There Is No Textualist Position

STANLEY FISH

I.

Some years ago as I was driving my father back to his apartment, we approached an intersection with a stop light that had turned red. He said, "Go through the light."

What did he mean? At the time I didn't take him to be telling me, "Don't stop, just barrel on through." Instead, I took him to be telling me, "As soon as the light turns green, drive straight ahead; don't turn either left or right." How did I come to that determination? The answer many would give is that I set aside a plain or literal meaning and substituted for it a meaning that corresponded to what I took to be his intention. I reasoned that my father could not have meant what he said—he could not have been directing me to break the law—and I quickly (and without much thought) settled on a meaning that "made more sense." This account of the matter is in line with the distinction (standard in mainstream philosophy of language), between sentence meaning and speaker's meaning, between the meaning an utterance has by virtue of the lexical items and syntactic structures that make it up, and the meaning a speaker may have intended but not achieved. It is because these are distinguishable entities (or so the standard story goes) that they can come apart, and when they do one can say, as one might in the case of the present example, my father said X, but he meant Y; his words, literally construed, say one thing, but it was his purpose to say something else. What I did could then be described as an act of choice: In stopping the car and waiting for the light, I chose to hearken to my father's purposive meaning—his intention—rather than to the plain meaning of his sentence; and again, that choice is available because it is

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possible to distinguish between the two.

I do not believe that Justice Antonin Scalia would have any problem with this account of my reasoning—and remember it is not my account, but the account a philosopher of a certain kind would give—but I am confident that he would resist any effort to transfer that reasoning to the arena of legal interpretation; for, as he declares in *A Matter of Interpretation*, ours is a government of laws—of texts written down—not men, and therefore it would be simply undemocratic "to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[1] It is what is "*said*" not what it is "*intended*" that is "the object of our inquiry."[2] "Men may intend what they will; but it is only the laws that they enact which bind us."[3] Not only is this a matter of democratic principle for Scalia, it is a matter of safeguarding law's stability and predictability: while words are material and available for inspection, intentions are not, and because they are not, they provide an insufficient constraint on those judges who might be tempted to rewrite the law in the guise of interpreting it.

> The *practical* threat [of taking intention as the object of interpretation] is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, . . . judges will in fact pursue their own objectives and desires . . . . When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant* . . . your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .[4]

So while Scalia might think that I was right to choose my father's intent over what his words literally said (this would be his characterization not mine), he would think it wrong of me to make the same choice were I a judge and asked to choose between what the law, literally construed, said and some account of the intention (conjured up from who knows where) of those who enacted it.

In Scalia's argument and the arguments of other self-identified textualists, the issue is always framed in this way—as a choice between something materially available (the text and the built-in sense it bears) and something absent and speculative (the intention of its author); and given that formulation of the issue, it seems reasonable and prudent to choose as he does. But is the idea of such a choice intelligible? I think not, despite its common sense appeal. First of all, for there to be a choice,

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1. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997).
2. *Id.* at 16.
3. *Id.* at 17.
4. *Id.* at 17–18.

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any choice, there must be distinguishable entities to choose between. In the case of this choice, there must be a textual meaning—a meaning a sentence *has* as its property—that one could either adhere to or depart from; for only then could this textual meaning be chosen or chosen against. So what textual meaning did I choose against when I heard my father as saying, "after the light turns green, go straight and don't make any turns"? The answer a textualist would give is that I chose against the literal meaning of "go through the light," that is, against the meaning arrived at by simply parsing the words: the imperative "go through" plus the object of the imperative, "the light." But were I to hear my father say *that*, it would not be because I heard his words apart from any intention within which they were uttered, but because I heard the words within the assumption of an intention different from the one I would have had to assume in order to hear him telling me to go straight ahead and not make any turns. The question here is, with which of two possible purposes (there could be many more) did my father produce these words? It is a question that the words themselves cannot answer, for if they could there would be no question and no interpretive issue. Intention cannot be separated from meaning or thought of in conflict with it. The choice is not between what my father said and what he meant, but between two specifications of what he meant. Did he mean (intend) to give directions to a son so hopelessly professorial that he could not be trusted to know where he was going, or did he mean (intend) to instruct that son to break the law, perhaps because he was late for an appointment, perhaps because he suddenly felt a pain in his chest, or perhaps because he enjoyed flouting authority and taking minor risks?

But, a textualist might say, one of those intentions is encoded in the language and remains the basic textually determined intention from which one might reason away in special circumstances; absent special circumstances, "Go through the light" means exactly what it says: go through the light. Not really. Suppose we re-imagine the moment of my father's utterance and put it at the end of a conversation in which I had asked him, "If you were late for an appointment or felt ill or had learned of an emergency, would you stop at the red light or go through it?" If he then replied, "Go through the light," I would have understood him neither as giving me directions nor as urging me to commit an illegal act, but as saying to me, "This is what I would do in the situation you describe; I would go through the light." I would not have heard "Go through the light" as an imperative but as an answer to my question, and

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I would have heard it as such immediately, in one stage, not two. As words alone, "Go through the light" has no determinate meaning, as an imperative or anything else. Once the words are heard within the assumption of an intention, they acquire a meaning, and the meaning they acquire will vary with the intention posited for them.

