FAITHFUL AGENT, INTEGRATIVE, AND WELFARIST INTERPRETATION

by
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We are in the midst of a series of lively debates about how to interpret enacted laws such as written constitutions and statutes. In constitutional law, there is a spirited clash between "originalists" and "nonoriginalists." In the statutory arena, we have a three-way battle between "textualists," "intentionalists," and "pragmatists." A common feature of these contending schools is an insistence on a single, correct approach to interpretation. In this respect, however, each of these rival theories deviates from the practice of interpretation. Real world interpreters—to a person—deploy a variety of interpretative methods when they seek to resolve the contested meaning of authoritative texts. The actual practice of interpretation is characterized by a plurality of approaches to interpretation, as opposed to adherence to a unitary ideal.

This Essay is an effort to sketch out, in a preliminary fashion, a typology of interpretative approaches, and to offer some suggestions about how to develop a conception of interpretation that synthesizes these different approaches. My hope is that this synthesis will provide a better understanding of how the interpretation of enacted texts proceeds in actual practice, as well as a guide that provides at least a broad overview of how it should proceed.

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I. INTRODUCTION

We are in the midst of a series of lively debates about how to interpret enacted laws such as written constitutions and statutes. In constitutional law, there is a spirited clash between "originalists" and "nonoriginalists." In the statutory arena, we have a three-way battle between "textualists," "intentionalists," and "pragmatists." A common feature of these contending schools is an insistence on a single, correct approach to interpretation. In this respect, however, each of these rival theories deviates from the practice of interpretation. Real world interpreters—to a person—deploy a variety of interpretative methods when they seek to resolve the contested meaning of authoritative texts. The actual practice of interpretation is characterized by a plurality of approaches to interpretation, as opposed to adherence to a unitary ideal.

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II. THREE MODES OF INTERPRETATION

Let me begin by offering a typology of modes of legal interpretation. This is my own device for imposing some order on a burgeoning world of interpretation theories. The typology is intended to encompass theories of both constitutional and statutory interpretation. There are some obvious differences between them, such as the much higher rate of interaction between the enacting body and the interpreter in the statutory realm relative to the constitutional one. But they also share important common features, most prominently the understanding that legal authority flows from a text which has been enacted following a process that is recognized as conferring legal authority on that text.

My typology begins with three basic modes of interpretation. I call them the faithful agent mode, the integrative mode, and the welfarist mode. Because each mode has a number of subsidiary approaches, each can be regarded as a family of interpretation theories. Often, you will not be surprised to learn, the most vigorous disagreements occur within families as opposed to across different ones. Nevertheless, each mode is characterized by a distinctive theory of legitimacy—a different

assumption about what it is that makes any particular interpretation correct or incorrect, or better or worse than other interpretations.

A. The Faithful Agent Mode

Faithful agent theories adopt a principal-agent model of interpretation. The interpreter is cast in the role of subordinate agent, seeking in good faith to carry out the instructions of the lawmaker, who is understood to be the principal.[1] The faithful agent conception of interpretation is grounded in the command theory of law, associated with John Austin and carried forward by the legal positivists.[2] Its roots lie in the close association between political sovereignty and a particular person—the king. At one time, the law literally was the command of the king, to whom all subjects in the realm owed a duty of obedience. The king over time morphed into the king-in-parliament, then to parliament alone, then to the people acting in their collective capacity as sovereign to elect representatives to legislate in their name.[3] But the duty of obedience of those subject to the sovereign command has remained, and this, according to the faithful agent theory, describes the appropriate function of the interpreter.[4]

All faithful agent theories are originalist in the sense that the meaning of the enactment is fixed at the time of its promulgation. This follows from the understanding of law as sovereign command. If the task of the interpreter is to uncover the meaning of the command, then it would seem to follow that the interpreter must seek to determine the meaning of the enactment when it became a command—that is, when it was transformed from being a mere proposal into binding law by operation of the rule of recognition.[5]

Because faithful agent theories are rooted in the understanding of law as command, they conceive of law as the expression of an intelligent mind.[6] Consequently, interpretation is understood to be the task of

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[1] *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2040 (2007).

[2] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1–30 (1832) (defining law as the command of the sovereign); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 779–80 (2010) (noting the connection between Austinian positivism and modern textualism).

[3] *See* F.C. MONTAGUE, THE ELEMENTS OF ENGLISH CONSTITUTIONAL HISTORY 59, 148 (New ed., William S. Hein & Co., Inc. 2001) (1910).

[4] The evolution of the idea of the judge as faithful agent is skillfully traced in PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008). *See id.* at 42–43 (discussing the shift from divine to human will as the basis for legal obligation).

[5] On the concept of the rule of recognition, see H.L.A. HART, THE CONCEPT OF LAW 97–107 (1961) (arguing that laws impose duties distinct from moral obligations insofar as they are promulgated according to a rule of recognition which gives them binding force).

[6] Austin was explicit about this. *See* AUSTIN, *supra* note 2, at 10 (defining law in its most general signification to be "a rule laid down for the guidance of an intelligent

decoding what this intelligent mind was trying to say. This creates a problem when the sovereign is a multi-member body, like a legislature or a people acting to ratify a constitutional provision. Different members of the enacting body may have different reasons for supporting the enactment, and these reasons may not sum to a common understanding of what is being said.[7]

The internal divisions within the faithful agent camp can be explained by different approaches to overcoming this "many minds" problem. For present purposes, we can distinguish three sub-theories within the faithful agent mode: textualism, intentionalism, and purposivism. Textualists say that enactments should be interpreted in accordance with the meaning an ordinary reader of the text would attribute to it at the time of enactment.[8] The problem of aggregating multiple minds is circumvented by shifting from the enacting body to the reader of the command, who is hypothesized to be "a skilled, objectively-reasonable user of words . . . ."[9] Intentionalists say enactments should be interpreted in accordance with what the enacting body intended the command to mean. Here, the problem of aggregation is overcome by hypothesizing a corporate or collective intention. In one version of intentionalism called imaginative reconstruction, the interpreter asks what the enacting body would have collectively decided upon if, contrary to fact, it had specifically addressed the disputed question of meaning.[10] Purposivists also call upon the idea of corporate or collective understanding, but cast this at a higher level of generality or abstraction. The task of the interpreter is to identify the general purposes of the enacting body, understood to be a collection of "reasonable persons pursuing reasonable purposes reasonably,"[11] and then to resolve the

being by an intelligent being having power over him"). For modern restatements of this proposition, see Joseph Raz, *Intention in Interpretation, in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 260–61 (Robert P. George ed., 1996); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 117 (1989).

[7] This insight is often attributed to modern public choice theory. *See, e.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). The insight is not new, however. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930).

[8] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997).

[9] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)). *Cf.* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 354 (2005).

[10] *See* Learned Hand, *How Far is a Judge Free in Rendering a Decision?*, *in* THE SPIRIT OF LIBERTY 103, 105–10 (3d ed. 1974).

[11] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–81 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

question of interpretation in the way that best fulfills or realizes these purposes.

B. The Integrative Mode

Faithful agent theories should be reasonably familiar to anyone who has followed debates about statutory or constitutional interpretation in recent years. Integrative theories may be less familiar, although in practice they are utilized extensively by interpreters, more so than faithful agent theories.

Integrative theories reject the model of the interpreter as a faithful agent of the enacting body. Instead, the interpreter is cast as a synthesizer who draws on a variety of sources of meaning and who seeks to knit these sources together in order to produce the meaning that has the best "fit" with these sources. The sources of meaning for the integrative interpreter include not only the text itself—which is of course of great significance—but also previous judicial decisions construing the provision in question, previous administrative interpretations, other enactments containing similar provisions, and even substantive canons of interpretation, which can be regarded for these purposes as distillations of conventional wisdom bearing on the provision in question.[12] Various metaphors have been offered to describe integrative interpretation, such as Ronald Dworkin's suggestion that interpretation is like a process in which different authors write successive chapters in a chain novel after reviewing all the previous chapters written by others.[13]

If the historical roots of the faithful agent model lie in the fealty that every subject owes to the sovereign, then the historical roots of integrative interpretation lie in the practice of judging at common law.[14] The sources of the common law were many, including Roman law, custom, and isolated parliamentary enactments. But in its full flourishing and archetypical understanding today, the common law is law embodied in previous judicial decisions.[15] The task of the judge is to examine previous rulings involving similar controversies, and to extract from these pronouncements a rule of decision to govern the present case. The method of the common law is generally what I call integrative—it seeks to identify the decisional rule that provides the best fit or synthesis with these various past pronouncements. Analogously, the integrative interpreter looks not merely to the language of the enactment, but to other sources, including most prominently, but not exclusively, previous

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[12] *See generally* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992) (arguing that the cannons of interpretation promote continuity in the law).

[13] *See* RONALD DWORKIN, LAW'S EMPIRE 228–32 (1986).

[14] *See* HAMBURGER, *supra* note 4, at 127–41.

[15] *See, e.g.*, Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 455 (1989) (book review).

judicial expositions of the meaning of the enactment in order to extract a decisional rule that fits or coheres with this larger set of data built up over time.

