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OBJECTS OF INTERPRETATION

*Richard Ekins**

I. INTRODUCTION

What is the object of interpretation? The question is ambiguous. The object may be either that which falls to be interpreted or the point of interpretation. This Article maintains that the central object of constitutional interpretation is the Constitution, which is an intentional lawmaking act rather than a text floating free in the world, and that the point of such interpretation is primarily to understand the meaning that those who made the Constitution intended to convey by promulgating the text in question.[1] I take as my foil Cass Sunstein's recent argument, in these pages, that there is nothing that interpretation just is.[2] His argument aims to demonstrate that all the familiar, established approaches to constitutional interpretation—originalist and non-originalist alike—are consistent with the idea of interpretation and that judges are free to choose whichever approach they think will have the best consequences in their time and place. I contend, on the contrary, that Sunstein misunderstands the way that intention works in language use in general and that the various alternatives to intentionalism that he outlines each fail. His idea of interpretation is empty and the radical interpretive choice for which he argues is ruled out by the nature of the Constitution. The final part of the Article considers the various ways in which one might understand the Constitution

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1. *See generally* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012); Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013); Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139 (2010); Richard Ekins, *How to Be a Free People*, 58 AM. J. JURIS. 163 (2013); Richard Ekins, *Interpretive Choice in Statutory Interpretation*, 59 AM. J. JURIS. 1 (2014).

2. Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

as an object requiring interpretation and outlines the significance that this understanding has for interpretive practice.

II. INTENTION AND ORDINARY LANGUAGE USE

While the balance of Sunstein's article considers other approaches to interpretation, including public meaning originalism and various forms of non-originalism, the argument that interpretation centers on intentions is his main target. He outlines the argument thus: "[c]onsider one view: In interpreting the meaning of words, we ask about authorial intentions . . . That is what it means to interpret words."[3] This is a problematic way of framing the alternatives. The object of interpretation in ordinary communication is not to interpret words but to interpret language use, which is to say some person's rational act of uttering some words in some context for some reasons.[4] Sunstein's stress on *words*, as opposed to utterances or communicative acts, is confirmed when he goes on to say that "[i]t is true that in ordinary life, we tend to interpret words in this way."[5]

Having outlined an example of ordinary communication, where one friend asks another to "meet [me] at [my] favorite restaurant," Sunstein goes on to say: "It might even be consistent with ordinary usage to say that in ordinary conversational settings, interpretation of other people's words amounts to an effort to elicit their intentions."[6]

One must ask: ordinary usage of what? The answer is the term "interpretation" itself. Sunstein here and throughout the article aims to outline ways of using the term "interpretation" rather than explaining what interpretation is or should be.[7] This strategy makes him a hostage to the breadth of linguistic usage rather than a student of the idea he aims to explore and the limits of which he intends to trace. Sunstein might reply that the very title of his article disavows any idea that interpretation has a constant nature, but this reply is problematic in two ways. First, the article does outline a theory about the nature of interpretation, but a thin theory that arbitrarily takes as

3. *Id.* at 194.
4. EKINS, THE NATURE OF LEGISLATIVE INTENT, *supra* note 1, at 210–11, 245–46.
5. Sunstein, *supra* note 2, at 194.
6. *Id.* at 194–95.
7. *See, e.g.*, *id.* at 196.

controlling the various ways in which the term is used by language users. Second, the stress on the fact of ordinary usage obscures the reasons why "interpretation" should be understood in this way.[8]

While conceding that intention (often, usually) has priority in interpreting ordinary language use, Sunstein's concern is to avoid the conclusion that this is fundamental to language use in general. He says: "Let us suppose that in ordinary conversation, most people understand the idea of interpretation to involve a search for authorial intentions. Even in that context, such an understanding is not mandatory; we could imagine the view that interpretation involves a search for public meaning, rather than authorial intentions."[9]

One can imagine the view, but is it plausible? Is it a view that one *should* adopt? The quoted passage ends in a footnote which says that "such an approach would make conversation work less well," referring to science fiction characters who act in this way with unfortunate (but humorous) results.[10] The footnote refutes Sunstein's argument: the humor works because the characters misinterpret the utterances of others, failing to understand other *persons*, missing the meanings they intend to convey.

Sunstein says that we ask about intentions in interpreting ordinary conversation "for a pragmatic reason; the goal of the particular communication will not be met if we do not."[11] Relatedly, "[i]f interpretation entails that practice [of asking about intentions], it is because in the relevant context, that is the best way to understand the term."[12] This invocation of the goal of a particular communication is striking. Persons have goals; communications do not. The confusion here is to take the communication to exist as an object apart from the people who communicate—apart from the speaker who aims to convey some meaning to her hearer, who in turn aims to infer the intended meaning in question. However, communication succeeds only if the speaker makes clear the meaning she intends to convey, that is, only if the audience recognizes that this is the meaning she intends to convey. Conformity to ordinary usage aside, it is not clear what Sunstein thinks makes an understanding of

8. *See also* EKINS, THE NATURE OF LEGISLATIVE INTENT, *supra* note 1, at 245–46.
9. Sunstein, *supra* note 2, at 195.
10. *Id.* at 195 n.16.
11. *Id.* at 196.
12. *Id.*

"interpretation" the best in some context or other. Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try to recognize.[13] The speaker's intended meaning is the intelligible object of the hearer's process of inference, such that there is good reason to term these inferences "interpretations" and to withhold the label from other modes of engagement with the speaker's choice of words. One may perform a function on her choice of words, say pretending that it is written in code by an imaginary speaker, but in so doing one is ignoring the reality of the language use as such.