A textualist could still have a comeback: he or she could say that in my re-imagination of the scene, the meaning of the words "Go through the light" is determined by the verbal context, by my question to my father. Context, after all, is just more text, and isn't it this extended text that determines what I will understand when my father replies? Isn't it text that finally constrains meaning? But to play the scene out one step further, I could have been wrong to hear my father as answering my speculative question; he might have experienced a sharp pain just as I asked it and instructed me to go through the light (and I might have misunderstood him, thus putting him in danger). Or he might have been day dreaming, and not listening to me at all, and he might have roused himself just in time to remind me that our destination lay ahead and not to the left or the right. I stand by my position: text alone, no matter how long and dense, can never yield meaning, whereas intention, whether assumed, discovered, or revealed, can always alter a meaning that had previously been in place; not because what had been said has been trumped by what was intended, but because one understanding of what was intended has been dislodged by another.

And what if no intention were in place? In that case not only would there not be a meaning; there would be no reason to seek one. That is, if I were persuaded that what I was looking at or hearing was not animated by any intention, I would regard it not as language, but as random marks—akin to the "garbage" one types in when testing to see if the font is one you like—or mere noise, throat clearings. And, conversely, if the sounds issuing from my father *were* heard as meaningful, were heard as words, it would be because I had heard them as issuing from a purposive being, a being that is capable of having intentions and having one at this moment. Just which one is what I had to figure out (did he mean x or did he mean y?); what I could not have figured out or even begun to figure out is what his words meant apart from any intention he may have had in uttering them. The instant I try to *construe* the words, the instant that I hear the sounds *as* words, the instant I treat them as language, I will have put in place some purpose—to give directions, to give orders, to urge haste, to urge outlaw behavior—in the light of which those sounds become words and acquire sense. *Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language*; and when someone tells you (as a textualist always will) that he or she is able to construe words apart from intention

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and then proceeds (triumphantly) to do it, what he or she will really have done is assumed an intention without being aware of having done so. A sequence of letters and spaces like "Go through the light" has *no* inherent or literal or plain meaning; it only has the meanings (and they are innumerable) that emerge within the assumption of different intentions. Scalia approvingly quotes Justice Jackson as declaring: "We do not inquire what the legislature meant; we ask only what the statute means."[5] My point is that if you do not want to know about intention, you do not want to know about meaning. It is not simply that (like love and marriage in a bygone age) they go together; they are inseparable from one another.

There is at least one more possible turn to this particular screw. Suppose I am sure that what my father is telling me is to stop at the light and then go straight ahead, but I decide, in order either to be mischievous or to make a point about language, to charge on through. I know his intention (in the only sense of "know" relevant; I am confident of it), but I choose to act as if he had another one. Were he to rebuke me, I might then respond, "but that's what you told me to do in so many words." That is, I can become, for the moment, an insincere textualist, although I know full well that it is not his words alone, but his words understood as the vehicle of an intention, that gives rise to a particular meaning. Here we see that because it is not words alone but words as tokens of an intention that mean, a space can be opened up in which someone with a mind to can endow another's words with an intention he knows the speaker or writer not to have had. This possibility will often be exploited by an administrator. Let's say that I am a dean, and that I receive a letter from the chairman of a committee charged with delivering a report whose findings will guide my college for the next five years. The letter reads, "Dear Dean Fish, I hereby resign my position as head of The Glorious Future Committee. I take this action because I cannot do the job without the additional office space that would allow me to store confidential materials and conduct interviews. As you know I have many times requested such space, but I have not received a positive response. Sincerely yours, John Smith." Now suppose that in the course of my deanship I have received many such letters (as indeed I have), and I know that in the case of at least half of

5. *Id.* at 23 (citing OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 397 (1951) (Jackson, J., concurring)).

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them, the letter is a ploy and the intention is not to resign, but to bargain or extort. Suppose too that Professor Smith, for personal and professional reasons known to me, does not really want to resign; what he wants to do is negotiate. At that moment, I am sitting pretty. Because words alone cannot deliver meaning, and because meaning will vary when different intentions are assigned to the words, and because words cannot refuse the intention assigned them (if they could they would indeed contain or embody meaning all by themselves) and because no amount of words, no degree of explicitness will necessarily protect words from the intention you assign them (a postscript like "I'm willing to discuss the matter" won't afford sufficient protection), I am perfectly free to accept Professor Smith's resignation if I want to, even though I know that his "sincerely yours" is a lie; and if he later were to protest that it was not his intention to resign, I could reply with a perfectly straight face (but with duplicity in my heart), "but that's what your words said."

Notice that this strategy would not be available to me if words really did carry fixed or even relatively fixed meanings; for then the words could be pressed until they yielded a meaning that would stop me short *as a matter of linguistic fact*; the words, in and of themselves, would exclude the meaning I tried to assign them. Of course words can stop me short, in this instance and in any other, if, for example, my assignment of an intention doesn't take with those who must ratify it, or if I am low in mental energy and just cannot see past the first intentional meaning that occurs to me, or if intention is specified by a public formula, as when I casually raise my hand at an auction and end up buying a pink elephant. However, in any of these cases it is not the words that will have stopped me, but some contingent feature of an empirical situation. Theoretically, nothing stands in the way of any string of words becoming the vehicle of any intention. Wittgenstein famously asks: "Can I say 'bububu' and mean 'If it doesn't rain I shall go for a walk?'"[6] The answer is yes. Of course you may not communicate that meaning (or any other) by saying "bububu"; but failure to communicate a meaning does not meant that it was not intended; and while the success of communication will often be a contingent matter, dependent on others and the world, the success of intending (assuming that you are not mentally ill and incapable of forming an intention) is certain. Wittgenstein presents this as if it were an extreme example, but in fact it is perfectly ordinary; his question is no different from the question "Can you say 'yes' and mean 'no'?" or the question "Can you say 'I guess so' and mean 'absolutely not,'" and in both instances the answer would be yes.

6. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS: THE ENGLISH TEXT OF THE THIRD EDITION 18e (G.E.M. Anscombe trans., 1973).

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II.

What this all adds up to is the title assertion of this Article: there is no textualist position. There is no textualist position because there is no candidate on behalf of whom a would-be textualist could argue. A textualist like Scalia will say that his candidate is the text and that meaning can be decoded by looking to the combination of lexical items (as they are glossed in standard dictionaries) and grammatical structures, with a little help, in the case of obscurity or ambiguity, from legislative history or judicial precedent. But, as I have been arguing, lexical items and grammatical structures by themselves will yield no meaning—will not even be seen as lexical items and grammatical structures—until they are seen as having been produced by some intentional agent. A text whose meaning seems perspicuous and obvious right off the bat is a text for which an intentional context has already been assumed, and it is also a text whose clarity and stability can always be troubled by an argument designed to put another intentional context (and another perspicuous meaning) in place. It is the specification or assumption of intention that comes first; the fact of a text with meaning comes second. The text, in short, has no independence; it is an entirely derivative entity—something else (an animating intention) must be in place before it can emerge, *as* text—and as a derivative entity it cannot be said to be the source or location of meaning. Nor can there be a middle position in which the text is a partial source of meaning, with the rest supplied by a little bit of intention, a little bit of history, and a little bit of context. This is the "pluralist" or "synthetic" approach,[7] but it fails for the same reason that full-blooded textualism fails: something that has no identity or property of its own (except for the physical property of being made out of shapes and spaces), something that can be successively appropriated, something that is not a some *thing*, but a vehicle, can no more be responsible for *some* portion of meaning than it can be responsible for *all* of meaning. You cannot anchor a method in a nonentity, in a notion—the text—that can neither produce nor constrain anything, that cannot even *be* in the absence of an informing and animating spirit.

It is because words alone can neither produce nor constrain meaning

7. For a pluralist approach, see Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533 (2005). For the synthetic approach, see Samuel C. Rickless, *A Synthetic Approach to Legal Adjudication*, 42 SAN DIEGO L. REV. 519 (2005).

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that they cannot settle disputes about what an utterance or writing means. In the world of Milton studies, the longest standing dispute (unlikely ever to be ended) is about what the words "two-handed engine" mean at line 130 of *Lycidas*: "But that two-handed engine at the door/Stands ready to smite once, and smite no more."[8] Non-Miltonists might be surprised and even appalled to find out that gallons of ink and reams of computer paper have been sacrificed in the effort to figure this puzzle out. Dictionaries, bestiaries, parliamentary records, volumes of theology, judicial proceedings, medieval allegories, royal pronouncements—these and many more "sources" have been ransacked for clues. But clues to what? Not clues to what the phrase means, but clues to determining which of the scores of accounts of what the phrase means (each supported by extensive research) can persuasively be linked up by some trail of evidence with what Milton had in mind. It is not hard at all to assign the phrase a meaning that would have been intended by someone who had this or that in mind; what has proven to be hard is to demonstrate to everyone's (or nearly everyone's) satisfaction that this or that was what Milton (not the compiler of a dictionary or the author of a bestiary or a church father) had in mind when he sat down to write the poem. (And even if he had meant to leave the meaning of "two-handed engine" vague or ambiguous, that too would be an intention which could, at least in principle, be figured out.) A successful demonstration will not be achieved by scrutinizing large amounts of historical material; for the material, no matter how vast and no matter how thoroughly studied from every angle, will not yield the meaning of "two-handed engine." Success (at least for a time) will follow when a selection of those materials is structured into an argument about what Milton intended and that argument has the effect of persuading others who had built a case for alternative intentions to quit the field and say "You're right."

I said in a parenthesis that this particular dispute may never be settled. This is not a theoretical point or a point about the inherent ambiguity of language (language has neither fixity nor ambiguity as a property; to assert either is to be a textualist), but an empirical one. It has been over 350 years and the two-handed engine is still a puzzle and the odds are that it will stay that way (although you can never tell). No doubt Milton had an intention and if we could figure it out, we would know what "two-handed engine" means, but the problem has been around for a long time and we may never figure it out. Now, in literary studies, that is a perfectly fine state of affairs, even a fortunate one. For more than forty

8. MILTON'S LYCIDAS 6 (C.A. Patrides ed., 1961).

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years I have been trying to figure out what *Paradise Lost*[9] means, and no one is holding a stopwatch on me and telling me that I must complete the task by next week, month, year, or millennium. In fact, I get rewarded professionally by issuing interim reports; and if I happen to change my mind once, twice, or even ten times about what *Paradise Lost* means, I just publish my new view of the matter and add another item to my C.V. As the man said, nice work if you can get it.

But there are fields of endeavor where this is not a tolerable situation—disputes must be settled promptly, for if they are not the entire business grinds to a halt—and law is one of them. That is, legal actors often do not have "world enough, and time"[10] to search for the meaning of an author (or authors in the case of the constitution, Supreme Court decisions, statutes, etc.). Someone is, in fact, holding a stopwatch on them, and they have to get on with it and come up with something conclusive. It is this difference between legal work and literary work (or the work of everyday domestic life) that explains why several contributors to this volume begin by acknowledging that the thesis that a text means what its author (or authors) intend it to mean is powerful and perhaps even true, but then go on to say that this view of the matter is incomplete or impoverished or unhelpful. Thus, Kent Greenawalt concedes that intentionalists "can provide a strict account of meaning and interpretation that does not do violence to social facts and relevant values"[11] (I do not know that values have anything to do with it), and Adrian Vermeule speaks of intentionalism's "intuitive appeal";[12] but both quickly leave intentionalism behind and go on to lines of inquiry they consider more fruitful. It might seem that Greenawalt and Vermeule are presenting alternative accounts of meaning—alternative answers to the question of what a text means—but in fact that are abandoning the topic of meaning or, rather, folding it into an account of how legal work is and ought to be done.