Integrative interpretation is by its nature non-originalist. Suppose the text is enacted at time T_1 and is then interpreted at time T_2. If at time T_3 an interpreter seeks to give meaning to the text by taking into account both the text and the interpretation rendered at T_2, such an interpreter is necessarily adopting an interpretation that draws on material other than the original understanding, which was fixed at T_1. Integrative interpretation thus inevitably evolves over time, in response to new circumstances that require adjustments in previous understandings.[16] Originalists are keenly aware of this, and hence are hostile to any approach to interpretation that gives significant authority to precedent.[17] The converse is also true: Any interpreter who gives significant weight to precedent in interpreting a written enactment cannot claim to be a thoroughgoing originalist.

Although the literature on integrative interpretation is less well developed than the faithful agent literature, multiple versions of integrative theory also exist. One version, which I will call Burkean integration,[18] posits that the task of the interpreter is to evaluate the variety of sources of meaning in order to identify the understanding that can most accurately be said to represent the current consensus view as to what the law is. Obviously, every interpreter will be influenced by her or his values and experiences, and must make evaluative judgments. But the Burkean version of integrative interpretation asks the interpreter to suppress different aspirations about what the law should be, and to seek the view of the text that most accurately reflects the balance of informed

[16] In the words of Peter Strauss, faithful agent interpretation conceives of enacted law as "static judgment" whereas integrative interpretation views legal enactments "as an element in the continuing evolution of law's fabric . . . ." Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 437.

[17] *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005).

[18] On Burkean interpretation in constitutional law, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

contemporary opinion.[19] It is, if you will, an approach that enshrines the status quo as an implicit normative baseline for engaging in integration.[20]

Another version, which I will call normative integration, is reflected in the writings of Bill Eskridge and Ronald Dworkin.[21] This version posits that the integrative interpreter must not only seek to identify the interpretation that provides the best fit with multiple previous sources of meaning, but should also explicitly seek to synthesize these elements in a way that produces the "best" result from the perspective of some theory of the good. The layers of cake built up from text and precedent must be held together, as it were, by a thick coat of icing composed of normative theory. This type of integrative theory therefore partakes of features of welfarist theory, to which I will address momentarily.

Now that I have described integrative interpretation, everyone should recognize that it is quite widespread in practice. Constitutional law, whether it be under the First Amendment, the Fourth Amendment, or the Equal Protection Clause, is dominated in practice by integrative interpretation, in that parsing prior judicial precedent is much more important in resolving disputed questions than is any theory of original meaning, original intent, or original purpose.[22] Many areas of statutory interpretation are also thoroughly integrative, including the antitrust laws, civil rights laws, and the securities laws.[23] Integrative theory, I should stress, is not limited to the integration of past judicial precedent. Any approach to interpretation that puts heavy emphasis on other enactments, administrative interpretations, congressional ratification, substantive canons of interpretation, or customary norms or practices, is an integrative theory, as I use the term.

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[19] As Mel Eisenberg has argued, the common law includes not just formal legal elements like precedent but also "social propositions" which condition and influence the evolution of legal doctrine. *See* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 14–42 (1988). A Burkean interpreter will not disregard such propositions, but will take her cues from existing consensus about what is socially permissible, rather than adopting some ideal moral theory.

[20] In this sense, Cass Sunstein's recent embrace of "Burkean Minimalism" is ironic, given that he previously invested great energy condemning modes of interpretation that adopt "status quo" baselines. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

[21] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); DWORKIN, *supra* note 13, at 225–75.

[22] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

[23] *See, e.g.*, Fallon & Meltzer, *supra* note 1, at 2042 (describing the Supreme Court's interpretation of the habeas corpus statute as more closely approximating what I call the integrative mode rather than the faithful agent mode of interpretation).

C. The Welfarist Mode

If faithful agent theories are familiar from debates about interpretation, and integrative theories are familiar in practice, what do I mean by welfarist theories of interpretation? Welfarist theories are quite simply those that justify interpretation in terms of its impact on social welfare. The term is new, but the concept, in one form or another, has been around for a long time. The basic idea is that decisions by persons in authority should be justified in terms of their consequences.[24] We are all familiar with judging the actions of elected officials and administrative agencies this way. We assess the way they exercise their discretionary authority in terms of whether these actions advance or retard the well-being of the persons these officials serve. Welfarist interpretation extends the same framework of evaluation to the practice of interpreting enacted texts.

Welfarists typically begin by pointing out that insofar as the meaning of the text is unclear, the interpreter inevitably exercises discretion in determining what it means. This exercise of discretion, like every other exercise of discretionary authority by government officials, should be judged in terms of its consequences. If legislators are judged by whether they enact good or bad law, and presidents are judged by whether they adopt good or bad policies for implementing laws, then courts and other interpreters should be judged by whether they propound good or bad interpretations of laws.

The historical model for welfarist interpretation is not entirely clear. In constitutional law the model welfarist decision is probably *Brown v. Board of Education*.[25] *Brown*, you will recall, justified its conclusion that segregated public schools are unconstitutional by citing social science research findings that segregation is damaging to the self esteem of African-American school children.[26] Today, decisions like *Brown* are more likely to be justified in terms of propositions of political morality, political justice, or human rights. The notion is that there are certain universal moral truths that interpreters should draw upon in construing vague constitutional texts like the Equal Protection Clause.[27] Although practitioners of this style of argument might regard it as demeaning to characterize these perceived moral imperatives as welfarist, I think it is

[24] *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 16 (2002); Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279, 282 (2006).

[25] 347 U.S. 483 (1954).

[26] *Id.* at 494 ("To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); *see also id.* at 494–95 n.11 (citing recent social science literature in support of this conclusion).

[27] *See, e.g.*, Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1731–32 (1998).

fair to do so since these claims rest on arguments that texts should bear certain meanings because of the consequences for human well-being. The point is that welfarism, at least as I use the term, need not be conceived in narrow utilitarian or cost-benefit terms, but can also be framed in terms of timeless and transcendent moral imperatives—and often is in the world of constitutional theory.[28]

Welfarist interpretation has come to statutory interpretation literature only very recently. Here the implicit model—or at least inspiration—may be interpretation by modern administrative agencies. In the aftermath of the *Chevron* decision,[29] agencies have come to be regarded as exercising discretionary policy authority when they interpret statutes.[30] A succession of Presidents has encouraged agencies to discharge this discretion by using formal cost-benefit analysis.[31] The net result is a model of interpretation in which the interpreter seeks to fill gaps and ambiguities in enacted texts by adopting meanings that best promote the social welfare, understood to be the interpretation that produces the greatest social benefit net of costs. Once we become comfortable with this characterization of agency interpretation, it is a short step—for the academically inclined at least—to think of judicial interpretation in similar terms.[32]

If one follows the welfarists in conceiving of interpretation as the exercise of discretionary authority, then one can quickly become impatient with more conventional faithful agent or integrative theories. Faithful agent and integrative theories sharply constrain the range of outcomes that interpreters can embrace. Faithful agent interpretation is constrained by the instructions laid down by the enacting body—often a bunch of long-dead white males who entertained ideas that no longer resonate today. Integrative interpretation is constrained by the accumulated weight of past practice and understandings, which again may reflect the dead hand of the past, not to mention the accidents of path dependency that characterize any practice grounded in following

[28] Constitutional theorists sometimes call this "perfectionism." *See* James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 FORDHAM L. REV. 2885, 2887–97 (2007). Recent examples would include JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY (2006); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES (2004).

[29] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[30] *See, e.g.*, Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304 (1988) (arguing that *Chevron* divides statutory interpretation into questions of law and questions of policy).

[31] *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–68 (2006) (describing the recent history of the Office of Management and Budget's review of agency rulemaking pursuant to presidential executive orders).

[32] For a model of judicial interpretation that appears to derive from the post-*Chevron* conception of agency interpretation, see FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009).

precedent. If the ultimate touchstone for justifying the exercise of coercive governmental authority is the social welfare, then why shouldn't the interpretation of texts also be guided by considerations of social welfare? As should be obvious, welfarist interpretation is thus both non-originalist and deeply skeptical of precedent as a basis for resolving questions of interpretation.[33]

Like faithful agent theories and integrative theories, welfarist theories come in a variety of sizes and shapes. As I have already noted, one strand of welfarist interpretation, which appears primarily in constitutional interpretation, can be characterized as a form of natural law or human rights theory. Another prominent strand, which has been tirelessly promoted by Judge Richard Posner, goes by the name of pragmatism.[34] In Posner's version of pragmatism, welfare tends to be defined in terms of cost-benefit analysis. An interesting variation on this version of welfarism, associated with Adrian Vermeule, can be called institutional choice welfarism.[35] This would resolve interpretational questions by making generalized judgments about which institution is most likely to make interpretations that maximize benefits net of costs, and adopting whatever interpretation is offered by that institution. One can imagine other forms of welfarism as well, such as "critical" theories of interpretation that emphasize the need to interpret texts giving special attention to the perspectives of historically disadvantaged groups.

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I have presented faithful agent, integrative, and welfarist interpretation as ideal types, and one can find interpretative theorists who closely correspond to one of these types or to one of the sub-types within one of these families of theory. Yet if one looks at real world interpreters—which for these purposes I mean primarily judges—a striking fact quickly emerges: There are no pure types among real world interpreters. Someone like Justice Scalia can put heavy emphasis on faithful agent interpretation in his extrajudicial writing[36] and in some of his opinions. But when you look at a larger sample of his opinions, you find that he also makes heavy use of integrative and even welfarist

[33] *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 247 (2008) (characterizing many precedents as "the weakened descendants of overbred aristocrats" due for "critical reexamination").