The main part of the article, as I say, aims in effect to establish that neither inferring intended meaning nor any other established course of judicial action is required or proscribed by the idea of interpretation itself. In this part of the article, Sunstein aims to establish that even outside the law intentions only matter sometimes.[14] He argues that when a supervisor tells an employee what to do, the employee should ordinarily ask what his supervisor meant.[15] However, "even subordinates sometimes ask about something other than speaker's intentions; everything depends on the role of the subordinate, some of whom might have a different or less deferential role."[16] When would it ever be intelligible for an employee to ask about something other than what his supervisor meant? Sunstein does not say, but his stress on the *role* of the subordinate is telling, for he implies that some "subordinates" should be free to depart from what they have been instructed, should be free to remake the instruction into a more pleasing form. But this is to confuse understanding another person's communicative act with the question of whether, and if so how far, one should conform to its injunctive content.

For my part, I can see why the employee should think about more than what the supervisor in fact meant to convey. The employee might consider what the supervisor plans to achieve by the instruction—the intentions that explain the intended meaning—or how some third party is likely to understand the supervisor, whether his supervisor in turn, or a union official, or a tribunal or court in subsequent legal action. But these alternatives

13. EKINS, THE NATURE OF LEGISLATIVE INTENT, *supra* note 1, at 193–96.
14. Sunstein, *supra* note 2, at 195–96.
15. *Id.* at 196.
16. *Id.*

are not really alternatives, for they all track inferences, whether one's own or someone else's, about what the language user (the supervisor) in fact intended. For Sunstein to say that "everything depends on the role of the subordinate"[17] is to make clear that he understands interpretation to be detachable from the act of language use—the *supervisor's* act, not the employee's—which falls to be understood. But this detachment is to give up on understanding and instead to license a subsequent act of language use—the nominal interpreter's—which takes advantage of the words uttered by some other.

The mistake here is again to conceive of communication as an object apart from a communicator. The reason for the mistake is that Sunstein runs together the question about what the supervisor's instruction means with the question of what employees should do. It may be that an employee may or should refuse to do as instructed, whether because the instruction is unlawful or unreasonable or simply inconvenient, but this is a course of action that follows after one interprets (which is to say, understands) the instruction, which requires one to understand what the supervisor is trying to convey. There are of course reasons why an employee might prefer to frame a refusal to obey as an interpretation of the supervisor's instruction ("I thought you meant *X*!"), but the standing possibility of deliberate (even if reasonable) misinterpretation hardly changes what it is to interpret. (This analysis is all consistent, I should add, with employees reasonably taking for granted that supervisors are likely to issue lawful, reasonable instructions.)

Sunstein anticipates an objection to his argument that intention is central in ordinary communication but that this centrality is limited and turns on particular reasons, which do not hold in other contexts.[18] The objection is that meaning turns on intention. Much of my argument above makes a similar point, although I would frame it a little differently: to understand some person's act of language use is to infer the meaning they intend to convey. Sunstein dismisses the objection summarily, relying on the discussion yet to come of interpretation in law to establish that the objection just fails in the legal context. In a footnote, he doubts whether the objection holds even in ordinary

17. *Id*.
18. *Id*.

communication, imagining a pattern of clouds spelling out the word "God," and concluding that the meaning of words may turn on conventions apart from inference about any author's intentions.[19] There are two problems with the response. First, by hypothesis, there is no *communication* here, for there is no speaker. Second, the truth that sentences have meanings does not refute the priority of intention in interpretation, for what falls to be understood in any particular communicative context is some agent's act of language use.[20] I turn to consider further the intelligibility and relevance of sentence meaning in the next section below.

III. THE INTELLIGIBILITY OF PUBLIC MEANING ORIGINALISM

Whatever may be the case in relation to ordinary communication, Sunstein argues that interpretation in law, especially constitutional interpretation, need not center on speaker's intentions. He maintains that the idea of interpretation does not entail any form of originalism and does not rule out the established, familiar forms of non-originalism, such as Breyer's "active liberty" approach or Dworkin's "moral reading[]."[21] His method is to consider various interpretive approaches in turn (originalist and non-originalist), arguing that each is plausible, that each falls within the capacious idea of interpretation, and that therefore one cannot argue for any one of them on the basis that this approach just is required by the very idea of interpretation. Instead, the choice the interpreter confronts—amongst various plausible modes of interpretation—should be made on the basis of the consequences its adoption is likely to have. In section V below, I consider more closely this theory of interpretive choice, and the radical contingency Sunstein embraces, but first I examine his argument that there is a range of plausible interpretive approaches such that the centrality of speaker's intention in ordinary language use does not extend to law.

It is "plainly false," Sunstein maintains, to say that in law "the idea of meaning" depends on "some kind of judgment about the author's intentions."[22] True, one way of thinking about

19. *Id.* at 196 n.17.
20. *See, e.g.*, EKINS, THE NATURE OF LEGISLATIVE INTENT, *supra* note 1, at 194.
21. Sunstein, *supra* note 2, at 202–03.
22. *Id.* at 196.

interpretation is to conceive of it as a search for speaker's intent and in ordinary life this is the usual way. But it is just one amongst many. For "it is easy to think of cases in which interpretation does not operate by reference to such intentions."[23] He does not go on to give any examples of such cases. His earlier examples from ordinary life fail to prove the point, viz. science fiction characters who misunderstand others, employees who ignore or misconstrue the instructions of supervisors, or one who sees words in cloud formations. Each example is at best misinterpretation. (In the earlier iteration of this paper he discussed the interpretation of Supreme Court precedent,[24] which was, I argued elsewhere,[25] a problematic and underdeveloped example.) Instead, he points out that for Justice Scalia the object of interpretation—what one should find—is the text's original public meaning rather than the original intention of its author.[26] And he quotes Scalia's remarks in *Heller* about the importance of the principle that the Constitution was written to be understood by voters, such that its words were used in a normal, non-technical fashion.[27]