To his credit, Samuel Rickless is very upfront about this:

> There are many who take for granted that the proper function of a judge is to interpret the law, in the sense of explicating its meaning . . . . There is something

9. JOHN MILTON, ENGLISH MINOR POEMS, PARADISE LOST, SAMSON AGONISTES, AND AREOPAGITICA 93–334 (Encyclopedia Britannica, Inc. 1952).

10. ANDREW MARVELL, *To his coy Mistress*, *in* ANDREW MARVELL 24, l.1 (Frank Kermode & Keith Walker eds., 1990).

11. Greenawalt, *supra* note 7, at 536.

12. Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607 (2005).

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> to this: explication of meaning is certainly *part* of what judges should do when they adjudicate. But the ultimate function of a judge is to adjudicate, that is, to resolve legal disputes, and there are many disputes that cannot, and many that should not, be resolved by appeal to the explication of meaning.[13]

Or, in other words, this "meaning" stuff is interesting and sometimes relevant, but when all is said and done, we have to get on with the job, and the search for meaning may be either inconclusive and therefore of no help or downright antithetical to the job because it generates absurd outcomes. As an example of this latter liability, Rickless offers the legislators who promulgate a "no vehicle in the park rule," but who intended by "no vehicles in the park" the meaning "no dogs in the city."[14] It would surely be wrong, he asserts, "for a judge to hold that the ordinance bans dogs from the city, but does not ban cars from the park."[15] Yes and no. It might well be wrong as a matter of public policy and it would be a public relations disaster and therefore politically wrong, but it would not be *interpretively* wrong. If it comes to light that those who enacted the rule meant by "no vehicles in the park" "no dogs in the city," then that is what the rule means. (All language is code-like, and what we have here is not a tension between ordinary, literal meaning and code meaning, but a tension between two forms of code meaning, one of which is shared by a larger public.) You might then decide that for any number of reasons the polity cannot live with that meaning and move to set it aside; but you should be clear about what you are doing: you are rejecting the meaning of the rule so that you can apply it sensibly (sounds funny, doesn't it?); that is, you would be ratifying Rickless's dictum that in some instances disputes simply should not "be resolved by appeal to the explication of meaning."[16]

Greenawalt makes the same point when he declares that much judging "never tries to determine exactly what is a text's meaning," and adds that often "proceeding in this manner is desirable."[17] Vermeule explains just why it might be desirable. Searching for a text's meaning (what he calls "maximizing intentionalism")[18] "neglects the direct costs and opportunity costs of searching further and further afield for evidence of legislative intentions."[19] Maximizers, he explains, might "become bewildered by a large set of conflicting evidence,"[20] and as a result render decisions that were confused and inaccurate. Better to have a "restricted set of

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13. Rickless, *supra* note 7, at 521.
14. *Id.* at 521-22.
15. *Id.* at 522.
16. *Id.* at 521.
17. Greenawalt, *supra* note 7, at 537.
18. Vermeule, *supra* note 12, at 613.
19. *Id.* at 613-14.
20. *Id.* at 614.

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resources"—a set of resources pre-identified as the place where meaning is to be sought and found—for then the interpreter knows in advance that the search for meaning can be confined to that set. Vermeule names this strategy "optimizing intentionalism."[21] The optimizing intentionalist "employs a stopping rule: she declines to search further afield if the expected benefits of further search are less than the costs."[22] Such a rule, Vermeule concludes, "provides a justification for considering less than all probative information bearing on legislative intentions."[23] Such a rule does more than that: it provides a justification for abandoning the search for meaning when the going gets too tough or too expensive; and one wonders if the calculation underlying the justification—efficiency should trump figuring out what laws mean—would be welcomed if it were baldly stated. Vermeule ends his essay by saying that it is his hope "to make interpreters and students of interpretation aware that the maximizing style is not inevitable, that it represents a particular choice among local decisionmaking strategies."[24] Yes, it represents a choice between interpreting and doing something else (a cost/benefit analysis). Someone who makes a choice in the direction Vermeule recommends is no longer an interpreter because he or she is no longer interested in the question "what does this text mean?" and has replaced it with the question, "what can we do with this text?," the answer to which is "anything we like or think good." Scalia fears that searching for intention runs the risk of legitimizing the interpreter's desires.[25] He should be more afraid of what happens when that search is cut short, leaving the "interpreter" (no longer one) free to determine how best to reach a conclusion that reflects his or her policy preferences.[26]

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 628.
25. Scalia, *supra* note 1, at 17–18.
26. In a private communication, Professor Vermeule insists that he is not giving up the search for meaning in favor of a cost/benefit analysis. Rather, he is saying that the optimizer will "capture intention more accurately than the maximizer." This makes sense only if what Vermeule means by the maximizer is someone who will go on looking for evidence of intention even after he is convinced that he has found it; and he will do this because, as Vermeule observes, he believes that "any source is in principle admissible." Vermeule, *supra* note 12, at 613. My reply would be that such a person would not be engaging in interpretation but in theorizing. That is, he would be holding to the theoretical point that any conviction one holds could always be upset by evidence waiting around the next corner and that therefore no conviction is sufficiently secure until every last possible piece of evidence has been found and factored in. In short,