[34] *See generally, id.* For some earlier versions of Posnerian pragmatism, see, for example, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 57–96 (2003); RICHARD A. POSNER, OVERCOMING LAW 387–405 (1995); and RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 454–69 (1990).

[35] *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

[36] *See generally* Scalia, *supra* note 8.

arguments.[37] Or when you look at the work of Judge Posner, you will find heavy emphasis on welfarist interpretation in his extrajudicial writing. But even when speaking extrajudicially, he introduces qualifications grounded in faithful agent and integrative ideals.[38] And of course, his opinions make use of faithful agent arguments and integrative arguments, as well as welfarist arguments.[39] This suggests that what is needed is some kind of synthesis of these modes of interpretation, a meta-theory, if you will, that helps us identify the proper domain of each of these modes of interpretation and what their relationship to each other should be.

III. SOME CONSIDERATIONS OF INSTITUTIONAL DESIGN

Before considering what such a meta-theory might look like, I will offer some preliminary analysis of the strengths and weaknesses of the three respective modes of interpretation. These comments are grounded in general observations about the design of our political institutions, and in particular, the role that democratic or representational institutions play in the overall structure of our constitutional government.

A. The Primacy of Faithful Agent Interpretation

There are, I believe, two powerful arguments grounded in the design of our political institutions that support the use of a faithful agent approach to interpretation of enacted texts.

First, faithful agent interpretation is necessary in order to preserve the bedrock principle of our constitutional government—popular sovereignty. The relationship between faithful agent interpretation and popular sovereignty is usually stated in backward-looking terms. Authoritative legal texts are enacted by the people or by the people's representatives, and therefore those who implement and enforce these texts must act as faithful agents of the enactors in order to assure that the will of the people is respected. This backward-looking perspective has the unfortunate tendency to degenerate into quibbling over whether the

[37] *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–92 (1991) (Scalia, J.) (resolving ambiguity about whether "attorneys fees" includes expert witness fees by examining other statutes); BFP v. Resolution Trust Corp., 511 U.S. 531, 544–45 n.8 (1994) (Scalia, J.) (resolving ambiguity about valuation of foreclosed real estate for federal bankruptcy purposes by invoking the need to promote the "security and stability of title to land").

[38] *See* POSNER, *supra* note 33, at 246 (acknowledging that it is necessary to insist on "jurisdictional niceties" such as deadlines for filing appeals).

[39] *See, e.g.*, Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 FLA. L. REV. 667, 669 (2010) (concluding that although economic analysis is the "predominant characteristic of Posner opinions," he has also "shown traditional skills of a legal craftsman and shrewd rhetorician").

Constitution and old statutes are truly "democratic." After all, women and African-Americans could not vote when the Constitution was adopted. Why do those living today owe any duty of allegiance to decisions made by a narrow subset of society now long dead?[40]

The powerful relationship between popular sovereignty and faithful agent interpretation is more easily made by turning the focus around and adopting a forward-looking perspective. We can ask, what guarantee do the people of today and tomorrow have that their wishes will be honored by those who implement and enforce the law? If the people speak, how do they know the interpreters will listen? We need faithful agent interpreters so that people living now and in the future can have confidence that if they assert their will—either by amending the Constitution or by enacting new laws—their wishes will be faithfully carried out by those who interpret the law. Without a basic commitment to faithful agent interpretation, the exercise of governmental authority by the people becomes illusory. A democratic uprising by the people would be regarded at best as an opinion poll to be weighed by those who interpret the law. At worst, it would be an empty exercise in futility to be ignored in the name of some higher or truer law discerned by the interpreters but invisible to the masses.

Let me offer a simple example to illustrate the point. About twenty years ago, the Supreme Court decided that burning the United States flag is protected speech under the First Amendment to the Constitution.[41] Many people were upset by these decisions. An amendment to the Constitution was proposed providing: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."[42] The amendment failed to garner the required two-thirds vote in either the House or Senate.[43] Suppose, contrary to fact, that it was approved by both chambers, and was then ratified by three-fourths of the States. Had this happened, the amendment would have become part of the basic law of the United States.

Suppose further that after this amendment is ratified, a protestor is prosecuted for flag burning, and his case goes before the Supreme Court. The protestor urges the Court to overturn his conviction, cleverly arguing that the words of the flag burning amendment only empower Congress to legislate, but do not expressly direct the Court to enter judgments of conviction. Invoking various integrative and welfarist

[40] For an overview of arguments and citations to the relevant literature, see Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

[41] *See* United States v. Eichman, 496 U.S. 310, 312 (1990); Texas v. Johnson, 491 U.S. 397, 399 (1989).

[42] H.R.J. Res. 350, 101st Cong. (1989); S.J. Res. 332, 101st Cong. (1990).

[43] Charles Tiefer, *The Flag-Burning Controversy of 1989–1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 377–78 (1992).

arguments, the defendant tells the Court that the "best" interpretation of the amendment is that it does not bind the Court to uphold convictions that violate the Court's own conception of freedom of speech.[44] How should the Court rule?

To me, the answer is obvious. The people have spoken. They are entitled to amend the Constitution, and have done so in the prescribed manner. Whether a majority of the Court agrees with the amendment or not, the Court is duty-bound to give effect to the amendment as the faithful agent of the sovereign people. To adopt an argument that would defeat the clear objective of the amendment would be to subvert the legal order, and in particular to deny the people the ultimate power to control their legal destiny. In effect, the Court would be asserting itself as the ultimate lawgiver in the society, immune from control save by impeachment, retirement, or revolution. I have no doubt that every one of the currently sitting Justices would reach the same conclusion. They would affirm the conviction, no matter how wrong-headed they regarded the amendment.

What this example tells us, I think, is that the structure of our legal order, grounded as it is on an assumption of popular sovereignty, requires that interpreters recognize a core of cases in which they must act as faithful agents. In the argot of statutory interpretation, it tells us that when an interpreter concludes that the enactment has a plain meaning, the interpreter is duty-bound to give effect to that meaning as the faithful agent of the enacting body. The example does not tell us whether the interpreter is to use the techniques of textualism, intentionalism, purposivism, or some combination thereof, in undertaking the inquiry into whether the enactment has a plain meaning. But it gives us a fixed point of reference and awards a primacy of place to the faithful agent mode of interpretation relative to the other contenders.

There is a second and distinct argument for interpreting enacted texts as the faithful agent of the enacting body, which complements the argument regarding popular sovereignty. Faithful agent interpretation is critical to maintaining stability and coherence in our system of government. We can call this the coordinating function of enacted law.[45] As Jack Balkin has pointed out, the Constitution contains a number of rule-like propositions whose meaning is plain and which no interpreter contests.[46] The list of uncontested propositions would include: each state has two Senators; Representatives serve two year terms; Senators and Representatives are directly elected; federal judges are nominated by the

[44] *Cf.* Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L. J. 1073, 1074 (1991) (arguing that the amendment would be unenforceable unless it expressly denied that "speech is a natural right").

[45] *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 162–66 (1991).

[46] Jack M. Balkin, *Fidelity to Text and Principle, in* THE CONSTITUTION IN 2020 11, 12 (Jack M. Balkin & Reva B. Siegel eds., 2009).

President; Presidents must be at least 35 years old, and so forth. These rule-like provisions are fairly numerous; we do not think about them very often precisely because they are uncontested. More importantly, they create a skeletal framework for government. They do not supply a complete flesh and blood constitution, in the sense of a complete description of the principles that govern the operations of government. But the rule-like provisions of the Constitution can be said to provide the bones on which the flesh and blood are attached. Take away the bones, and the body politic would collapse, or at least would be radically destabilized.

An analogous point can be made about important statutes. Laws that create government bodies or prescribe the powers and limits of government bodies, commonly called organic acts, play an extremely critical role in the functioning of our government. These laws, like the Constitution, contain many rule-like propositions that are plain and uncontested. For example, the Federal Communications Act tells us there will be something called the Federal Communications Commission, or the FCC; that it has authority to issue broadcasting licenses; that it is unlawful to operate a transmitter without an FCC license, and so forth.[47] Only the legislature has authority to create such institutions and confer governmental power upon them. The President and the courts cannot declare, on their own authority, that there will be an FCC.[48] And when the legislature has acted to create institutions and prescribe their powers, it is critical that those who act in the name of the government follow the rule-like propositions that the legislature has laid down. If the interpreters of such laws did not carry out these instructions as faithful agents, the result would be significant instability.

I am not claiming, of course, that every provision in the Constitution or every provision of every important statute should be regarded as some kind of rule having a plain meaning. Obviously, many provisions are broad generalities. These broad generalities have to be interpreted, and they have long been interpreted in ways that are very difficult to characterize as exercises in faithful agent interpretation. The point is simply that the Constitution—as well as every organic statute that establishes an agency or institution of government—contains a large number or structural or organizational rules whose meanings are plain. If interpreters did not enforce these rules in accordance with their uncontested meaning, it would be difficult to establish a system of government characterized by the rule of law.

Powerful empirical support for the primacy of faithful agent interpretation is supplied when we examine the many interpretative theories that have been advanced in recent years. When we scrutinize these theories closely, we find that most start with the acknowledgement

[47] *See* 47 U.S.C. §§ 151, 307, 318 (2006).

[48] *See* Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456 (2010).

that the interpreter is bound to enforce the plain meaning of authoritative texts.[49] The dispute is over what the interpreter is supposed to do when the meaning is *not* plain. This is a tacit acknowledgement that the role of the interpreter, at its core, is that of a faithful agent of the enacting body. When and if the lawgiver manages to speak plainly, the interpreter dutifully complies with the instruction that has been given. This means that the role of the interpreter, at its core, is that of a faithful agent.