Sunstein takes the disagreement amongst originalists about whether original meaning or original intentions should be authoritative to be "a point that suggests that interpretation, to qualify as such, need not be focused on intentions."[28] He makes the point even more clearly when he "insist[s] that a prominent understanding of originalism—as involving public meaning rather than intentions—is enough to demonstrate that attention to subjective intentions is not built into the very idea of interpretation."[29] This is a non sequitur. Disagreement about whether interpretation involves a search for either speaker's intention or for public meaning does not entail that the disagreement is misconceived. Sunstein wrongly takes for granted, again, that the *idea* of interpretation (in law as in ordinary life) includes whatever some language users take to fall within the term.

23. *Id.* at 197.

24. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 19–32 (2009).

25. Ekins, *Interpretive Choice in Statutory Interpretation*, *supra* note 1, at 5–6.

26. Sunstein, *supra* note 2, at 197 (quoting District of Columbia v. Heller, 554 U.S. 570 (2008)).

27. *Id.* at 197 (quoting *Heller*, 554 U.S. at 576).

28. *Id.* at 197.

29. *Id.* at 198.

There are good reasons, I say, to think that original public meaning is not an intelligible alternative to intended meaning, however plausible it looks at first glance.[30] Recall the quote from Scalia above, which understands the Constitution by reasoning about the purposes of those who wrote it, about the sense in which they intended to use the words in question. Scalia assumes, it is true, that there was a stable public meaning to be adopted, but the principle he discerns is not detachable from inference about intention. More generally, notwithstanding the number of persons who take public meaning seriously, there are good reasons to doubt its coherence. Sunstein provides one such reason when he queries why one should focus on *original* public meaning rather than contemporary public meaning. The right response, I say, is to stress that the adoption of the Constitution was an authoritative lawmaking act, the point of which was to introduce a framework for government. This stress on intentional lawmaking choice, and on the reasoning that makes sense of it, involves reasoning about the intentions of the author of the document. That is, the good reasons to focus on original rather than contemporary public meaning are reasons to focus on the intentions of the language user that chose the Constitution.

There is a difference between sentence meaning and intended meaning.[31] The semantic content of a sentence, generated by the combination of word meanings and syntax and taken in isolation from the context of its utterance and the person of its utterer, is open for study. The study of sentences in this way is important and interesting, but it tells us rather less about the nature of language use than lawyers often assume, not least since sentence meaning is very often much narrower and more austere (or absurd) than the meanings standardly conveyed by the use of such sentences by actual speakers intending to communicate with others.[32] Away from the logician's chopping table one does not encounter sentences floating free from an agent's use of those sentences to convey some meaning or other. True, one often does not know precisely who the agent is, or one may be mistaken about the agent's identity or character, but in attempting to understand an act of language use one attempts to infer what the

30. Alexander, *Originalism, the Why and the What*, *supra* note 1, at 541–42; *see also* Alexander, *Telepathic Law*, *supra* note 1, at 140–41.

31. EKINS, THE NATURE OF LEGISLATIVE INTENT, *supra* note 1, at 194–96.

32. *Id.* at 196–205.

agent intended to convey. If there is no agent, then what appears to be language use (say, the marks on the beach or shapes in the clouds) is not, save in the odd way that the observer imagines or pretends that the marks in question are someone's act of language use. There is nothing unintelligible about imposing on a form of words some meaning that a possible or imagined language user might use those words to convey. But in such imposition the nominal interpreter is in truth the speaker or author.

Public meaning originalism is mistaken about the nature of meaning and language use. Particular instances of language use do not have a public meaning in any sense other than the best inference about intended meaning. There is no middle way between intended meaning and sentence meaning and in understanding any particular act of language use it is the former that should be our object. (Jeffrey Goldsworthy's theory of utterance meaning attempts to find a middle way, with its stress on how the hearer reasonably understands the speaker's intended meaning, but the attempt fails.[33]) Speakers exploit sentence meaning to convey their intended meaning, but sentence meaning is not itself transparent, in law or otherwise, for what ordinary language users are likely to try to convey in uttering the sentences in question or for how those utterances are likely to be understood. However, the appeal of public meaning originalism is not in its theory of meaning.[34] Instead, it is at best an attempt to square the insight that the adoption of the Constitution was an intentional lawmaking act, which introduced legal propositions which should have a stable content and should not be changed without subsequent deliberate action, with the concern that the Constitution is a problematic communicative act, for it is not clear who the speaker is or how or if that speaker had an intended meaning to convey.

The truth in public meaning originalism is that the meaning of an act of language use, such as the promulgation of a document, is found at the time of its use. The linguistic conventions that prevail at that time help frame the formation and inference of

33. Jeffrey Goldsworthy, *Marmor on Meaning, Interpretation, and Legislative Intention*, 1 LEGAL THEORY 439, 441–44 (1995); Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1 (1997). *But see* EKINS, THE NATURE OF LEGISLATIVE INTENT, *supra* note 1, at 209–10.