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I am not inveighing against the employment of so-called stopping rules. They are not at all unusual—remember again the rule that if you raise your hand at an auction, you have bought the pink elephant even if that was no part of your intention—and it is always possible to argue that they are necessary if the stability and predictability of the law are to be maintained. My only point is that stopping rules are not rules of interpretation, but rules that tell you when the effort to interpret should cease and something else should take over. I am perfectly willing to concede that in some instances (maybe many), the search for meaning is either so difficult that keeping at it paralyzes the system or so subversive of the purposes law is supposed to fulfill that insisting on it would be perverse. I would just say that acknowledging the obstacles to the specification of meaning, or the un-wisdom in some cases of bothering about meaning at all, does not change the fact that the answer to the question "what does a text mean?" is that a text means what its author intends it to mean; and if that is so, a text intended by no author has no meaning because it is not a text.

III.

This is the way to think about the extended example offered by Walter Sinnott-Armstrong who supposes that lightning has struck a tree "and leaves marks on the tree" that could be taken to spell "STOP."[27] He

given this view, interpretation is, in the words of the English poet Edmund Spenser, "endless work." EDMUND SPENSER, THE FAERIE QUEENE bk. IV, canto xii, stanza 1, l. 1 (A.C. Hamilton ed., 1977). Such an interpreter would not be in danger of capturing intention less accurately than the maximizer. Rather, he would be in danger of never getting to the point where intention came into view because, given his theoretical position, that point could never arrive. It is one thing to say that an interpretation can always be revised in the light of new information: that is just an empirical fact about the history of interpretations. It is quite another to say that evidence not now known, but theoretically discoverable in some shadowy future, perhaps never encountered, should hang over the empirical effort of determining the intention of an utterance or writing. It is again the difference between interpreting and theorizing. What this means is that there are no maximizing intentionalists or, more precisely, those who perform as maximizing-intentionalists are not intentionalists at all but just (bad) theorists. Absent the distinction between maximizing and optimizing intentionalists, we are left just with intentionalists; that is, with interpreters who are looking for evidence of intention. Where they decide to look or not to look will depend on where they believe evidence of what they seek is likely to be found. An intentionalist could very well decide that evidence is unlikely to be found in legislative history and could produce good empirical reasons for thinking so. But if the reason for not consulting legislative history is something like "the expected benefits of further search are less than the costs," then the interpreter is no longer one because that is not an interpretive reason—a reason tied to the imperative of figuring out intention—but a reason that flows from the political and economic conditions prevailing in the enterprise.

27. Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465 (2005).

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further supposes that over many years "drivers who approach the intersection and see the tree regularly stop," and that when one day a driver fails to stop (should we say that he "ran the tree"?), his car is hit by another driver who relied on the expectation that those who approached the tree would stop.[28] He then imagines that a trial ensues and a court "awards damages to the driver who was hit by the other driver who did not stop at the tree, and this decision is upheld on appeal."[29] Sinnott-Armstrong concludes, first, that this decision is not "obviously wrong" and, second, that the sequence of events "shows that the marks on the tree have a legally enforceable word meaning."[30] But these two points should be decoupled. Whether or not the decision is wrong is a question independent of the question of whether or not the lightning-produced marks have a meaning. One could argue, for example, that a pattern of reliance and the expectations that grow up around it are sufficient to hold the second driver liable for acting imprudently, even recklessly. One could argue further (although this might be stretching it) that it is a social good to enforce a custom even though there is no positive legal basis for it on the reasoning that "publicly accessible"[31] word meanings—even word meanings that are not there—are necessary to law's predictability; that is, one must take into account the fact that everyone in the community treated the lightning-produced marks as if they formed a word. But in the end, of course, they did not. At best they resembled a word—no purposive agent formed them—and a court that based its decision on the fact that many in the community acted as if the marks had a meaning would be basing their decision on a mistake—they did not have meaning; they were just random marks—and what the court would be enforcing is not the word-meaning of the marks, but the mistake, made by many, of thinking that they had one. (The idea of enforcing a mistake is not as odd as it sounds; that is what happened when gymnast Paul Hamm was allowed by a tribunal to keep his gold medal.)[32] A court that decided that way would not be saying anything about the general interpretive issue of the relationship between meaning

28. *Id.* at 474.
29. *Id.*
30. *Id.*
31. *Id.* at 488.
32. Hamm was allowed to keep his gold medal in gymnastics in the 2004 Summer Olympics despite the fact that the Olympic judges made a scoring error. The decision was finalized in arbitration at the Court of Arbitration for Sport. For the Court's detailed decision see http://www.tas-cas.org/en/pdf/yang.pdf (last visited Apr. 23, 2005).

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and intention—the court would be doing law, not philosophy of language—and it could come to its decision without ever pronouncing on whether or not the marks meant "stop." The legal question—should we enforce this pattern of behavior and thereby give legal weight to a long-standing and effect-producing mistake?—is absolutely distinguishable from the question debated at our conference: what is the meaning of a text? A court that acted as Sinnott-Armstrong conjectures it might would be doing exactly what Vermeule's optimizing interpreters are doing—bypassing the issue of meaning altogether and deciding on the basis of values—efficiency, stability, predictability—it thought more central to its task.

