throughout history, do not interpret the Constitution by attempting to ascertain intended meaning.<sup>6</sup> (The same is true in many other nations.) Those who reject intended meaning have diverse accounts of interpretation, and some are better than

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<sup>3</sup> H.L.A. Hart, *The Concept of Law* (1965). It is possible, however, to identify a kind of formalism that insists on following the actual or plain meaning of texts, and that does not claim, wrongly, that vague or ambiguous texts have a single meaning. Uses of actual or plain meaning raise their own questions, but that is not my topic here. For a valuable discussion, see William Baude and Ryan David Doerfler, *The (Not So) Plain Meaning Rule*, *Univ. of Chicago L. Rev.* (forthcoming 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2805431](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805431)

<sup>4</sup> I am bracketing here questions about the role of history and original understandings.

<sup>5</sup> See Ronald Dworkin, *Law’s Empire* (1985).

<sup>6</sup> I am putting to one side the relationship between “common law constitutional law” and interpretation. See David A. Strauss, *The Living Constitution* (2010).

others. But when a judge rejects intended meaning, and nonetheless struggles hard over how to interpret words like “equal protection” or “due process of law,” it is unhelpful – a kind of stipulation, an effort to declare victory without doing the (normative) work required to earn it -- to say that they are no longer engaged in the enterprise of interpretation. It is, in short, a species of formalism in the sense that I am using the term.

Some clichés bear repeating: The meaning of words depends on their use. In law – and I think in many other social activities, including music, art, and literature – reasonable people can and do argue over the best conception of interpretation. Intended meaning is unquestionably one candidate, but there are others. To choose among the plausible candidates, judges and lawyers need normative criteria external to texts, and it is hardly sufficient to investigate interpretation as a social practice (in, for example, ordinary conversations). It is necessary to think about the world and to look outward, rather than to pretend that definitions can solve the problem.