34. *But see* Lawrence B. Solum, *Semantic Originalism* (Illinois Public Law and Legal Theory Research Paper Series, Research Paper No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

intended meaning. In conveying some meaning to a large and distant audience, speakers and authors have good reason to attempt to speak clearly and directly. Nothing in the sheer fact of disagreement amongst originalists undermines these propositions. Sunstein relies on the plausibility of the argument that original public meaning is the object of interpretation to refute the argument that the object of interpretation should be intended meaning—and vice versa.[35] He maintains that a focus on original public meaning is justified if good consequences follow from such a focus, not because this is required by the idea of interpretation.[36] In support of this argument, he calls in aid the fact that many scholars and judges rely on the good consequences of their originalism as a reason to adopt it.[37] It follows, Sunstein argues, that while judges should stick with the text, they need not stick with the original meaning of the text if this would have terrible consequences.[38]

There are two things to be said about Sunstein's argument here. The first is that it assumes a distinction between the text of the Constitution and its meaning which many public meaning originalists deny. Departing from the original meaning of the text is to depart, the riposte should run, from the text, for the text is not just a template for later judicial action. (I argue later that like other enactments the Constitution is not a set of sentences to which judges are free to attach meanings: it is an intentional lawmaking act, with a meaning, specifically an intended meaning, that judges should aim to find.) The second is that it assumes that those originalists who point out the good consequences of originalism do not think originalism is otherwise justified. There is nothing unintelligible about Scalia relying on the nature of meaning and language use, as he sees it, to ground a theory of interpreting the Constitution, while also noting, for the unpersuaded, its good consequences. Relatedly, it bears mentioning that the grounding for a theory of interpretation need not be either the nature of interpretation or the consequences of adopting the theory. The grounding might instead be the relationship of authority between lawmaker and subjects, taken together with insight into the nature of language use, which the

35. Sunstein, *supra* note 2, at 198.
36. *Id.* at 198–202.
37. *Id.*
38. *Id.* at 200–01.

lawmaker employs to exercise authority. I explore this point further in sections V and VI, where I suggest that "interpretation" should not be the central organizing idea here.

IV. NON-ORIGINALISM AND INTENDED MEANING

The idea of interpretation does not entail originalism, Sunstein insists.[39] And while it does rule out "approaches [which] cannot qualify as interpretation at all," such as "substitut[ing] the best imaginable constitution for our own constitution," the idea of interpretation is consistent with all established non-originalist approaches.[40] Sunstein asks:

> Suppose a judge thinks that where the Constitution is vague or open-textured, he should interpret it to make the democratic process work as well as it possibly can—an idea that John Hart Ely and Justice Breyer have vigorously championed. Is that approach ruled off-limits by the very idea of interpretation? It is hard to see why.[41]

It is not clear from this passage what it is for the Constitution to be vague, and indeed one could not say without some theory of meaning. When the Constitution is vague, it may call for specification so as to yield some concrete proposition capable of guiding action. There is good reason to think that dealing with vagueness is not interpretation, for one is not finding meaning, but dealing with the consequences of vague meaning.[42] If Breyer's stress on serving the democratic process were limited to instances of vagueness, where the original (intended) meaning of the Constitution was vague, it would not be ruled off-limits by the idea of interpretation, but likewise it would not be a theory of interpretation itself.

Sunstein goes on to explain how he understands the scope of Breyer's theory:

> Justice Breyer has argued that a democracy-protective approach, honoring "active liberty," fits with the text and purposes of the document even if it does not fit with the original meaning, narrowly conceived. (Recall that some originalists think that the Constitution was deliberately written

39. *Id.* at 202.

40. *Id.*

41. *Id.* (footnotes omitted).

42. Timothy Endicott, *Legal Interpretation*, *in* ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 109 (Andrei Marmor ed., 2012).

> in broad terms whose meaning was meant to evolve over time.)[43]

This approach, as Sunstein outlines it, would thus seem to go beyond addressing the consequences of vagueness and instead to contemplate departures from original meaning.[44] This is problematic as a theory of interpretation to the extent that it licenses "interpreters" to invent meanings that cannot be squared with the act of language use in question. However, it is not quite clear whether the theory does propose this. Sunstein's equivocal term "original meaning, narrowly conceived" suggests otherwise, as does, especially, the parenthesis, which aims to square the approach with the original intentions in question, viz. adopting general terms that call for discretionary application over time. It is mistaken, I think, to say that the meaning of terms evolves over time. It would be better to say that the terms were *meant* (their intended meaning was) to be suitably general and to involve and to make possible a (wide) range of applications over time.[45]

But let us assume, as Sunstein suggests, that Breyer's approach contemplates substituting for the original meaning some other meaning, which better "fits with the text and purposes of the document."[46] The latter phrase is unfortunate for documents do not have purposes; rather, authors have purposes in writing documents. One infers the author's intended meaning by reasoning about their likely purpose. Breyer's approach would be defective as a theory of interpretation insofar as it substituted for the actual intended meaning some other meaning, which better fitted with his (or another judge's) view of the meaning that would better serve the Constitution's purposes or present day circumstances or so forth. It may be that the interpretation of the act of constitution-making involves not just finding the Constitution's intended meaning but finding the reasoned choice that explains that meaning, which might warrant qualifying or extending that meaning. In this sense, the interpretation of a lawmaking act does not reduce to an understanding of language use alone. But this is not to set intention aside but to follow it ever

43. Sunstein, *supra* note 2, at 202 (footnotes omitted).

44. *Id.* at 202.

45. Richard Ekins, *Updating the Meaning of Violence*, 129 LAW Q. REV. 17 (2013); Lord Hoffmann, *Judges, Interpretation and Self-Government*, *in* LORD SUMPTION AND THE LIMITS OF THE LAW 67 (N.W. Barber et al eds., 2016).

46. Sunstein, *supra* note 2, at 202.

more closely, attending to the detail of the complex intentions involved in the act of language use and, I say, the exercise of authority in service of which the language is used. This equitable interpretation, as one might term it, is centered on the original lawmaking act, including a sound understanding of the detail of the language use in question.