Sinnott-Armstrong might reply (as he does in his essay) that what his hypothetical shows is that the question of meaning is settled by the community of interpreters and not by the intention of any author: marks can acquire a meaning even if no one intended it, so long as the meaning is agreed on by those who encounter them: "What gives the marks their meanings are the ways in which they are *understood* by the community, not the way in which they were *produced*."[33] This might be called the "interpreters (or readers) decide" principle and it is one frequently encountered in the literature. Thus, for example, Richard Shusterman insists that "the necessary meaning-securing intentions could belong to readers of the text (or collectively to an interpretive community) rather than to its original 'historical author.'"[34] This position, he argues, is supported by the reception-history of texts, a history in which the specification of a text's meaning undergoes repeated revision at the hands of subsequent generations of readers; it is the intentions of those readers, says Shusterman, rather than the intention of the author "that continue to guide and shape understanding . . . far beyond . . . authorial control."[35] As that understanding changes, the "properties and meanings" of the text change too, and indeed "interpretation and knowledge are always rendering changes in the objects they appropriate."[36] The point is made concisely by Raymond W. Gibbs, Jr: "[R]eaders (and listeners) often . . . go beyond what a writer (or speaker) intended . . . ."[37]

Now as a matter of empirical fact, this is of course true: the history of reception provides much evidence of radically different meanings being posited for the same text; and one could say that such meanings "go

33. Sinnott-Armstrong, *supra* note 27, at 475.

34. Richard Shusterman, *Interpreting with Pragmatist Intentions*, *in* INTENTION AND INTERPRETATION 167, 169 (Gary Iseminger ed., 1992).

35. *Id.* at 173.

36. *Id.*

37. RAYMOND W. GIBBS, JR., INTENTIONS IN THE EXPERIENCE OF MEANING 261 (1999).

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beyond" whatever the author may have intended. The question is: Does "go beyond" locate a failure in the effort to determine meaning—we were looking for the intended meaning but we overshot it—or does "go beyond" indicate an achievement in which the narrow intentions of authors are overcome in the name of reader liberation? Is going beyond an unfortunate consequence of the difficulty, in some cases, of figuring out what an author means, or is going beyond what readers do when they are at their most creative, going boldly where no interpreter has gone before? Clearly, Sinnott-Armstrong, Shusterman, and Gibbs would opt for the second alternative in which going beyond is a goal and a boast. But that surely is not what motivates those readers who strive to dislodge a previous interpretation and put a new one in its place. A reader who does that believes that he or she has (at long last) discovered the true meaning of the text, the meaning its author intended. If that were not the case, successive interpreters would not bother to argue that a previous reading was wrong, or that the evidence adduced for a rival interpretation was unpersuasive, or that new evidence has finally solved the puzzle. If the point is just to be more ingenious than the last guy, why not get right to it and skip all that disagreement and demonstration stuff? The whole process, along with the notion of "same" text, only makes sense if there is something everyone is after. Sinnott-Armstrong, Shusterman, and Gibbs mistake an empirical difficulty—it is often hard to determine what a text means even when many interpreters have had a go at it for a very long time—for an agenda—the bizarre agenda of thinking up as many meanings for a text as you can. Indeed, if that is your agenda, why stop at eliminating evidence and argument? You might as well eliminate the text, which is what you will have done anyway if you operate under the assumption that interpretation always changes its objects (and it is a good thing too); for under that assumption—the assumption of the "readers decide" principle—the imperative is not to get it right (if only because there is no more "it"), but to come up with a reading that serves your present purposes and needs.

One might object that in the end there is not that much difference between the "readers decide" position and the intentionalism offered by Larry Alexander, Steven Knapp, Walter Benn Michaels, and me. We say repeatedly that intentionalism is simply the right answer to a question (what is the meaning of a text?) and not a method. Knowing that it is intention you are after gives you no leg up when you are faced with the task of interpreting a particular text. You still have to determine

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what the intention is, and more often than not that determination will involve disputes in which, by offering different accounts of the intention animating a text, interpreters will give different accounts of its "properties and meanings." Won't the resulting history—a history of revision and re-characterization—look very much like the history Shusterman describes as "a continuous and contested construction" of the text's "understanding and interpretation"?[38] It might, but even if the two histories—one occupied by seekers after authorial intention, the other occupied by interpreters who believed in their right (and obligation) to go beyond it—were identical in their events, only members of the first group could give a reason (beyond the reason of having fun) for engaging in the enterprise and for approving or contesting the findings of others; only those who were seeking authorial intention would have an object that would give point and sense to their efforts.

That is why a lot hangs on the intentionalist position even though nothing hangs on it methodologically. (It does not tell you what to do; it just tells you what you are doing.) Someone who believes that intention is what he or she is trying to determine has a question to ask of every piece of possible evidence that is turned up: does it bring me closer to identifying the object of my search? Someone who believes something else has no question to ask either because his or her search has no object or because it has too many objects, and no way of distinguishing between them. When all is said and done, there is only one coherent answer to the question "what does a text mean?" It cannot mean what its readers take it to mean, for then the interpretive game would have no rules (and no possibility of victory) and would be an instance of what H.L.A. Hart derides as the game of "scorer's discretion."[39] Nor, as we have seen, can it mean what the words alone mean (this is the textualist position, and not a possible one to hold) because absent the assumption of intention, the words alone (not really words; remember the lightning-struck tree) do not mean anything. Nor does it mean what the dictionary tells us about the words it contains, because what the dictionary gives us is a record of the intentions previous speakers have had when using a word, a record, that is, of possible and multiple meanings absent any way of specifying which is the right (that is, intended) one; (and besides, the next intender may well extend the range of usage—that is often how lexical change occurs—in a way that will require the revision of the dictionary.) Nor does a text mean what is specified by the conventions of the day because conventions do not have intentions and they do not author texts. Nor does it mean what the ordinary or ideal or reasonable

38. Shusterman, *supra* note 34, at 173.
39. H.L.A. HART, THE CONCEPT OF LAW 142 (2d ed. 1994).

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interpreter would mean by the words because none of those authored the text either, and declaring any one of them the author by fiat would amount to rewriting, not interpreting. There is only one candidate left and one answer to the question: a text means what its author intends.