The nearly universal authority that interpreters ascribe to texts with plain meanings, however, also reveals the key weakness of faithful agent theories. If all texts had plain meanings, then everyone would engage in nothing but faithful agent interpretation, and there would be no need for interpretative theory. But obviously, all texts do not have plain meanings. And when texts do not have plain meanings, faithful agent theorists must look elsewhere in order to give meaning to the enactment. One move here is to shift from the text to the intentions or the purposes of the enacting body and to seek to derive meaning by asking how the text should be interpreted in order to advance these intentions or purposes. Another, more common, move is to draw upon the techniques associated with the integrative mode of interpretation.

B. The Ubiquity of Integrative Interpretation

If interpretation must be built on a foundation of faithful agency, then it is also important to acknowledge the ubiquity of integrative interpretation. With respect to the interpretative issues of greatest controversy—including those that surround the meaning of the broad clauses of the Constitution like the Commerce Clause or the Equal Protection Clause—integrative interpretation is a much more descriptively accurate characterization of actual practice than is faithful agent interpretation.[50] Faithful agent theorists seem not to know what to do with this awkward truth. They acknowledge that precedent and evolved understanding may serve as a constraint on the faithful agent

[49] *See, e.g.*, Balkin, *supra* note 46, at 17–18; CROSS, *supra* note 32, at 132; EINER ELHAUGE, STATUTORY DEFAULT RULES 58 (2008); VERMEULE, *supra* note 35, at 1. Dworkin may be an exception to this generalization. His most recent work merges legal and moral interpretation into a single unified inquiry, suggesting perhaps that a plain legal text would have to give way to a contrary principle of morality. *See* Lawrence B. Solum, *The Unity of Interpretation*, 90 B. U. L. REV. 551, 555 (2010).

[50] *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 79 (2008) (using case analysis and social science research to show the importance of precedent in Supreme Court decision-making); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 730–34 (1988) (describing the Supreme Court's integrative interpretation of New Deal legislation).

interpreter. But this is treated as an unpleasant concession to reality,[51] rather than a feature of the interpretative landscape that needs to be integrated into a more comprehensive conception of interpretative practice.

In practice, integrative interpretation exerts a very powerful gravitational force, a force so powerful that no interpreter can afford to ignore it. In support of this claim, I offer a remarkable exchange at the beginning of the oral argument in *McDonald v. City of Chicago*,[52] which occurred in the Supreme Court on March 2, 2010.[53] *McDonald* presented the question of whether the Second Amendment, as interpreted in *District of Columbia v. Heller*,[54] applies to the States through the Fourteenth Amendment.[55] Faithful agent interpreters had been greatly heartened by *Heller*, where it seemed that both the majority and the principal dissenting opinion looked primarily to the original meaning of the Second Amendment in deciding whether that provision recognizes an individual's right to bear arms for self-defense in the home.[56] Lawyers with a strong commitment to originalism assumed that the Court would therefore also be open to faithful agent interpretation in deciding whether to apply *Heller* to the States. What this would mean, according to the dominant view among originalists, is that the Court would look to the Privileges or Immunities Clause of the Fourteenth Amendment as a basis for determining whether *Heller* applies to the States, because the authors of the Fourteenth Amendment assumed the Privileges or Immunities Clause would be the vehicle for incorporation.[57] This in turn would require that the Court overrule the *Slaughter-House Cases*,[58] which had interpreted the Privileges or Immunities Clause narrowly as not incorporating all the rights embodied in the first eight amendments to the Constitution, including of course the Second Amendment.[59]

Counsel for the petitioners in *McDonald*, Alan Gura, began his presentation by urging the Court to look to the Privileges or Immunities Clause to decide the issue before it.[60] Chief Justice Roberts quickly interjected, "Of course, this argument is contrary to the Slaughter-House cases, which have been the law for 140 years. . . . [I]t's a heavy burden for

[51] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (defending originalism but acknowledging that "most originalists are faint-hearted" when it comes to overturning settled precedent).

[52] 130 S. Ct. 3020 (2010).

[53] Transcript of Oral Argument, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

[54] 128 S. Ct. 2783 (2008).

[55] *McDonald*, 130 S. Ct. at 3026.

[56] *Heller*, 128 S. Ct. at 2788–89; *id.* at 2822 (Stevens, J., dissenting).

[57] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS 163–214 (1998).

[58] 83 U.S. (16 Wall.) 36 (1873).

[59] *Id.* at 82.

[60] Transcript of Oral Argument, *supra* note 53, at 3.

you to carry to suggest that we ought to overrule that decision."[61] Gura regrouped and suggested that the *Slaughter-House* decision was entitled to little respect as a precedent, because "there is a great consensus that it was simply not decided correctly," that is, not decided correctly from an originalist point of view.[62] Then came this bombshell from Justice Scalia: "[W]hy are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due [process]—I mean, you know, unless you are bucking for a—a place on some law school faculty . . . ."[63] The transcript at this point indicates, "(Laughter)."[64] Justice Scalia then continued:

> What you argue is the darling of the professoriate, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process, which as much as I think it's wrong, I have—even I have acquiesced in it?[65]

Again, the transcript says, "(Laughter)."[66] When the proposition that the Constitution should be interpreted in accordance with its original meaning elicits two laugh lines from Justice Scalia, you know the faithful agent perspective is in trouble.

What is going on here? How can Justice Scalia, one of the foremost proponents of originalism in constitutional law[67] and the author of the originalist majority opinion in *Heller*, mock the originalist position in *McDonald* as "the darling of the professoriate"? The answer has to be that overturning the *Slaughter-House Cases*—and with them, the basis for determining which provisions of the Bill of Rights apply to the States and which do not—would simply be too unsettling to the system of constitutional law that the Court has developed in the many decades since that decision was rendered. Even a committed originalist like Justice Scalia recognizes that the Court is not about to pull the rug out from under 140 years of jurisprudence, with all sorts of collateral consequences, many not entirely foreseeable.[68]

To revert to an earlier metaphor, if the rule-like provisions of the Constitution and organic laws are the skeleton on which the body politic rests, then accumulated understandings that have attached to that

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[61] *Id.* at 4.

[62] *Id.*

[63] *Id.* at 6–7.

[64] *Id.* at 7.

[65] *Id.*

[66] *Id.*

[67] *See* Scalia, *supra* note 51; Nelson, *supra* note 9, at 347.

[68] As foreshadowed by his remarks at oral argument, Justice Scalia joined the plurality opinion in *McDonald*, relying on the Due Process Clause as the basis for incorporation. McDonald v. City of Chicago, 130 S.Ct. 3020, 3050 (2010) (Scalia, J., concurring). Only Justice Thomas was willing to overrule the *Slaughter-House Cases* and ground incorporation in the Privileges or Immunities Clause. *Id.* at 3058–88 (Thomas, J., concurring in judgment).

skeleton and grown over time are the muscle, blood, and vital organs of the body politic. To excise these understandings root and branch—based on some view of the correct original understanding or otherwise—would jeopardize the body politic no less than would ignoring the rule-like propositions that have always been uncontested. History has its claims, not merely in terms of founding moments, but also in terms of everything that has transpired between the founding and the present. This is the key insight of the integrative approach.

Integrative interpretation has another advantage, which hearkens back to our consideration of the need to preserve the fundamental institutional design postulate of popular sovereignty and its corollary, representative government. Integrative interpretation, especially in its Burkean version, promotes stability in law. Interpretation of the law changes slowly and organically, rather than in fits and starts. This gives the relatively more representative institutions, like the legislature, a clear target when considering whether to make changes in the law. Also, if interpretation is plodding and resistant to change—as it is more likely to be under the integrative model—then those who seek change in the law will have an incentive to take their case to forums where change is more likely to occur. The principal candidates for such change, again, are the relatively more representative institutions, such as the legislature.[69] In short, integrative interpretation is likely to promote change through bottom-up democratic means, as opposed to change through interpretation, which tends to be top-down and elitist. In this respect, integrative interpretation reinforces the basic principle of democratic institutional design.

Like faithful agent theories, integrative theories have their points of vulnerability. One has already been alluded to. If the sovereign people rise up and reject the settled understandings of the law that are reflected in integrative understanding, then interpreters are bound to respect the judgment of the people, not the collected wisdom of the ages. Integrative interpretation is therefore subordinate to plain meanings of enacted texts. For example, if the Fourteenth Amendment were amended to say in so many words that the first eight amendments of the Constitution apply to the States, the *Slaughter House Cases* and 140 years of accumulated jurisprudence would have to be overruled, whatever destabilizing consequences this might introduce.[70]

[69] *See* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 275–76 (2005).

[70] Originalists argue of course that this was the intended meaning of the Privileges or Immunities Clause in 1868. But the evidence on this point, although considerable, is not conclusive. If the original Fourteenth Amendment had said in so many words that the first eight Amendments apply to the States, then integrative interpretation would have to yield to this directive. But if the Fourteenth Amendment plainly said that, then the *Slaughter-House Cases* would never have been decided as they were.