The passage quoted above continues: "Breyer's approach must be evaluated on its merits; it cannot be ruled off the table. To his credit, Breyer is candid about this point, and contends that the consequences of his preferred approach would be good."[47]

But the merits of the approach turn not on whether its adoption would have good consequences but on whether the approach makes sense of the nature of language use (and thence of authority) and, relatedly, whether its adoption would involve the illicit substitution of some other constitution "for our own constitution" which Sunstein decries. The assertion that departing from original meaning is not ruled out by the idea of interpretation turns on a very thin, arbitrary understanding of that idea.

Much the same analysis holds for Sunstein's discussion of Dworkin's view "that the Constitution should be taken to include abstractions that invite moral reasoning from judges."[48] For Sunstein, this approach "certainly count[s] as interpretation within permissible linguistic understandings of the term."[49] But key to Dworkin's argument, at least in its mature form, is that the framers of the Constitution did in fact intend to convey abstract formulations, intending and contemplating that the vague formulations would be applied to matters as they arose. To this extent, Dworkin just is an originalist:[50] the grounding of his theory of constitutional adjudication is an account of intended meaning.

True, Dworkin has a further argument about the nature of constructive interpretation, in which the interpreter aims to make

47. *Id.*

48. *Id.* at 202.

49. *Id.* at 203.

50. *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 262–63 (1999); Larry Alexander, *Was Dworkin an Originalist?*, *in* THE LEGACY OF RONALD DWORKIN 299 (Will Waluchow et al eds., 2016); Goldsworthy, *Originalism in Constitutional Interpretation*, *supra* note 33, at 21; Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution*, 65 FORDHAM L. REV. 1269, 1280 (1997). *But see* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 29–31 (2009).

the object of interpretation the best it can be, by way of a theory that accounts for the material in question (fit) and shows it in as good a light as possible (justification). And this theory has some force in relation to the development of case law. Is it a good theory for interpreting the meaning of a statute or Constitution? Sunstein notes that Dworkin's theory can accommodate a range of interpretative methods in turn but resists concluding that constructive interpretation is the one way to understand interpretation, for: "[i]f we believe that interpretation involves the search for authorial intentions, we will not much care about justification. We will attempt to identify a fact: What did the author(s) intend?"[51] Quite so, but on Sunstein's own premises it would be wrong to think that interpretation in fact involved the search for author's intentions. This would be at most one mode amongst many of interpretation, one function that one could choose, if so minded, to perform on a text to generate a meaning, which again would be one amongst many. At work here is an important presupposition, viz. that there are many meanings that can be attributed to (or foisted on) a text, such that there are many legitimate modes of interpretation, amongst which the interpreter faces a choice. The counterargument is that the nature of language use—in law as much as in ordinary life—makes clear the priority of the author's intended meaning. The substitution of some other meaning in place of this intended meaning may or may not be justified—the philosophy of language cannot speak to this—but it is a curious interpretation (understanding) of the act of language use in question. Or, perhaps it would be better to say that to attribute such a meaning would be to exploit, but not to understand, that act.

V. INTERPRETIVE CHOICE AND THE IDEA OF INTERPRETATION

The plausibility of each particular interpretive approach, Sunstein argues, undercuts the claim of any interpretive approach to be mandatory. Hence, he contends that public meaning originalism falls to be evaluated alongside other equally intelligible alternatives, including other forms of originalism and various non-originalist approaches. That is, judges should evaluate the consequences of adopting public meaning

51. Sunstein, *supra* note 2, at 204.

originalism as opposed to any of the other possible (plausible) interpretive theories. The best originalist theorists recognize this truth, Sunstein notes, and hence they argue that their method has better consequences than other methods rather than that the latter do not count as interpretation at all. This mode of argument is required, Sunstein continues, because the idea of interpretation rules very little in or out, and more particularly because originalists must confront and disarm the problem that their method might very well give rise to awful consequences.

Perhaps "the constitutional text, taken only as such, is good, or good enough. But suppose that it is a great deal worse if it is understood in light of its original meaning."[52] That is, perhaps its original meaning is "hopelessly undemocratic, or . . . entrenches racial injustice."[53] In this case, Sunstein asks, why should judges uphold the awful original meaning rather than some other meaning which avoids these consequences? He points to the Constitution's broad phrases—protecting freedom of speech, guaranteeing due process of law and equal protection of law, vesting executive power in President—and says that "if these words were construed in accordance with their original meaning, understood in terms of its expected applications, our constitutional order would be far worse than it is today."[54] The sentence includes a footnote bracketing the question of whether originalism requires a focus on expected applications and maintaining that his point is just that it is a strong argument against a theory if it would make the constitutional system worse.[55] This way of framing the question trades on the widely shared scholarly view that expected applications should not be decisive, precisely because they are distinguishable from original meaning.[56] A better question would have been whether judges are free to depart from the Constitution's original meaning, in the course of "interpreting" the Constitution, if they conclude that the meaning in question is unjust or even simply suboptimal.

52. *Id.* at 199.

53. *Id*.

54. *Id.* at 199–200 (footnotes omitted).

55. *Id.* at 200 n.33.

56. *See, e.g.*, Larry Alexander, *The Method of Text and ?: Jack Balkin's Originalism with No Regrets*, 3 U. ILL. L. REV. 611, 614 (2012); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 443–44 (2007); Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 384 (2007).