If a text means what its author intends, many of the debates about how legal interpretation should proceed lose their urgency and become evidence of just how strong a hold a mistake may have on an entire discipline. Consider, for example, John Manning's essay, *Textualism and the Equity of the Statute*.[40] Once you realize that in Manning's view his title names two real choices of how to interpret, you know (or at least I know) that there is not going to be anything of theoretical value in the next 127 pages. The first sentence of Manning's second paragraph reads, "The question of text versus purpose has always troubled the law of statutory interpretation . . . ."[41] No, it has not. If statutory interpretation is what is going on (and remember it need not be), then by definition those engaged in it are trying to figure out the statute's purpose. What has troubled (if that is the word) statutory interpretation are the disputes between those who would describe its operations and imperatives differently, but these differences do not, indeed could not, translate into different ways of interpreting because there is only one way. The history Manning rehearses is not (as he thinks it is) the history of the rise and fall of different interpretive options—there are no interpretive options, although there are different, not optional, ways of pursuing the task of determining intention, which is what interpretation necessarily is—but the history of the rise and fall of different ways of talking about interpretation. When he reports that "the 'plain meaning' rule eventually supplanted the equity of the statute as hornbook law in England"[42] or that early on "the Marshall Court began to shift to the faithful agent theory as the dominant constitutional foundation of statutory interpretation,"[43] he is reporting on shifts in the theoretical account of interpretation and not on a shift in its practice. Now theoretical accounts have histories too and a scholar might well think it worth his and our while to tell the story of changes in the way statutory interpretation has been characterized. But we would not learn from such a story either how interpreting was

40. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).
41. *Id.* at 4.
42. *Id.* at 55.
43. *Id.* at 86.

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done—we already know that; it was done by specifying or searching for intention—or how it should be done. (We already know that too.) The plain meaning rule might have supplanted the search for purpose in the hornbooks, but because the plain meaning rule cannot be followed—there is no meaning apart from purpose, and purpose cannot be inferred from the words alone—that fact is of no interpretive interest whatsoever. Interpretive interest might be returned to Manning's essay if we thought of it as providing evidence of where different interpreters in different periods thought to look when seeking intention; for then we would be learning about different strategies for prosecuting the only task one can be engaged in and still be interpreting, the task of trying to figure out what some purposive agent intended.

IV.

Time to sum up, and I will do so with the help of an essay by Natalie Stoljar. Professor Stoljar is surveying the various approaches to legal interpretation, and at one point she lists some of the standard objections to intentionalism. First, she says, there is the "epistemological objection"[44]: because evidence of intention "is often equivocal, incomplete, or obscure, it will be difficult for an interpreter to offer convincing justification for the claim that a certain interpretation corresponds to an author's actual intention."[45] But this is not an objection to the thesis that a text means what its author intends; rather, it is a complaint that determining exactly what that intention is may prove difficult. If the thesis is correct, the empirical difficulty of acting on it is just that, an empirical difficulty and one that does not undermine intentionalism at all.

To put the matter even more strongly, the intentional thesis is neither challenged nor supported by empirical evidence. It has nothing to do with empirical evidence; its force is conceptual and is not derived from experience. This is a difficult point and we might get some help in elaborating it from a moment in John Rawls's *Political Liberalism*.[46] In Lecture II, Rawls rehearses the basic elements of his concept of citizenship. The last of these is "that citizens have reasonable moral psychology"[47]; that is, they "have a capacity to acquire conceptions of justice and fairness and a desire to act as these conceptions require."[48] Rawls does not mean, as he hastens to assure us, that citizens actually

44. Natalie Stoljar, *Survey Article: Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law*, 11 J. POL. PHIL. 470, 479 (2003).
45. *Id.*
46. JOHN RAWLS, POLITICAL LIBERALISM (1993).
47. *Id.* at 86.
48. *Id.*

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have any such desire as a matter of empirical fact. Rather, he means that those who buy into what he calls "the political conception" must act as if they did, must assume—put on as if playing a role—the psychology ascribed (Rawls's word) to them by the scheme of political liberalism. This psychology, in short, is, like the "original position," an artifact and artifice of reason. (Here Rawls follows Kant who declares that the inner moral status of citizens is irrelevant in a state organized by the formal imperative of respect for the autonomy of all, for in that state even devils will act as the imperative requires and so do the right thing despite themselves.) That is why Rawls calls his psychology "philosophical, not psychological": "It is not a psychology originating in the science of human nature but rather a scheme of concepts . . . for expressing a certain political conception of the person and an ideal of citizenship."[49] That is to say, Rawls's moral psychology is not the answer to the question, "How do people actually behave?"—the question par excellence of Psychology as such—but the answer to the question, what model of behavior must be presupposed (that is, ascribed) if the basic scheme of the political concept is to be complete and rational. As he says later in the text, "The absence of an explanation in cognitive psychology is not to the point"[50] because the point is conceptual coherence, not fidelity to observed behavior.

