

On Creativity in Constitutional Interpretation

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Abstract

In the present article a particular aspect of constitutional interpretation will be considered. This aspect is called "creative" and involves retrieving the meaning of an object of interpretation. It is with regard to this particular aspect or moment of interpretation that creativity is often viewed as something to be avoided, to be shunned. If the task at hand is to "retrieve" some meaning, then the idea that this meaning can be created, in whole or in part, seems quite simply antithetical to the enterprise at hand. It suffices to note that many jurists and legal thinkers believe that interpretation as retrieval is an essential aspect of constitutional interpretation. Constitutional interpretation, is shaped by the legitimating need to anchor decisions in authority. That is very much part of the legitimation structure of constitutional law—important not just to the citizenry, but to judges and to legal academics. Over the practice and the idea of constitutional interpretation have become marked with the forms of this legitimation structure. The notion then that judges would be creative in their interpretations seems antithetical to both the practice and the idea of legal interpretation. The introduction of creativity in constitutional interpretation accordingly appears to deny the authority of authority.



Keywords

constitutional interpretation, creativity, interpretation as retrieval, meaning, hermeneutics, constitutional law, legitimacy

We begin with interpretation. We explore a number of complexities and conundrums. We end with creativity.

Consider a certain aspect of constitutional interpretation that most jurists and legal thinkers consider crucial to the interpretive enterprise. This I will call *interpretation as retrieval*. This aspect (which may or may not be pragmatically possible) involves retrieving the meaning of an object of interpretation—here the Constitution or one of its clauses. It is with regard to this particular aspect or moment of interpretation that creativity is often viewed as something to be avoided, to be shunned.

Why? Because if the task at hand is to "retrieve" some meaning, then the idea that this meaning can be created, in whole or in part, seems quite simply antithetical to the enterprise at hand. It may be, of course, that the enterprise at hand—interpretation as retrieval—is not a coherent one, but we will bracket that. It suffices for now to note that many jurists and legal thinkers—originalists as well as living constitutionalists—believe that interpretation as retrieval is an essential aspect of constitutional interpretation.

Why retrieval?

Interpretation

In an article published in 1996, Joseph Raz the eminent jurisprudential thinker asked, "Why Interpret?"¹ Specifically he asked: Why do legal professionals engage in interpretation at all? The answer he proffered is as simple as it is convincing: The authority of law depends upon tracing its meaning to the authoritative sources. This tracing, in turn, is according to Raz, what we call "interpretation".

But, of course, not any kind of interpretation will do. It must be a legal interpretation—that is to say, the kind of interpretation authorized and laid out by the law itself.² And it is, of course, the kind of interpretation that is directed at its proper authoritative objects (not substitutes).

Notice we have here the embryonic form of a small hermeneutic circle: The law must be interpreted, but its interpretation must be authorized by law itself—and often the very same law that is to be interpreted.³

In this hermeneutic circle, any number of complexities might emerge. For instance, consider the object of interpretation. As a concrete instance, take the United States Constitution. Just what is the object of interpretation here? It's the U.S. Constitution, of course. Certainly. But what is it?

It's a writing

It's an outline

It's a charter

It's a social contract

It's a plan

It's a plan to be redeemed

It's a legal event

It's a political act

It's a delegation of authority

It's an organic whole

It's an inscription in positive law

It's an approximation of higher law

It's a bridge to the past

It's an incorporation of the past

It's a break with the past

It's an anticipation of an inchoate future

It's a legal document (like other legal documents)

It's the establishment of a political-legal ontology that is itself constitutive of the state (broadly or narrowly understood) political community

It's a combination of any these things and many more, some of the time, much of the time or all of the time.

Notice that any interpretive strategy one might use — "heed the plain meaning of the text", "follow the framers' intent" — is woefully inadequate to specify which of these possibilities is

¹ Joseph Raz, "Why Interpret?", 9 *RATIO JURIS* (1996), 349.