Aiming to establish that his view is not that judges may simply do whatever they please, Sunstein goes on to say, in a passage that is pivotal to the overall argument:

> True, we should agree that judges should be faithful to the text itself, even if the text were not as good as it is. If judges were not faithful to the text, it is fair to say that they would not be engaged in interpretation at all. If judges disregard authoritative texts, they cannot claim to be interpreting them. In that sense, the idea of interpretation does impose constraints on what judges may do. Moreover, legal systems do much better—and even count as legal systems—if judges are faithful to authoritative texts. If they do not, the rule of law is itself in jeopardy, because judges would appear to be empowered to do whatever they want. In that sense, there is an excellent consequentialist argument in favor of taking constitutional texts as binding. But under the assumptions I have given, why should judges stick not merely with the text but also with its original meaning? If the consequences of sticking with it would be terrible, and if those consequences could be avoided with another approach, shouldn't judges consider that other approach?[57]

The limit on the idea of interpretation, for Sunstein, is thus fidelity to the text itself. What does it mean to be faithful to the text (itself)? Sunstein does not tell us. He contrasts "the text" with "its original meaning." Is the point then that the text is just the semantic content of the canonical document? It is unclear what else it could be, but of course Sunstein emphatically does not want to equate interpretation with this type of demanding textualism. The textualism for which he argues is rather less onerous: "[I]t is true that any theory of interpretation has to be textualist—not in the sense that it must always "follow" the text, or may never depart from its ordinary meaning, but in the sense that it must always make the text the foundation for interpretation."[58]

Again, what "the text" is remains unexplained. But the proposition that it grounds interpretation that does not follow the text is hardly the articulation of a discernible limit.

If *all* the established, familiar modes of constitutional interpretation are legitimate, then judges must choose amongst them on normative (and consequentialist) grounds. However, Sunstein's assertion that all the established modes are faithful to

57. Sunstein, *supra* note 2, at 200 (footnotes omitted).
58. *Id.* at 206.

the text is arbitrary. Each may purport to assign a meaning to the text, to present its conclusions as if they were conclusions about the meaning of the text, but this does not make it so. In truth, the text cannot be sensibly distinguished from its intended meaning, save by an exercise in make-believe—the pretense that these words lack a history or an agent or an intended audience or indeed anything that would mark them out as an actual instance of language use rather than as a set of counters in a game. Maintaining the rule of law, and recognizing *authoritative* texts as such, requires more than lip service to a form of words.

Note also that Sunstein's final two questions cut just as sharply against sticking with the text itself (the form of words or their semantic content) as they do against sticking with its original meaning. If the consequences of sticking with the text are terrible, and if one would avoid them by not sticking with (the awful parts of) the text, then why should not the judge act thus? The answer may be that the judge should not stick to the text. This would be an arguable conclusion about the moral obligations of judges but would not change the nature of constitutional interpretation or meaning, for the judicial refusal to uphold the text (and its meaning) might be justified but would be abandonment of authoritative direction not interpretation of such. There are plausible (if also defeasible) reasons why judges should not abandon an awful Constitution, such as upholding the rule of law and keeping faith with past acts of self-government. But then these reasons may require (so I and others argue) the judge to uphold the original meaning of the text, not simply "the text." The whole structure of Sunstein's discussion here is revealing. He is aware that he needs to square the openness of interpretation, as he sees it, with recognition of some limits thereon. But his argument that consequences matter is difficult to square with the idea that judges should not just substitute for the Constitution an alternative they would prefer.[59] Indeed, it seems to me that in fact this is exactly what his argument licenses, subject to the rider that they should mask any such substitution in the appearance of interpretation, which is to say as a good faith attempt to understand some past act of language use.

Fidelity to the text seems at best to be obscure. Sunstein explains his idea of interpretation further by way of Lawrence

59. *Id.* at 202.

Solum's distinction between interpretation (finding linguistic meaning) and construction (giving legal effect to meaning).[60] Perhaps this distinction entails, Sunstein muses, that while there is nothing that construction just is, interpretation just is finding linguistic meaning.[61] He concludes otherwise, reasoning that linguistic meaning fractures into original intention, original meaning, contemporary understandings, and so forth and that the term interpretation is, in legal practice, standardly used to encompass much that Solum deems construction.[62] The latter argument again places too much weight on the apparent ordinary meaning of the term interpretation,[63] which is not relevant. The former misunderstands language use: the various senses of linguistic meaning that Sunstein contemplates are not all equal, I say, and their apparent equality turns on their isolation from the context of language use in the world, by real persons, in which setting the central importance of the speaker's intended meaning becomes obvious. Discussing Solum's examples of changes in the meaning of "goal" and "domestic violence" since the 18th century, Sunstein says that in interpreting these terms we would be drawn to originalism.[64] True enough, but why? He does not say. The reason for his attraction to originalism in this case is, I suggest, because it is very clear that to ignore the intended and/or original meaning in this case would be tantamount to abandoning the text itself. But this is *always* true, for whenever one abandons the meaning of the text (better, the meaning the text is used to convey)—even if the abandonment is subtle or not easily discerned—one is abandoning the text in the only sense that matters.

For Sunstein, as for others,[65] judges face an open choice amongst rival interpretive theories, none of which are ruled out by the idea of interpretation as such. Instead, they should simply choose whichever method is likely to make their particular

60. *Id.* at 204. *See also* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

61. Sunstein, *supra* note 2, at 205.

62. *Id.* at 206.

63. *See also id.* at 203.

64. *Id.* at 205–06.