So it is with the intentional thesis. The assertion that the act of interpreting is always and necessarily the act of determining intention is not the answer to the question "What is going on in the interpreter's mind?"—a question that *would* require research into brain waves, cognitive processes, institutional practices, and much more. Rather, it is the answer to the question "What must be the case—what must we presuppose—if notions like agreement, disagreement, error, correction, and revision—are to make any sense?" The intentional thesis will not be defeated or even challenged by a list of the empirical difficulties (such as multiple authors, texts written long ago, authorship by impersonal institutions) facing the interpreter who is seeking intention. The intentional thesis would be challenged and perhaps defeated if some other answer to the question "What does a text mean?" were shown to be rationally compatible with notions like agreement, disagreement, error, correction, and revision. That has not happened, and I doubt that it ever will.

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49. *Id.* at 86–87.
50. *Id.* at 120.

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A second standard objection—Stoljar calls it the "non-existence objection"[51]—is a relative of the first. It says that in the case of groups like legislatures, "individuals within the majority have different aims and intentions in mind. How should the individual intentions be combined to form a group intention that is plausibly the intention 'behind' the legislation?"[52] Asked in a certain way, the question confuses intention with motive; while different legislators might have different motives for signing on to a piece of legislation, they could collectively form the intention to put the legislation on the books. But suppose different legislators meant something different by the words of the legislation—the word was "canard" and some were voting for "ducks" and others for "false stories." What then? Well, as J.L. Austin might say, that is an infernal shame, for then you would have two texts and two meanings and no way of reducing them to one, and you would have to figure out another way to proceed. This, however, would be an unusual instance; in most cases a multiauthored text presents no particular problem to interpreters. The very theorists who bring the "non-existence" objection against the intentionalism of Knapp and Michaels happily read them as having a single intention. Or consider, as another example, Perri O'Shaughnessy, a best selling author of popular mysteries. On the inside back cover of her books, it is revealed that "she" is actually a pair of sisters.[53] Nevertheless, the copy at the front of the book, written by people who surely know, speaks of O'Shaughnessy's achievement and O'Shaughnessy's plots; and the writers who blurb the books, also in the know, offer their praise to the realized intention of *an* author. But what if it came to light that one sister intended to write a straightforward whodunnit and the other intended to write an allegory of the war on terror, and neither knew what the other was intending as the manuscript was passed back and forth between them? Once again you would have two intentions and two texts and two meanings and reviewers would be at a loss to know what to review. A quandary, to be sure, but not one that would call into question the fact that a text means what its author intends.

There is another possibility; not two persons with different intentions, but one person with different intentions. This, Stoljar tells us, is the "indeterminacy objection":[54]

> Even in the simplest cases, such as those of the interpretation of contemporary texts by single authors, authors often have several intentions at the same time.

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51. Stoljar, *supra* note 44, at 479.
52. *Id.*
53. A biography of the sister-authors can be found on their website. *See* http://www.perrio.com (last visited Apr. 23, 2005). For an example, see PERRI O'SHAUGHNESSY, INVASION OF PRIVACY (1996).
54. Stoljar, *supra* note 44, at 479.

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> For instance, authors may have in mind both specific examples of the application of a clause, for example, to permit racial segregation, and a general aim, for example, to enshrine a principle of equality.[55]

Such authors, however, would not have two intentions, but one: the intention to permit segregation; and they would have that intention within the assumption that segregation and equality are compatible. (This is of course the majority in *Plessy*.)[56] One could argue that they are wrong to think so and that segregation is by definition antithetical to the principle of equality; but that would be an argument about the reasoning that led them to have the single intention they have, not an argument about whether or not they have it or whether or not they have two. Could an author have contradictory intentions and employ the same words as the vehicle for both of them? Sure, but in that case we would speak of an author "of two minds" with each of the minds producing its own text with its own meaning. In short, the mystery-writing sisters again, but this time crammed into a single skull.[57]

I am sure that there are more puzzles to ponder and more ingenious hypotheticals designed to show that a text's meaning is more than or less than or other than the meaning its author intended. But enough is enough, life is short, time is fleeting, and I have to rest my case. Here, one last time and for the record, it is:

- A text means what its author intends.
- There is no meaning apart from intention.
- There is no textualist position because intention is prior to text; no intention, no text.
- There is no choice between intentional meaning, conventional meaning, dictionary meaning, and the meaning imputed to the ordinary, or exceptional, or reasonable man, only choices between alternatively posited intentions. Dictionaries and conventions do not have intentions; the ordinary or exceptional or reasonable man did not author the text you are interpreting.

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55. *Id.*
56. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).
57. *See* THE THREE FACES OF EVE (Twentieth Century Fox 1957); *Sybil* (NBC television broadcast, 1976).

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- If you are not trying to determine intention, you are not interpreting; but sometimes interpreting is not what you want to be doing (although before you do something else, you should be sure you have good reasons).
- The intentions of readers, except for the intention to determine intention, do not count as interpretations, but as rewritings.
- None of the above amounts to a method. Knowing that you are after intention does not help you find it; you still have to look for evidence and make arguments. And thinking that it is something else you are after will not disable you if you are really interpreting; for then you would be seeking intention even if you said you were not.
- Interpretation is not a theoretical issue, but an empirical one, and, therefore, all debates about the nature of interpretation should stop. (Fat chance!)

That's it. Have a nice day. (And what did I mean by that?)

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