Another weakness of integrative interpretation is that it often cannot provide any guidance as to how to interpret an ambiguous text on the first occasion it comes before the court or other body for interpretation. One cannot rely on precedent when no precedent exists.[71] Conceivably, other integrative tools such as references to previous or subsequent enactments, administrative interpretations, or substantive canons could be called upon for assistance. But one can readily imagine circumstances in which a tribunal is faced with nothing more than the ambiguous language of a recently enacted text that must be given some meaning. If the interpreter only knows how to do integrative interpretation, then the interpreter will not know how to proceed. Clearly then, integrative interpretation is also incomplete and must be supplemented, at least in some cases, by either some non-text-based version of faithful agent interpretation—like intentionalism or purposivism—or welfarist interpretation.

C. The Limited Domain of Welfarist Interpretation

When we get to welfarist interpretation, the disadvantages significantly outweigh the advantages, or so it seems to me. There are two issues of overriding concern. One is whether interpreters of authoritative texts—including here not just Supreme Court Justices (who tend to have above average skills) but all other federal and state judges (who tend to have skills closer to the average lawyer) plus the lawyers in general counsels' offices in various federal and state agencies—have the ability to engage in welfarist analysis. I think it is fair to say that the skill set of judges and lawyers, as a class, *is* well suited to engaging in faithful agent and integrative modes of interpretation. Certainly one can ask: What other branch of government decision-makers would likely do better? Would the members of the legislature or the heads of executive departments do better in figuring out what authoritative texts mean, based on a careful analysis of the language used and its historical context? Would these political actors show greater thoroughness and insight in dissecting past precedents and other integrative sources? I think the answer must be surely not. So we can at least be confident that faithful agent and integrative modes of interpretation are well suited to the skill set of those we typically charge with the task of interpretation.

I am, however, deeply skeptical of the claim that those who are conventionally charged with interpretation would be equally adept at welfarist interpretation. This is easiest to see if we consider Judge Posner's proposal that judges should interpret ambiguous texts so as to maximize social benefits net of costs. Suppose you were tasked with producing a cost-benefit analysis of a policy proposal like health care or

[71] *Cf.* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 639 (2006) (noting that "textual arguments always come first, ahead of the doctrinal arguments").

financial reform. Would you hire a retired judge for this purpose? Not likely. A former policy analyst from the relevant administrative agency would be a better choice, or an economics or business consulting firm. Admittedly, judges have some relevant advantages. They are habituated to engaging in disinterested analysis, and they are attentive to the way in which different facts affect the correctness of reaching different results.[72] But they are not accustomed to dealing with large databases, they lack quantitative skills, and they do not tend to think—explicitly at least—in terms of aggregate welfare models. If one wants texts to be interpreted so as to maximize social benefits net of costs, we should give all questions of interpretation to administrative agencies.[73]

A good illustration of the pitfalls of welfarist interpretation is provided by a recent case involving the standard for challenging the fees charged by investment advisory firms to mutual funds.[74] Writing for a panel of the Seventh Circuit, Judge Frank Easterbrook drew upon orthodox Chicago School economics to opine that there is no need for any legal scrutiny of such fees, because competition between funds for investor dollars will keep advisors from charging excessive fees.[75] Dissenting from denial of rehearing en banc, Judge Richard Posner argued that Judge Easterbrook's views were out of date and that more recent economic research indicates that investment advisors can extract excessive fees from individual investors.[76] Both the Easterbrook and the Posner opinions were exercises in welfarist interpretation. The contending judges, both former Professors at the University of Chicago Law School, disagreed with each other on grounds of economic theory and evidence.

The Supreme Court granted further review, and in a unanimous opinion written by Justice Alito, reaffirmed the traditional multi-factor standard for review of investment advisory fees, as first articulated by the Second Circuit in a decision rendered in 1982.[77] Justice Alito observed that the Second Circuit standard "may lack sharp analytical clarity," but it "accurately reflects the compromise" embodied in the statute, and "has provided a workable standard for nearly three decades."[78] He then remarked that the debate between Judges Easterbrook and Posner "regarding today's mutual fund market is a matter for Congress, not the

[72] VERMEULE, *supra* note 35, at 3.

[73] Adrian Vermeule has concluded—correctly, in my view—that if welfarist interpretation is the proper mode of interpretation, courts should routinely defer to administrative agency decisions. *See id.* at 1.

[74] Jones v. Harris Assocs. L.P., 130 S. Ct. 1418, 1422 (2010).

[75] Jones v. Harris Assocs. L.P., 527 F.3d 627, 634 (7th Cir. 2008).

[76] Jones v. Harris Assocs. L.P., 537 F.3d 728, 730–31 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc).

[77] Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923, 928–30 (2d Cir. 1982).

[78] *Jones*, 130 S. Ct. at 1430.

courts."[79] Perhaps this rebuke will discourage further explorations in welfarist interpretation. In any event, it is interesting to note that the Supreme Court was able to reach unanimous agreement upon the mode of analysis to use in delivering this rebuke—a quintessential exercise in integrative interpretation, relying on arguments from precedent (including lower court precedent), ratification, and reliance.

The case against the use of welfarist interpretation by judges and lawyers is slightly harder to make if the analysis is of the natural-rights or human-rights variety, as we tend to find in the literature on constitutional interpretation. But I am prepared to make it. Just as judges and lawyers do not have the skill set to engage in complex economic analysis, so they also do not have the skill set to engage in sophisticated moral philosophy.[80] There is a tendency among constitutional theorists of a moralizing bent, like Dworkin, to valorize courts as the "Forum of Principle."[81] But few judges qualify as deep thinkers, at least of the sort who would command natural deference for their insights about universal moral truths. When Anthony Kennedy, the most powerful Justice on the Supreme Court today, starts to rhapsodize about the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[82] the effect is simply embarrassing.

Those who urge judges to interpret vague constitutional texts in light of universal moral truths also have a strong tendency to dwell on past judicial heroics (or imagined heroics) rather than contemporary conundrums. They nearly always appeal to propositions that are today uncontroversial, such the wrongfulness of segregation or of denying equal rights to women, ignoring the halting process by which courts actually came to embrace these propositions. Ex post, we can see that they reflect moral principles we are prepared to call universal. We can shower hosannas on courts for their perspicacity in aligning themselves on the correct side of the issue. But it is much more difficult to mount a persuasive case that judges should use moral philosophy to decide issues that are deeply controversial today, such as whether to permit late-term elective abortions or how to strike a balance between public security and individual liberty in monitoring communications among suspected terrorists. Considerations of moral philosophy are obviously relevant in trying to answer these questions. But do we really believe that judges have better insights into finding the right answers to these questions, based on moral reasoning, than do other decision-makers or ordinary citizens?

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[79] *Id.* at 1431.

[80] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, 129–41 (1999) (discussing the limited impact of moral theory on Supreme Court decisions).

[81] RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985).

[82] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion).

The second overriding concern involves the need for stability in interpretation. Integrative interpretation rates high on stability, since the more settled or entrenched an interpretation becomes, the harder it is to displace it under an integrative model of interpretation. Faithful agent interpretation rates slightly less highly on the stability scale, since the faithful agent is always trying to discern the meaning at a fixed point in time in the past. As this point in time recedes, new materials that bear on original understanding may be discovered, and new perspectives on how to interpret the past may emerge that are based on changing societal values and experience. So the understanding of original meaning one hundred years after enactment may differ significantly from the understanding of original meaning ten years after enactment. Avulsive changes based on sincere faithful agent interpretation cannot be ruled out.[83] Still, faithful agent interpreters will be looking at the same words and the same context of enactment. This will tend to confine the range of possible meanings.

Welfarist interpretation, by comparison, seems to be an open invitation to instability in interpretation. Cost-benefit analysis is notoriously sensitive to changes in the measurement of variables or the discovery of new variables. Pollution that does not warrant control one year can suddenly become a matter of regulatory concern the next, or vice versa, as measurement improves, populations shift, and technology changes.[84] Interpretation of texts using cost-benefit analysis would have the same shifting aspect, even if done by totally competent practitioners of the art—as opposed to incompetent judges. Interpretation drawing upon moral reasoning is subject to similar shifting perspectives. Sexual relations between members of the same gender can be regarded as morally abhorrent in one generation, and normal or even healthy in the next.[85] Likewise, the rights of unborn fetuses or animals can be considered of small moment in one era, and matters of great significance in another. Welfarist interpretation, at least in a relatively pure or untethered form, would therefore be highly unstable, as compared to either integrative or faithful agent interpretation.

The problem is compounded when we consider that different interpreters are likely to have different views about how social welfare can be advanced through interpretation. Faithful agent interpretation has a theory that collectively binds interpreters—they are bound by the instructions of the enacting body. Integrative interpretation similarly has

[83] Arguably, *Heller*, in which the Court interpreted the Second Amendment more than 200 years after its adoption to embody an individual's right to bear arms for self-protection, reflects such a change. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[84] *See generally* Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998) (providing illustrations of the sensitivity of cost-benefit analysis to small changes in variables).

[85] *See* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 77–79 (2006).

a theory that collectively binds interpreters—they are bound by precedent or by propositions about the meaning of texts that can be regarded as settled.[86] What is it that binds one judge or other interpreter to the welfare analysis carried out by another judge or interpreter? Welfarist interpretation is only controlling if one agrees that the analysis is correct. If you disagree with a welfarist analysis rendered by someone else—either because you have better data, you are smarter, or your moral values are superior—you have no reason to follow the lead of the other welfarist.[87] A world of welfarist interpretation would therefore be a world of continuous revisitings of previous decisions, dramatic shifts in legal understanding with new appointments, and rampant overruling of prior interpretations.