65. *See, e.g.*, SCOTT SHAPIRO, LEGALITY 355–87 (2011); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000). *But see* Ekins, *Interpretive Choice in Statutory Interpretation*, *supra* note 1.

constitutional order better, which turns on decision costs (complicating judgments) and error costs (bad outcomes).[66] An interpretive method is less choice-worthy to the extent that it is more likely to produce bad outcomes, such as unsettling existing practices, failing to proscribe race or sex discrimination, or failing to secure the rights that citizens (deserve to) enjoy.[67] Disagreement about how to interpret the Constitution thus often effectively collapse to a disagreement about what count as good or bad outcomes.[68] More generally, he continues, the case for or against choosing to adopt any interpretive theory must turn in part on the relative strengths and weaknesses of legislatures and courts: "If judges are excellent and error-free, their excellence bears on the choice of a theory of interpretation. If judges are likely to blunder, their fallibility bears on the choice of a theory of interpretation."[69]

Here as elsewhere Sunstein runs together the question of how to interpret the Constitution with the question of the authority judges ought to exercise. It may be that if judges are excellent and error-free they ought to be authorized to review legislative acts on wide grounds, but it does not follow that in the absence of such authorization their excellence empowers them so to act. That one is capable (or rather, thinks oneself capable: recall Sunstein is asking judges to evaluate their own capacities) may be a reason for others to entrust one with a certain task, but it is not a reason to think that one is free to remake the task with which one has been entrusted. The merits of judicial review may turn in part on the nature of constitutional interpretation,[70] but it is very odd to think the reverse holds, viz. that sound interpretation varies with the interpreter.[71] Sunstein's discussion at this point echoes his earlier dubious analysis of the freedom some employees enjoy to flout their supervisor's intended meaning under the guise of interpretation.

66. Sunstein, *supra* note 2, at 207.

67. *Id.* at 208.

68. *Id.* at 209.

69. *Id.*

70. *See, e.g.*, Richard Ekins, *Judicial Supremacy and the Rule of Law*, 119 L. Q. REV. 127, 137–38 (2003); Jeremy Waldron, *Never Mind the Constitution*, 127 HARV. L. REV. 1147, 1156–58 (2014).

71. *Compare* SHAPIRO, *supra* note 65, at 358–59, *with* Ekins, *Interpretive Choice in Statutory Interpretation*, *supra* note 1, at 15–18.

That Sunstein confuses a theory of adjudication with a theory of constitutional meaning and interpretation is confirmed by his argument for the contingent merits of a Thayerian approach to the Constitution or of his own minimalism. Neither approach is a theory about the interpretation of the Constitution—about how one finds and gives effect to its meaning or even about how one is to keep faith with its text. Indeed, in two footnotes Sunstein concedes that neither theory can be a complete account of constitutional interpretation because both require supplementation with an account of constitutional meaning.[72] He asserts that neither "is ruled out by the Constitution itself. Each can be implemented in a way that firmly respects the document's text and attempts to interpret it."[73] This assertion may be true but it is irrelevant to the wider claim, which it is deployed to support, that judges are simply free to choose whichever theory of constitutional meaning will better secure outcomes they prefer, including their own empowerment.

VI. THE OBJECT OF CONSTITUTIONAL INTERPRETATION

My disagreement with Sunstein is not about the meaning of the word "interpretation." It would be closer to say that it concerns the idea of interpretation. But there are good reasons to think that there is little to be gained from analysis of interpretation in general, in isolation from some particular object that warrants interpretation. More precisely, one might say that interpretation should be understood in relation to some particular type of intelligible human action and is an attempt to understand that action. For Sunstein, the ordinary meaning of interpretation and/or the general idea it articulates are coterminous with the boundaries of legitimate adjudication. He takes for granted that judges have authority to interpret the Constitution, such that provided one can say that their action is in some sense an instance of interpretation then it is not illegitimate. This is not to say that Sunstein thinks all modes of adjudication are equally good—judges should choose that mode which has better consequences in their time and place—but rather that he thinks the judicial choice of any one mode in particular cannot be illegitimate.

72. Sunstein, *supra* note 2, at 210 n.81, 211 n.83.
73. *Id.* at 211.

However, the Constitution does not invest judges with authority to do whatever some lawyers have been willing to label as interpretation. Strictly speaking the judicial power is not a power to interpret the law: it is a power to adjudicate disputes in accordance with law, which requires the judge, like every other subject of the law, to discern what the existing law is, how the legal sources bear on this particular controversy. It is a mistake, therefore, to ground an argument about how judges should interpret the Constitution in the diverse (undisciplined) ways in which we use the term interpretation. Pitched abstractly enough, to encompass such diverse objects as clouds, dreams, novels, nonsense poems, and traffic flows, it might well be true to say, with Sunstein, that there is nothing that interpretation just is. But the lack of unity in the idea of interpretation at this level of generality does not entail that interpretation of statutes or constitutions is also empty. It is worth entertaining the hypothesis that the nature of the source of law that falls to be understood bears strongly on how it may reasonably be understood. That is to say, before one can conclude that the Constitution is rightly open to many interpretive approaches one must reflect on the Constitution as an object requiring interpretation.

Some such reflection is implicit in Sunstein's work and indeed my argument above has traced at various points his reduction of the Constitution to a text alone. Recall that in outlining the idea of interpretation the limit he discerns is fidelity to the text. The limit is threadbare, as I have argued, for it permits one *not* to follow the text and is instead a requirement that the judge's lawmaking choices be framed as if they were an account of the meaning of the text. The incredulity of others, especially the wider public, is the real limit on this exercise, which chimes with the stress on the bounds of the meaning of the word interpretation rather than the meaning of the Constitution properly understood. For Sunstein then, subject to a caveat I explore below, the Constitution is the text we have before us, which it falls to the judges now to invest with meaning. The text comes with no directions as to how it is to be interpreted, hence the judges must choose the rules that are to apply and perform a function on the text so as to generate its meaning.