² H. Jefferson Powell, "The Original Understanding of Original Intent", 98 *HARV. L. REV.* (1985), 885.

³ The vexatious character of this circle (cheery Gadamerian solutions aside) is encountered perhaps most acutely in constitutional interpretation. The reason is simple: The Constitution as its name indicates is supposed to be both constatively and performatively constitutive and paramount. This constitutive and paramount character would be severely impugned if it turned out that the modes of interpretation were ultimately authorized from elsewhere. For many American law students, *Marbury v. Madison* 3 U.S. (Cranch) 1 (1803) often serves as the primal and crucial encounter with this particular circle.

really and truly the right one. Even Chief Justice Marshall's emphatic statement, "It is *a constitution*, we are expounding", is of no help—since, as many have demonstrated, a great many conflicting things arguably follow from that particular declamation.⁴

Not only are there difficulties specifying or selecting the appropriate "method" of interpretation, but perhaps more troublesome, it is not even clear what it is that is to be interpreted. This is the missing legal ontology: Just what is it that is being interpreted?⁵

Notice too that if you put your mind to it (and even if you don't) any of the ostensible identities of the Constitution listed above can in the very act of reading refer you to any of the others. As one reads all sorts of hierarchies of identity can proliferate — each identity *collapsing* into or *subsuming* the others. Hence the constitution as "writing" can be subsumed within "the political act" (or vice versa) which in turn can be subsumed within "the incorporation of the past" and so on and so forth in a manner at once terminable (because the interpretive quest must be abandoned at some point) and yet interminable (because one could go on).

As you proceed in the reading, you may be impelled to discard any possible identity as quite simply impossible given recent advances in . . . [the academic specialty of your choice.] You may even be led to demand some degree of "coherence" or "rationality" as determinative of the identity of the instrument. On the other hand, you can also be led to jettison the touchstones of "coherence" and "rationality" in the name of authority. Hence, it could well be that, coherent or not, it is the framers or authors of the Constitution who have the last word.

At some point, all of this may bring into play the question of who *you are* in this reading: Each change in the identity of the Constitution possibly brings about a change in your identity as an interpreter.

Now, it might have seemed that, in constitutional law (or at least U.S. constitutional law) this particular complexity could have been avoided: One might have thought that, in the last analysis, it is "the court" who is the authorized interpreter. But, this move (aesthetically akin to giving the framers the last word) immediately collapses upon the realizations that . . .

all manner of interpreters are authorized: courts, legislatures, we the people, etc.
each of the authorized interpreters will, consciously or not,
incorporate the contributions of the other interpreters
each of these interpreters is an enablement or construct of the law itself
and so on.

Moreover, the very idea of the "court" as an authorized subject is itself but a reification of a more or less stable glomming-on of professional habits, political commitments, cognitive capacities, linguistic competencies, institutional arrangements, legal imperatives and delimitations, etc. variously registering (or not) in a largely somewhat more/somewhat less mutable bio-site generally known as "the judge". The judge, in turn, is a creature of trained self-reification — a self-reification that is more or less enduring, depending upon the judge's own jurisprudential aesthetics, political commitments, cognitive abilities and his or her psychological location on a spectrum ranging from utter self-abnegation before the text of law at one end to free-form juridical adventurism on the other.

This then, I would offer, as a very brief (and radically incomplete) sketch of "constitutional interpretation". This description may well seem positively alarming to legal and non-legal thinkers alike. Rest assured, however, that, in an overriding sense, the seemingly vertiginous hermeneutic possibilities uncovered above need not and in fact rarely come to pass.

⁴ McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1919).

⁵ See, Thomas C. Grey, "The Constitution as Scripture", 37 *STAN. L. REV.* (1984), 1.