What is the case on the other side? One argument commonly advanced in support of welfarist interpretation is that it is necessary in order to keep enacted texts up-to-date.[88] The Constitution, in particular, is notoriously difficult to amend. A very strong consensus must emerge, and a very strong motivation for change must gather steam, before two-thirds of the House and Senate and three-fourths of the States will agree to amend the Constitution. It is also difficult to amend statutes. Congress has only a limited capacity to move legislation through the bicameral approval process, especially given the need to obtain the assent of the President or a two-thirds vote to overcome a veto. If all significant statutory change must come from Congress, then quite a number of obsolete laws will gather on the books, frustrating the general welfare. The conclusion drawn from these laments about the difficulty of updating the law is that interpreters should do the updating by adopting some form of welfarist interpretation.[89]

This claim seems to me to be overstated. For one thing, it ignores other mechanisms for legal change. If the Constitution is too difficult to amend, then statutory rights can be created that will have virtually the same effect. Discrimination against the elderly or the disabled, for example, has not been recognized as triggering significant constitutional protection.[90] Yet Congress has passed the Age Discrimination in Employment Act,[91] the Americans With Disabilities Act,[92] and other

[86] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 279 (1972).

[87] *Cf.* VERMEULE, *supra* note 35, at 118–48 (discussing the difficulties of achieving coordination among judges in pursuit of some normative objective).

[88] *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 312–44 (1998) (arguing that President Roosevelt and his advisors concluded it was impractical to seek to amend the Constitution and that changing Supreme Court personnel was a better strategy to enshrine the principles of the New Deal).

[89] *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (proposing that judges assume the power to disregard "obsolete" statutes).

[90] *See* City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (disability); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (age).

[91] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006).

statutes that protect the elderly and the disabled against discrimination. Similar stories can be told about discrimination based on race, gender, religion, and sexual orientation.[93] Congress is also aware that statutes are difficult to amend and keep up to date. For this reason, Congress often delegates broad authority to administrative agencies, which can do the updating at a lower cost using broad rulemaking authority.

Another problem with relying on updating through interpretation is that this mode of legal change also requires a very strong consensus and eagerness to change the law on the part of the interpreters, such as the judges. Suppose the issue is one on which society is divided, such as whether to recognize gay marriage. If society is divided, then it is likely that the judges will be divided too. The Ninth Circuit may recognize a constitutional right to gay marriage, but if it does, the Supreme Court, given its current composition, is likely to nix it. Judges will only act in a coordinated and decisive fashion to change the law through interpretation when enough time has passed to allow a succession of sympathetic Presidents and Senates to appoint a majority of judges who are also sympathetic to the change.[94] Given the increased life expectancy of judges,[95] this may take quite a long time. In the meantime, if we assume a succession of sympathetic Presidents and Congresses, amending the Constitution or, better yet, passing a statute, may be a more expeditious way of proceeding to achieve a desired change.

And of course, overhanging all of this discussion about the need for legal change is a fundamental question of institutional design. Since when are unelected and life tenured judges the preferred instrument for achieving legal change in a society committed to popular sovereignty? To make this more concrete, suppose we posit a situation in which a certain change is unambiguously desirable from a social welfare perspective. Suppose, further, that achieving this change through interpretation will hasten the happy day when the change arrives by, say, five years relative to achieving the change by slogging through the political process. We still have to confront the objection that achieving the change through more

[92] Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006).

[93] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006) (prohibiting employment discrimination based upon "race, color, religion, sex, or national origin"); Civil Service Reform Act of 1978, 5 U.S.C. § 2302 (2006) (prohibiting discrimination against federal employees based upon "conduct which does not adversely affect the performance of the employee").

[94] *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–85 (1957).

[95] The average age of Supreme Court Justices at death or resignation from the Court has risen from 58 years in the early decades of the Court to nearly 80 years today. *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 24–25 (Roger C. Cramton & Paul D. Carrington eds., 2006).

democratic or representational methods is the right way to go in a society committed to rule by the people.

A second, more subtle, argument in favor of welfarist interpretation is that such interpretation is appropriate to the extent it promotes the general norm of government by the people. This is John Ely's famous argument in support of a limited form of non-faithful agent judicial review.[96] Ely argues that a variety of aggressive constitutional rulings associated with the Warren Court were justified, precisely because they had the effect of making the political process more responsive to popular will. Judicial review of this variety, Ely argues, is consistent with a "meta-norm" of popular sovereignty, and thus comports with the most general principle of institutional design we have been considering.[97]

Although this version of welfarist interpretation appears to be more compatible with a commitment to popular sovereignty than rootless pragmatism, on closer examination it too encounters serious objections. One concern is the meaning of "more democratic." Ely regards it as self-evident that decisions reapportioning electoral districts to conform to the principle of "one person, one vote," decisions commanding full equality for African-Americans and women, and decisions striking down limits on political speech all make our polity more democratic. But when we push the inquiry further, we quickly find that the classification becomes more problematic. Is direct democracy by initiative and referendum more or less democratic than representative democracy? Is delegated policymaking by administrative agencies using notice, comment and public hearings more or less democratic than direct policymaking by elected legislatures? Is an elected judiciary more or less democratic than an appointed judiciary? There are no obvious answers to these questions, with the result that a general mandate to judges to remake society in the name of "democracy" seems hardly more constrained than a mandate to "do good."

A related objection is that even if we can agree on which structural option is more democratic, it is not clear that the Constitution requires that we select this option without regard to countervailing considerations. To take but one example, consider the choice between direct and representative democracy. Even if we can agree that direct democracy is more democratic than representative democracy, it is hard to maintain that the Constitution authorizes a judicial campaign to promote the use of direct democracy. The Constitution establishes the federal government as a representative democracy, not a direct democracy, and it guarantees the States a "republican form" of government, not a direct democracy.[98] Moreover, because most voters are rationally ignorant of the details of policy proposals, there is significant

[96] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101–02 (1980).

[97] *See generally id.* at 83–84, 87, 102–03.

[98] U.S. CONST. art. IV, § 4.

evidence that direct democracy is simply a bad idea, at least if conducted on a state-wide scale.[99] Again, the conclusion would seem to be that charging judges with promoting democracy leads to conundrums beyond the capacity of judges to resolve.

Having said all this, I do not mean to suggest the welfarist interpretation is always and everywhere forbidden. Sometimes it is inevitable, and sometimes it is a better choice than all the others. Suppose, for example, that a new statute or constitutional provision is adopted, and the text contains a serious ambiguity or gap. Suppose further that the evidence of legislative intent or purpose is equally ambiguous or opaque. Finally, suppose that there is no precedent, no similar enactment, and no established canon of interpretation that yields an answer. In such circumstances, the interpreter has no choice—other than declaring the provision nonjusticiable—but to resolve the ambiguity or close the gap by adopting the interpretation that seems to the interpreter to achieve the best results under the circumstances. Thus, although I believe it would be a mistake to adopt welfarist interpretation as a mode of first resort, I concede that there will be circumstances, hopefully relatively rare insofar as judicial interpretation is concerned, when it must be adopted as a mode of last resort.

IV. TWO PRINCIPLES OF SYNTHESIS

The foregoing analysis of the three modes of interpretation reveals that no single mode, by itself, is going to provide a satisfactory theory of legal interpretation. Faithful agent theory may be foundational, but in practice it can quickly run out of gas. Integrative interpretation is generally far more useful, but it is necessarily subordinate to faithful agent interpretation and does not offer any satisfactory account of how the process of interpretation is started. Welfarist interpretation seems the most alien to judicial traditions, and is better suited to specialized agencies than to courts of general jurisdiction. But there are occasions when even courts must resort to welfarist interpretation. How then can we fit the pieces together? In a preliminary effort to explore how that might be done, I will offer two principles for achieving a synthesis of interpretative modes. While these principles do not answer all questions about how to approach problems of interpretation, they at least promise to get us started in that direction.

A. A Hierarchy of Interpretative Authority

The first basis for achieving a synthesis is to acknowledge a hierarchy of authority among different modes, together with the recognition that the modes that exist in a higher position in the hierarchy are inevitably

[99] *See* Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 282 (2010) (citing studies).

incomplete and will require supplementation by modes further down the hierarchy. Based on the discussion in Part III, the hierarchy can be stated easily enough, at least for traditional interpreters like courts. Courts should start with the faithful agent approach, and interpret texts in accordance with their plain or uncontested meaning if this is possible. Once faithful agent interpretation is exhausted, courts should turn to integrative interpretation and should seek to ascribe meaning to the text by considering past precedents, interpretations by other branches of government, other enactments, legislative ratification, and substantive canons of construction. As a last resort, if and only if both faithful agent and integrative interpretation fail to produce an answer, courts should look to welfarist considerations and give the text the meaning that appears to produce the best results, as far as the court is able to discern.

This hierarchy poses some interesting and important subsidiary questions. One critical question concerns which version of the faithful agent inquiry courts should employ. When the text fails to supply a plain or uncontested meaning, should the court immediately move on to integrative techniques—as self-proclaimed textualists like Justice Scalia tend to do? Or should the interpreter first explore other faithful agent approaches, such as intentionalism or purposivism, and turn to integration only if these alternative faithful agent techniques fail to yield an answer?