But the Constitution is not a text to exploit. The view that it is may help explain the diversity of interpretive approaches in practice (although at the cost of deeming most or all of them

false), but it does not perceive the nature of the language use that the promulgation of the Constitution involves or the shape of the lawmaking act in which such promulgation consists. These points are related, for as with statutes so too with the Constitution: law is made deliberately by an authority that uses language to convey some intended meaning. Still, they should be distinguished, if only to address a possible misunderstanding. Solum reasons that if "goal" is used in an eighteenth century letter then one should understand its meaning at the time and the same holds for the Constitution. Sunstein comments:

> That is true, but is the constitutional setting analogous? Consider the view that judges should decide, as a matter of principle, whether current practices do deny people "equal protection of the laws," or violate "the freedom of speech," rather than asking about the original meaning of those words. Whether that view is right or wrong is a normative question. It cannot be settled by an understanding of how communication through language works. Philosophical work on that topic does not resolve the question of the appropriate judicial role undertaken under the capacious rubric of "interpretation."[74]

The contrast in the second sentence is, I think, between "a matter of principle" and "the original meaning," for it is the constitutionality of "current practices" that requires adjudication. Sunstein is quite right to say that what judges should do is not settled by the philosophy of language. But the philosophy of language does tell us something very important about the nature of language use, viz. that persons use texts (semantic content) to convey their intended meaning-content. If one adopts "a matter of principle" in place of "the original meaning" then one is not showing fidelity to the text in any meaningful sense—one is not understanding it as an act of language use but rather simply deeming it a canvas on which one projects the meanings one wishes had been intended. The continuity of law and the importance of self-government over time both provide very powerful reasons to consider the original meaning of the Constitution decisive. These are reasons that point one to the nature of the language use that is the Constitution's adoption.

Like a statute, the Constitution is not a text that invites exploitation by adjudicative bodies but a deliberate lawmaking act the intended meaning of which is to be upheld. The reasons

74. *Id.* at 207.

for constitution-making by deliberate adoption of some canonical text are reasons for the relevant authority to choose to introduce some particular propositions and to articulate them in the intended meaning of the canonical text it promulgates. The Constitution is thus an object in the sense that it is an intentional act, which falls to be understood as such. The law that act introduced into the life of the community remains good law until it expires on its own terms or is overtaken or amended by some subsequent act of lawmaking. This is how I understand the Constitution qua object and why I conclude that it is not rightly open to all of the many established interpretive approaches, for only some modes of reasoning recognize the Constitution's nature and aim to understand its content accordingly.

The Constitution is only part of the Constitution. The former is the law made by the lawmaking act that is the Constitution's promulgation, whereas the latter is the ensemble of legal rules (including the Constitution, statutes and common law) and non-legal rules (conventions) that frame how and by whom public power is exercised. Not every constitutional rule, in this broad (and British) sense of the term, is to be found in the meaning of Constitution or even in its authoritative judicial exposition. Recognizing, with Dworkin, that much constitutional law is found in the mass of judicial decisions, Sunstein asserts, first that "judges who interpret the Constitution owe a duty of fidelity to what has come before"[75] (so not just to the text) and that one "recurring question is the relationship among the case law, social practices and the original understanding of the text."[76] He concludes that "the general concept of interpretation" permits different answers to that question.[77] On this view, the object of constitutional interpretation would seem to be the judicial practice of working with the canonical text. Hence, one interprets not the text itself, such that its original meaning is not controlling, but the history of adjudication by reference to that text, which may take us increasingly far from that original meaning without abandoning it altogether. The living constitution, and its counterpart in Canada, "the living tree," captures the idea of moving steadily beyond one's foundations.

75. *Id.* at 203.
76. *Id.* at 204.
77. *Id.*

Much judicial interpretation of the Constitution has this cast to it. The history of interpretation rather than the Constitution itself becomes the object of further interpretation. This shift in focus may be a reasonable response to the injustice of the Constitution qua deliberate lawmaking act and the assertion of a nominal connection between the continuing practice and the text itself (shorn of its substance as intentional language use) may be a shrewd strategy to avoid public controversy. But it is clearly an abandonment of the lawmaking act that the Constitution in truth is and was and in that sense is not interpretation of the Constitution at all. The strategy is unstable, moreover, for the ongoing reference to the text of the Constitution retains some force and the practice remains in law answerable to further reflection about its true (which is to say, its intended) meaning. The revival of originalism in American constitutional practice may confirm the point.

VII. CONCLUSION

The way to reason about how to understand the Constitution is not to reflect on the idea of interpretation itself, or the variety of theories of interpretation in practice, but to consider the Constitution as an object that requires understanding. The Constitution is not a set of free-floating sentences. Nor is it the history of adjudication by reference to such sentences. Rather, it is a deliberate lawmaking act, which falls to be understood by recognizing an intended meaning that articulates authoritative choices. The arguments contested in this Article aim to deny the priority of intended meaning in constitutional interpretation—but each fails. Intended meaning is and should be the object of interpretation in ordinary language *and* in law, including constitutional law. Neither the ordinary meaning of the word "interpretation" nor the diversity of theories of constitutional interpretation establishes otherwise. Further, neither public meaning originalism nor non-originalist theories constitute viable alternatives to an interpretive approach that centers on intended meaning. Constitutional interpretation is not the performance of some function on a text with which one may do as one pleases, but an exercise in understanding a past lawmaking act and the intended meaning in which it consists. It may sometimes be reasonable to substitute for the original object of interpretation—the Constitution qua deliberate lawmaking act—some other

object, such as the history of past adjudication, but one should be clear that this substitution is itself a constitution-making act, one that tacitly abandons the authoritative act to which one pays continuing, but insincere, homage.