The reason is simple: Among all the dizzying ontological and hermeneutic possibilities, one of them is to reduce all the others to just one possibility. And as a contingent, but nonetheless dependable psycho-social matter, this is the path that judges will take (deliberately or not) almost all the time.⁶ In fact, much of the time, the judge does not even have to "reduce" the dizzying possibilities: he or she has been trained in law school not to see them in the first place.⁷

Particularly among appellate judges, there will be a premium on such reductionist skills. Unlike literary critics or philosophers, judges do not have the luxury of ending on the note, "This is all so intractable. We just don't know what to believe."⁸ To the contrary, the appellate judge must end his or her legal opinion on a single monistic note — even if this monistic note has three parts, or ten parts or even if it entails remanding, or something of the sort.⁹

So both in court and in the law school, the hermeneutic situation tends to be radically simplified. Indeed, most of the discussion and thinking on the issue take place within aesthetic constraints that might be described as a hermeneutic two-step:¹⁰

First thing: Assume an object of interpretation (i.e. the constitution).

Now, how should it be interpreted?

This radical distinction between 1) a stable object of interpretation which all agree is the thing in issue and 2) the action of interpretation greatly simplifies the hermeneutic problem. For one thing this sharp object/interpretation distinction enables the participants to presuppose that they are all interpreting the same thing and are thus engaged in intelligible agreements or disagreements about its meaning. They may, of course, concede that as in the Hindu fable of the eight blind men and the elephant, their understanding of this particular elephant is partial. But, in at least some sense, they're all talking about an elephant (the authoritative object of interpretation) as opposed to a rhinoceros or God knows what.¹¹

I want to be fair and acknowledge that very often the actual steps in the interpretive enterprise are presented in a more sophisticated manner. Thus, legal thinkers (Dworkin comes to mind) will introduce elegant subtleties and nuances—spirals of law spiraling their way towards a law that works itself pure. Typically, however, such refinements come down to two other formulae:

Increase the sophistication of the account of interpretation by multiplying the number of steps above (i.e. put in more than two). and/or

Invoke and elaborate some sophisticated expression such as "integrity" or "redemptive" or "intimate relation" to refine the relations between object and interpretation.

The problem with the first formula is that, in one sense, it is not discernibly different from the original hermeneutic two-step (i.e. Assume an object of interpretation.) Instead, it is simply the repetition of the same operation at multiple levels (i.e. more than two). In fairness, this formula does have the advantage of making articulate the complexity of considerations that can arise in the act of legal interpretation. It does not avoid the circularity we have encountered, but

⁶ Robert Cover, "The Supreme Court, 1982 Term—*Nomos* and Narrative", 97 *HARV. L. REV.* (1983), 4.

⁷ Stanley Fish, "Dennis Martinez and the Uses of Theory", 96 *YALE L. J.* (1987), 1773.

⁸ Nothing, of course, prevents the legal academic from ending on such a note. But since most legal academics assume the persona and perspective of a judge, the fact is: they generally don't.

⁹ If the judge does not end on a monistic note, there will be almost always a default rule in effect deployed by some other agent or agency that will render a determination that ends on a monistic note.

¹⁰ An early and notable exception is Grey, *op. cit.* note 6.

¹¹ Some participants realize, of course, that having interpreted the constitution differently, they have ended up with different constitutions. But, at the same time, each of them (so far as I can tell) claims to have interpreted the "right" one, the "real" one, the one that everybody else is and should be busy interpreting (however badly these other people may be botching the job).

at the very least it enacts a bigger, richer, more interesting circle and this may well be the best that we can get.¹²

The problem with the second formula is that while it has the aura of intellectual respectability and it is almost always deployed as if something positive were being offered, expressions like "mutually constitutive" seldom mean much beyond: "There's something of a relational nature going on here though what it is, we haven't much of a clue."¹³ That, of course, would be perfectly fine so long as the authors of those expressions emphasized the relative vacancy of their expressions. That, however, is almost never the case. More problematic perhaps is that despite the promising character of these expressions, there is absolutely nothing about them that guarantees reaching hermeneutic equilibrium as opposed to hermeneutic vertigo.