Another critical question concerns the relative status of different tools of integrative interpretation. Courts tend to ascribe very significant weight to their own past exercises in interpretation,[100] but much less weight to other integrative tools, such as administrative interpretations or substantive canons. This raises the question of whether courts, once plain meaning runs out, should move directly to past judicial precedents, but then perhaps move *back* to other faithful agent techniques like legislative intent or purpose if there are no precedents on point or if the precedents are conflicting. In other words, there is a question of whether some integrative techniques should be given a status in the hierarchy higher than some faithful agent techniques, even if, as a general matter, faithful agent interpretation should come before integrative interpretation.

I have no firm answers to these interesting questions, at least none that I am prepared to offer here. Arguably there should be no answers to these questions that apply across the board. After all, evidence of legislative intent or purpose and strength of precedent are matters of degree. One could quite plausibly argue that when the text runs out but evidence of intent is quite strong, interpreters should move first to intent; conversely, when the text runs out but past precedent is quite strong, interpreters should move first to precedent. Allowing interpreters the

[100] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 277–79 (1972) (applying a super-strong version of stare decisis to statutory interpretation).

flexibility to make these subsidiary determinations in a case-by-case fashion may be perfectly sensible.

A third critical question is whether a different hierarchy should be adopted for specialized interpreters such as administrative agencies. Clearly, the general arguments for the primacy of faithful agent interpretation apply to agency interpreters as well as judicial interpreters. Agencies no less than courts must comply with uncontested propositions of enacted law. Picking up on the implications of *Chevron*,[101] however, one could argue that agencies are much better suited than courts to engage in welfarist interpretation. Also, given the close relationship between agencies and the political branches, the case for stability in interpretation may be less compelling in the agency context, where the election of new administrations may properly lead to changes in agency policy. All of which suggests that in some circumstances we might invert the second and third orders of preference, and encourage agencies to engage in welfarist interpretation rather than integrative interpretation once the trail of faithful agent interpretation turns cold.[102]

The only point I insist upon is that, at least for courts, the general hierarchy of interpretation among the three modes should be: faithful agent > integrative > welfarist. This is a significant starting point for moving on to more refined questions about subsidiary methods and the proper treatment of specialized interpreters, and provides significant clarification about interpretational debates.

B. Implied Delegations of Integrative and Welfarist Authority

A second and complementary principle for achieving a synthesis among interpretative modes is the idea of implied delegation. Faithful agent theories of statutory interpretation have long recognized that one possible interpretation of the meaning of a text is that the enacting body has delegated authority to some interpreter to fill in the blanks left by the enactor. We have grown accustomed to speaking this way in the administrative law context in the wake of the *Chevron* decision, where it is now common to see references to implied delegations to administrative agencies to interpret statutes.[103] Also, federal antitrust laws entail an

[101] 467 U.S. 837 (1984).

[102] *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005) (suggesting that sensible principles for agency interpretation might look different from those we associate with judicial interpretation).

[103] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."); Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). For an argument that this is the preferred

implied delegation to courts to develop subordinate principles that define the meaning of combinations and conspiracies "in restraint of trade or commerce."[104] So, in principle, Congress can also delegate broad authority to courts to develop a subordinate body of law.

The idea of implied delegation is an attractive basis for synthesis because it suggests a way in which all three modes of interpretation might be drawn together and rationalized under the rubric of faithful agent interpretation. In effect, one can imagine a world consisting of three interpretative alternatives: (1) the enacting body decides a matter for itself, and its instructions are faithfully carried out by the interpreter; (2) the enacting body does not decide a matter itself, but delegates authority to a particular interpreter to elaborate on the meaning of the enactment using techniques of integrative interpretation; or (3) the enacting body does not decide a matter itself, but delegates authority to a particular interpreter to elaborate on the meaning of the enactment using techniques of welfarist interpretation. In such a world, all modes of interpretation are traced back to instructions given by the enacting body, and hence all modes of interpretation partake of the strong justifications for faithful agent interpretation. Instead of a plurality of theories of legitimacy in interpretation, all ultimately reduce to some variant of faithful agent interpretation.

The concept of implied delegation also allows us to accommodate variations in the hierarchy of interpretational modes across different interpreters and possibly also across different areas of law. We might conclude, for example, that Congress has delegated authority to courts to supplement faithful agent interpretation with integrative interpretation, but has delegated authority to specialized agencies to supplement faithful agent interpretation with welfarist interpretation. Or we might conclude that the Framers of the Constitution delegated authority to courts to engage in welfarist interpretation when courts first "liquidate" the meaning of a broad constitutional provision, and thereafter to engage in integrative interpretation.[105]

There are, of course, a number of difficulties presented by this potential synthesis. The framers of the Constitution did not explicitly delegate authority to anyone to flesh out the meaning of the Constitution through interpretation. So any delegation of interpretational authority

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foundation for the *Chevron* doctrine, see Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 870–73 (2001).

[104] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (stating that Congress, in passing the Sherman Act, 15 U.S.C. § 1, "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition"). For discussion, see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44–45 (1985).

[105] *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 598 (2003).

under the Constitution necessarily would be implied rather than express. Congress from time to time does expressly delegate authority to fill in the blanks of a statute, either to courts or, more commonly, to administrative agencies.[106] But again, the primary source of delegated interpretational authority is implied rather than express.

Identifying implied delegations is inherently problematic. From the faithful agent perspective, one must have sound reasons to believe that the enactor has in fact chosen to make a delegation of authority to future interpreters. The use of broad language in the text is one piece of circumstantial evidence in support of such an inference, but it is not conclusive. Sometimes broad language can be taken as an implied delegation, but other times it should be taken as an incorporation of historical understandings, or perhaps as nothing but precatory language not meant to be taken literally.

In determining whether an implied delegation has been made and what type of interpretational authority has been delegated, the course of dealing or course of conduct between principal and agent is illuminating. Suppose Congress passes a broadly worded statute to be enforced by the courts. The courts then interpret the statute using techniques of integrative interpretation. Later, Congress reenacts the statute, leaving the same broad language in place. This course of conduct can give rise to the inference that Congress has ratified the approach to interpretation followed by the court.[107] In the language of faithful agent theory, one could say that the principal impliedly ratified an assumption by the agent that it was delegated authority to interpret the enactment using integrative methods.[108] Similar reasoning could be applied to ratify an assumption of authority to interpret using welfarist interpretation.

As this example suggests, it is much easier in the statutory than in the constitutional context to determine whether the enacting body has impliedly delegated interpretative authority and, if so, what kind. In the statutory context, interpreters have the advantage of considerable give and take with legislatures. The antitrust laws, for example, were not at first clearly regarded as a delegation of authority to courts to engage in delegated lawmaking.[109] This characterization emerged only over time, as courts experimented with different interpretations, and Congress seemed to acquiesce in this process of judicial lawmaking, both by not interfering

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[106] *See, e.g.*, Batterton v. Francis, 432 U.S. 416 (1977) (discussing federal statute delegating authority to Secretary of Health, Education, and Welfare to define "unemployment").

[107] The ratification doctrine, of course, ordinarily applies where the legislature has re-enacted a statute after it has been authoritatively interpreted as having a particular meaning. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998).

[108] *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. b (2006).

[109] *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899) (Taft, C.J.) (characterizing the Sherman Act as an affirmative prohibition of those contracts that would have been unenforceable at common law).

with the judicial work product and by adopting amendments that built on prior judicial understandings.[110]

In constitutional law, in contrast, the extreme difficulty of adopting amendments deprives the courts of important feedback about their assumption of delegated lawmaking power. Consider, for example, the Warren Court's vast expansion of constitutional criminal procedural protections starting in the 1960s.[111] Did "We the People" ratify the Court's assumption of delegated authority to craft a code of constitutional criminal procedural rules and impose this code on the States? Or was opposition to this enterprise simply too diffuse, allowing the Court to seize a certain policy space without fear of retaliation? Quite likely we will never know.

Another difficult issue presented by the idea of implied delegation concerns which institution is intended to be the delegatee. Even if we conclude that particular provisions of the Constitution were originally understood as delegating authority to future interpreters to flesh out the meaning of broad terms through interpretation, the question remains *which interpreter* was understood to be the recipient of this delegation. This is a familiar problem in statutory interpretation post-*Chevron*. Did Congress delegate interpretative authority to the agency or to the court? The Court has concluded that the agency is the presumed delegatee if certain conditions are met; otherwise it is the court.[112]

A nettlesome example involves the Fourteenth Amendment. If we pay particular attention to the text, as the faithful agent perspective would surely have us do, then it is hard to understand how the Fourteenth Amendment is properly read as delegating authority to the courts to implement the broad principles of section 1, as opposed to delegating authority to Congress to do so. There is nothing in the text about a delegation to the courts. Section 5, however, says that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[113] An approach to constitutional interpretation that stresses the text supplemented by the principle of implied delegation would have some work to do in showing how the document

[110] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 904–06 (2007) (reaffirming that the Sherman Act confers authority on courts to determine the legal standard for assessing resale price maintenance and construing a series of congressional enactments regarding resale price maintenance as acquiescing in that understanding).

[111] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (mandating specific warnings that must be given to suspects before interrogation); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (requiring that states exclude from trials evidence obtained in violation of the Fourth Amendment).

[112] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that agency interpretations are entitled to *Chevron* deference only if Congress has delegated authority to act with the force of law and the interpretation is rendered pursuant to the exercise of such authority).