Nonetheless, for purposes of "doing" constitutional interpretation and representing the enterprise as coherent, the hermeneutic two-step is a nice move. Or rather, to be more accurate, it's not so much a move as it is something judges and legal academics just simply do.¹⁴

But as convenient as the hermeneutic two-step and its sharp distinction may be, they are haunted by problems. One problem is that it is not at all clear how one might go about deciding what belongs to interpretation and what belongs to its object. Between object and interpretation where and how is the distinction ("/") to be found or created? As between the object and interpretation, how can one tell one from the other? What belongs to each? And what non-dogmatic, non-circular, non-infinitely regressive, non-self-decentering justification could one possibly give for the distinction?

One might say, of course, that these are questions of philosophy not law. But that simply displaces and replicates the problem on a new substantive terrain. One immediately confronts the same form of questions: Between philosophy and law, where and how is the distinction ("/") to be found or established? As between... (and so on).

The short of it is, that try as one may, there is simply no privileged entry point into this problem. Hermeneutics, linguistic theory, political philosophy, historical inquiry—none offers a privileged entry point intellectually sufficient to triumph over the others. Each approach has some truly telling critique to offer against the others. But consistent with that recognition, each approach is itself compromised by the critiques offered by the others. Now one might say that this problem is so esoteric as to have no significance in day-to-day constitutional law. But that is wrong. The problem surfaces at the very heart of even the most basic exercises in constitutional interpretation.

Once the interpretation/object distinction collapses and the object goes on ontological holiday, it becomes unclear whether anything terribly definitive can be said about constitutional interpretation. Instead, it begins to seem as if constitutional interpretation is 1) a confused, if not impossible, activity resting on a missing ontology... 2) while also an activity accomplished with great aplomb and confident rationality by jurists and legal academics in America and elsewhere. It is in short like baptism viewed from the perspective of the atheist: it doesn't exist, and there's way too much of it going on.¹⁵

¹² Moreover, it may well be that obfuscation is perversely functional. Cf. Thurman Arnold, *Symbols of Government* (Connecticut, New Haven, Yale University Press 1935). This, of course, would create a real ethical dilemma for law teachers who presumably would have some reticence to a knowing participation in an enterprise of mystification.

¹³ There's nothing wrong with that last bit. Indeed, offered as a negative insight in an academic context over-saturated with positive (and sometimes unappealing) meaning, it's downright helpful. But that is seldom what is intended or understood.

¹⁴ Fish, *op. cit.* note 8.

¹⁵ While it would be too much to pursue the point here, the religious analogy above does raise the question whether interpretation in law, at least, does not harbor in its very form (even in its secular form)

In constitutional law in particular, the gap that separates these last two discordant descriptions—constitutional interpretation as a woefully confused yet confidently rational endeavor—is often bridged by reference to politics,¹⁶ violence,¹⁷ authority,¹⁸ faith,¹⁹ conscience,²⁰ etc. All these headings are deployed in ways that infuse the gap with the possibility of positive meaning—ways of thinking about interpretation's identity and character that render it a cogent (even if not always an entirely innocent) enterprise.²¹

While these terms serve as the headings for very different kinds of legal projects, the headings are all rather intimately intertwined—at least so far as law is concerned. Invoke one of them in the decisions of law and the others are perforce implicated and effectuated as well.

The risk with all these headings (politics, violence, etc.) is that one or some or all might be taken too seriously—as *the* answer to the interpretive predicament. Which would be intellectually unfortunate, because even as these headings point in different interpretive directions, they are nonetheless relatively empty. Nothing very definitive or elaborate has been (or can be said) about any of them. They designate realms or phenomena which largely escape rational ordering. To think at once deeply and non-reductively about politics, violence, authority, and faith is to reckon with their irreducibly non-rational character. Rationalize them (i.e. submit them to some ostensibly rationally ordered structure) and you will have missed them as well their roles in language, law and culture.

Creativity

What I would like to insist upon here by way of conclusion is the theme announced early in this essay and exemplified throughout. This would be the creative aspect in constitutional interpretation. I would not—given what has been said above—want to represent creativity as having any more substance than politics, violence, authority, faith, conscience or any other such heading. In fact, I would want to insist on something closer to the opposite—namely, that it is also a relatively empty and elusive concept.

Why then insist on creativity at all? Because creativity is at once so absent from the juridical and academic accounts of constitutional interpretation and yet so evidently ineluctable in its practice. That the heading of creativity is so absent from juridical and legal academic discourse is not surprising. Indeed, its absence is explained by the first few paragraphs of this essay. Constitutional interpretation, is shaped by the legitimating need to anchor decisions in authority.

a residually theological structure. As secularists, this would leave us operating within quasi-theological forms devoid of the animating substance that once gave them life and meaning. We would be confronting the Nietzschean problematic of the death of god. It's safe to say that very few people in constitutional law have recognized this problematic, to say nothing of its immensity.

¹⁶ Duncan Kennedy, *A Critique of Adjudication* (Fin de Siecle) (Massachusetts, Cambridge, Harvard University Press, 1998).

¹⁷ The violence of law here is much more the kind described by Robert Cover than by Jacques Derrida. Compare Jacques Derrida, "The Mystical Foundations of Authority", in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (ed.), *Deconstruction and The Possibility of Justice* (Routledge, Abingdon, 1992), 3 with Robert Cover, "The Violence of the Word", 95 *YALE L. J.* (1986), 1601-1629, 1610.

¹⁸ Owen Fiss, "Objectivity and Interpretation", 34 *STAN. L. REV.* (1982), 739.

¹⁹ Joseph Vining, *The Authoritative and the Authoritarian* (Illinois, Chicago, University of Chicago Press, 1986); Sanford Levinson, *Constitutional Faith* (New Jersey, Princeton, Princeton University Press, 1998).

²⁰ Phillip Bobbitt, *Constitutional Interpretation* (New Jersey, Hoboken, Blackwell Publishing, 1991).

²¹ These are "theoretical unspecifiabiles". For elaboration, see <http://brazenandtenured.com/2011/10/23/theoretical-unspecifiabiles/>

That is very much (at least in the United States) part of the legitimation structure of constitutional law—important not just to the citizenry, but to judges and to legal academics. Over time (centuries) the practice and the idea of constitutional interpretation have become marked with the forms of this legitimation structure. The notion then that judges would be creative in their interpretations seems antithetical to both the practice and the idea of legal interpretation. The introduction of creativity in constitutional interpretation accordingly appears to deny the authority of authority.

Yes it does.²² And yet here we are nonetheless.

The judge creates the artifact (i.e. the constitution) that he is interpreting. Of course, he doesn't create it any which way. And the creation is not *ex nihilo*. And the creativity (like most creativity worth anything) is trained and informed. And the judge is most certainly not alone. Yet for all these qualifications, the creative moment seems intellectually undeniable.²³

Indeed, the creative aspect or moment seems undeniable even in the most creativity-denying jurisprudence. The judge, for instance, who believes he is bound by the framers' intent, has had to imagine law as the sort of thing that binds. And he has creatively chosen to follow that particular metaphor—*binding*. The judge who believes he is constrained by the limits of the constitution has had to invent a text with limits that constrains. He too has creatively chosen a particular metaphor—*limits*. The judge who believes that justice trumps the constitution is also using a particular metaphor—*trump*. All of these metaphors and images—these aesthetic representations of law and others as well—are creatively constructed. The only real difference among jurists and legal thinkers on this particular score is the degree to which they thoughtfully acknowledge and address this moment of constitutional creativity.



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²² And it does so even if we acknowledge (as we should) that the legal authority in question (i.e. the constitution) authorizes a certain creativity. That particularly move, at some point, when pushed hard enough, turns upon and corrodes the authority that ostensibly authorizes the move in the first place.

²³ I suppose it could be denied (and sometimes is) through a performative assertion of authority. But that just displaces and replicates the problem: Which side should we affirm, intellect—authority or creativity?