[113] U.S. CONST. amend. XIV, § 5.

delegates power to courts, as opposed to Congress, to develop an elaborate jurisprudence that claims the authority of constitutional law.[114]

V. OTHER IMPLICATIONS

My proposed typology of interpretive methods, and the understanding that each plays a role in the actual practice of interpretation, has specific payoffs in terms of contemporary debates about legal interpretation. I will suggest three.

A. The Incompleteness of Textualism

The textualist school of statutory interpretation, which burst on the scene in the late 1980s through the advocacy of Justice Scalia,[115] has been resisted by most judges and scholars. But it is unquestionably energetic, and has put other approaches to statutory interpretation on the defensive. As the foregoing discussion should reveal, however, textualism is radically incomplete as a theory of interpretation.

Textualism is regarded by its proponents as a type of faithful agent theory.[116] It seeks to ascertain the instructions of the enacting body by asking what an ordinary reader would understand the text to mean, taking into account the context in which the words are used.[117] The problem is that in any difficult case requiring interpretation the ordinary meaning of the text is ambiguous, or is vague, or it leaves a gap by failing to address the particular question at all. What is a textualist interpreter to do in these circumstances? Try as they might, textualists cannot tease out the answer to every question of interpretation by vigorously massaging the words of the text.[118] Instead, they must look to precedents, other enactments, substantive canons, administrative interpretations and the like. In other words, textualists must shift to an integrative mode of interpretation. Alternatively, they make arguments about the consequences of adopting one interpretation versus another. In other words, they must shift to a welfarist mode of interpretation. But these shifts are not acknowledged to be departures from the faithful agent

[114] This of course, is the opposite of the position the Court has taken. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (claiming that the power to enforce does not include "the power to determine what constitutes a constitutional violation"—which is for judges to decide).

[115] For the circumstances surrounding the birth of modern textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

[116] *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001).

[117] *Id.* at 16.

[118] *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 731–33 (2006) (plurality opinion of Scalia, J.) (attempting to give meaning to the phrase "navigable waters of the United States" by considering dictionary definitions of "waters").

enterprise, which textualists regard as foundational.[119] This leaves textualism underspecified and unjustified in most of its applications.

Indeed, textualism is a very thin faithful agent theory. Other faithful agent theories are more robust. When the text runs out, an intentionalist or a purposivist can turn to evidence of the intentions or purposes of the enacting body in an effort to resolve the interpretative issue. Textualism, in contrast, denounces these alternative faithful agent approaches as illegitimate.[120] In so doing, the textualist must necessarily turn to some *other* mode of interpretation besides the faithful agent mode. Yet we do not have an account from the textualist perspective as to why, given their foundational commitment to faithful agent interpretation, these alternative modes are legitimate.

Since textualism cannot possibly be a complete theory of interpretation, we cannot meaningfully assess the debate between textualists and their adversaries until the textualists spell out what it is they intend to use when the textualist method runs out, and why. What textualists need, in other words, is an account of the proper role and function of integrative and welfarist interpretation in the interpretative process. Until textualists acknowledge this, their theory of interpretation will remain incomplete and unjustified.

B. The Empty Idea of Nonoriginalism

When we turn to constitutional interpretation, we find a debate between "originalism" and "nonoriginalism." Originalism breaks down into the usual subcategories of the faithful agent mode of interpretation—textualism, intentionalism, and purposivism. But what exactly is "nonoriginalism?" At one time, those who opposed originalism in constitutional law said they were in favor of a "living Constitution."[121] The vacuity of this concept has apparently led to its quiet abandonment. Nevertheless, most constitutional law scholars continue to oppose originalism.[122] The obvious question is: What exactly is it that they do embrace?

One possibility, which emerges during public occasions like Supreme Court confirmation hearings, is that a nonoriginalist is someone who supports following precedent. Originalism is denounced on these occasions as an effort to turn back the clock on racial

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[119] *See generally* Manning, *supra* note 116, at 18, 105–15.

[120] *See, e.g.*, Scalia, *supra* note 8, at 18–29.

[121] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (referring to questions posed to nominees in judicial confirmation hearings). On the migration of erstwhile proponents of living constitutionalism into the camp of originalism, albeit of the broad purposive variety, see Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007).

[122] *See, e.g.,* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 11–12, 165 (2008).

integration, access to contraceptives, and equality for women.[123] A nonoriginalist, in contrast, is depicted as a sensible person who favors Supreme Court precedents that endorse these happy, consensual results. Another possibility, which is more likely to be found between the covers of law reviews, is that a nonoriginalist is someone who supports welfarist interpretation, most likely of the universal human rights variety.[124] In these settings, the nonoriginalist emerges as someone who would reconstitute the Supreme Court in the image of the Warren Court, and use adjudication as an engine of social reform. Unfortunately, by shifting back and forth between these conceptions of the alternative to originalism, nonoriginalists end up appearing to have no principled theory of interpretation at all.

Recent literature suggests that there are two potentially promising strategies available to those who oppose conventional originalism. One, which has been mapped out by Jack Balkin and Aharon Barak, is to embrace a form of purposivism.[125] This allows the opponent of conventional originalism to embrace the mantle of the faithful agent, indeed, to proclaim that he too is an originalist, rightly understood. What the agent is faithful to under this conception, however, is an extremely abstract statement of the "purposes" of the enacting body, usually described in terms like promoting "equal citizenship," "political justice," or "human flourishing." Balkin, for example, has argued that a broad right to abortion is required by the original meaning of the Fourteenth Amendment, understood to incorporate an "anti-subordination" principle.[126]

The other promising strategy, which has been mapped out by Eskridge and Dworkin,[127] is to adopt a highly normativized version of integrative interpretation. This emphasizes the need to reach outcomes that integrate all relevant legal material, but adds a large dollop of moral theory to the mix.[128] Not coincidentally, the moral theory generates outcomes congenial to left-progressives. Depending on how large the component of moralizing is relative to the more conventional legal elements, this version of integrative theory also has the potential to segue into a type of pure welfarism.

As should be clear, I do not endorse either of these strategies. Both appear to be efforts to re-package welfarism of the left-progressive variety as something else—purposivism or integrative interpretation. My point is

[123] *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 54, 63–64, 81–82 (2005).

[124] *See, e.g.*, MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 121–51 (1988).

[125] *See* Balkin, *supra* note 46, at 11; AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 86 (Sari Bashi trans., 2005).

[126] *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007).

[127] *See* DWORKIN, *supra* note 13; ESKRIDGE, *supra* note 21.

[128] DWORKIN, *supra* note 13, at 201.

simply that the failure of the opponents of conventional originalism to coalesce around one of these two strategies has made it seem, to casual observers at confirmation hearings and the like, that the choice is between originalism and something fuzzy and ill-defined, but which appears to be welfarist interpretation of the left-progressive variety. Given this choice, the future of "nonoriginalism" is not very bright, since there is not much public support for this brand of welfarist interpretation by judges. Again, greater attention to the full range of interpretative modes on the part of those who oppose originalism in constitutional law would lead to a clearer contrast between the alternatives in constitutional interpretation.

C. The Corrosive Nature of Pragmatism

Finally, we can see how pragmatism, if advanced as a first order theory of interpretation, is deeply unsettling. If the only standard for assessing the validity of an interpretation is whether it advances or retards the public welfare, then everything is up for grabs. Someone like Posner can explain that a pragmatic interpreter will take into account the need to respect legislative supremacy, to promote stability in the law, and to minimize the costs of adjudication.[129] The savvy pragmatist judge, according to Posner, after mulling these factors, may conclude that something that looks like faithful agent interpretation or that appears to be integrative interpretation is in fact the best approach in a given case.[130]

But this is not the way most interpreters understand the enterprise in which they are engaged. When the instructions of the enacting body are plain, they regard it as their legal duty to enforce those instructions. And when the pattern of the law is settled, they regard it as their legal duty to preserve these settled understandings. For the thoroughgoing pragmatist, however, these concessions to convention are grounded in a calculus about consequences. They are faux exercises in faithful agent or integrative interpretation, adopted by the pragmatist because—all things considered—they will produce better results. Like Dostoevsky's Grand Inquisitor,[131] the pragmatist judge adopts the pose of the faithful agent or the integrator, but only because preserving these illusions will produce a better society. For most judges, such a pose is not sustainable. In the long run, it would be deeply corrosive, and would sap the institution of law of much of its strength.

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[129] *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 34, at 90–91, 104, 438–39.

[130] *Id.* at 271–72.

[131] *See* FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV (Ralph E. Matlaw ed., Constance Garnett trans., W.W. Norton & Co., 1976) (1880).

VI. CONCLUSION

Once we break free of the standard debates about interpretation—textualism versus intentionalism and originalism versus nonoriginalism—we can see that there are in fact three competing modes of interpretation, which encompass a number of sub-modes or versions. In practice, all interpreters are faithful agents, integrators, and welfarists. But they do not and should not embrace these modes of interpretation in random order or in equal parts. Given some basic assumptions about the design of our political institutions, most importantly the premise of popular sovereignty, we know that the faithful agent perspective has primacy of place, integrative interpretation will serve as the day-to-day workhorse, and welfarist interpretation should be a mode of last resort.

Among the payoffs from adopting this wider-angle lens on interpretation, we can see some of the standard battles over interpretation in a different light. Textualism is radically incomplete, nonoriginalism is an empty suit, and pragmatism misdescribes the essential nature of the interpretative enterprise. There is much more to say, but I hope that what I have said at least suggests that this is a promising way of thinking about a very important legal activity.