Foreword

by EVAN TSEN LEE*

When I hear someone is writing an article about "constitutional interpretation" or "constitutional theory," a distinct picture comes to mind. First, I imagine the article will contain a survey of existing literature on methods of constitutional interpretation. I expect this survey to be accompanied by a running commentary in which the author concludes that each previously proffered theory of constitutional interpretation is either incoherent or normatively depraved. The author then proposes his[1] own method of constitutional interpretation, proclaiming it the only truly legitimate or coherent theory.

Constitutional theorists write this kind of article because there is a market for it. We all crave a new interpretive or theoretical paradigm, and I am no exception. So is that what the reader gets in this issue of the *Constitutional Law Quarterly*? Not at all. It contains, instead, an assortment of insights associated in some way with the Constitution or constitutional theory. No single theme runs through these articles. If John Hart Ely's representation-reinforcing theory[2] and Raoul Berger's jurisprudence of original intent[3] are preplanned menus driven by the single culinary ideal of a master chef, then this issue of the *Constitutional Law Quarterly* is a potluck attended by people whose identities and tastes have carefully been withheld from each other.

Disappointed? Don't be. When the evening is over, the people at the potluck are likely to be more satisfied. This is not because each of us is necessarily happier or better off eating a diversity of foods. Personally, I would be happier eating Parisian haute cuisine or Chinese dim sum every day of my life than I would be sampling new

---

* Professor, University of California, Hastings College of the Law.

1. For some reason, virtually all the theories of constitutional interpretation have been proffered by men. Is this because men tend to be theory-worshippers and women anti-foundationalists? *Cf.* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). Or is it simply because there are fewer women on law faculties than men?

2. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

3. *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987).

foods every day. The reason the people at the potluck are likely to be more satisfied *on the whole* is that not everybody has the same favorite food. At a banquet where no one has a choice, some will be ecstatic and some will be miserable. At the potluck, virtually everyone will find something he or she likes.

Now that I've whetted your appetite, what have our dining companions brought to the potluck, and how does it differ from the kind of theory that I described at the outset?

Professor Christian Fritz's article, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, examines the early postratification understanding of "popular sovereignty." Judges, lawyers, and academics assume they know what popular sovereignty is when they articulate doctrine or theory; maybe they don't. Fritz exposes us to the nineteenth century debates over the meaning of popular sovereignty. As an historical piece, Fritz's article offers no new theory of interpretive methodology. It does not even assume that "originalism" of any form is binding on us, for we can surely learn from past generations without being slaves to them.

Scott Gant's article, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, argues for an integral, if ultimately subordinate, role for nonjudges in constitutional interpretation. Without passing on his proposal, I confess a reflexive attraction to the notion of involving more actors in the interpretive process. It reminds us that the question of *who* decides is often as important as the way in which the matter is decided. It also places confidence in dialogue among constitutional actors—generally a good thing. Again, however, Gant's paper makes no arguments or strong assumptions about interpretive methodology.[4]

The very topic of Samuel Levine's article, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, implies that the narrowest versions of textualism and "original intent" jurisprudence are wrong. If we are justified in looking only to the text or intent of the Framers, then we could take account of the Jewish legal tradition only insofar as it *actually* influenced the drafting or ratification of the Constitution. But Levine does not take it upon

4. I suppose one might oppose Gant's position on the ground that only trained judges are capable of digesting the legalistic data that—on one view—is the stuff of legitimate constitutional interpretation. I would think the brazenly political appearance of constitutional adjudication has disabused most of this notion.

himself to argue for a "nonoriginalist" theory of constitutional interpretation—that is not his project.

Professor Stuart Streichler's study of Justice Curtis's dissent in *Scott v. Sandford*[5] is a political and historical analysis. To the extent that Streichler uses Curtis's opinion as a lens through which to view the jurisprudential path of constitutional history, this article is pertinent to interpretive methodology. But the assumptions about methodology are all submerged beneath the surface. It is not Streichler's purpose to make a thoroughgoing argument about the legitimacy of this or that interpretive mode.

Brendon Ishikawa's article, *Everything You Always Wanted to Know About How Amendments Are Made but Were Afraid to Ask*, focuses on the procedure that governs formal constitutional amendment. He may have a relatively traditional view of constitutional interpretation in mind when he examines Article V, but his paper certainly does not argue that other forms of interpretive methodology are illegitimate.

Having said that the works in this collection are not stereotypical articles about "constitutional interpretation," the one arguable exception is Professor Richard Saphire's article, *Originalism and the Importance of Constitutional Aspirations*. Saphire critiques Michael Perry's recent abandonment of nonoriginalism, for which he had been one of the nation's leading proponents. Professor Perry now declares that the debate—which used to be called the "interpretivist vs. noninterpretivist" debate—is dead. The originalists have won, says Perry. No method of constitutional interpretation is valid unless it takes the text and original intent of the Framers as controlling.

One should not, however, make the understandable mistake of lumping Perry's originalism in with that of people like former Judge Robert Bork[6] or former Attorney General Edwin Meese.[7] Bork and Meese view original intent at the lowest levels of generality; Perry views it at a rather lofty—and capacious—level of abstraction. The result is his rather leftish take on phrases like "equal protection" and "due process." Although Saphire has written about interpretive methodology, he isn't hawking his own theory. He's simply giving a needed perspective on another scholar's work.

5. 60 U.S. (19 How.) 393 (1857).

6. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 17 (1971).

7. *See* Edwin Meese, *The Law of the Constitution,* 61 TUL. L. REV. 979 (1987).

That is our menu du jour, and it scarcely resembles the reductionist scholarship that I portrayed in the beginning. Indeed, I have not attempted to conceal my ambivalence toward new "theories of constitutional interpretation," as I have somewhat narrowly defined them. Openness dictates that I disclose the reasons for my ambivalence. Put bluntly, I suspect such theories are virtually doomed to failure. My intuition is that most people will not be persuaded by the next article or book offering a new theory of constitutional interpretive methodology, or the next article/book, and so on.

Why do I think this? New theories of constitutional interpretation will have supreme difficulty in winning widespread acceptance because there are too many places where agreement can break down. There are several problems that make it unlikely that we will ever be able to achieve a satisfactory consensus on the premises necessary for a widely accepted theory of constitutional meaning. Let us begin with the premise that the Constitution is an intentional document, by which I mean that the valid method of extracting meaning from the document is to ascertain the intentions that underlie it. (This is a controversial premise, but for the sake of argument, let us assume it is correct.) One problem is determining whose recorded intentions are authoritative. Is it all the people who were in the room when the Constitution was signed? Is it only the people who voted for the clause in question? The individual drafter of the clause in question? The ratifiers at the several colonial conventions? Ordinary colonials circa 1787? The average reader of English circa 1787? At present? The intentions of any one of these groups of people (or hypothetical groups of people) might be considered authoritative.

Another problem concerns the metaphysics of intention. Original intent jurisprudence assumes that intentions correspond to facts in the world much as the Boston Tea Party or the Battle of Yorktown correspond to facts in the world. But not everybody sees it this way. Intentions might be seen as akin to ideas or emotions or desires, which most of us normally regard as something usefully distinguishable from "fact." Thus, even if we could agree on whose intentions ought to be determinative, we would also have to agree on whether intentions actually correspond to something in the real world. If intentions are facts, then we are left with an empirical problem. It becomes a problem of method. The task is simply to root out intentions in the same way that we must uncover artifacts during an archeological dig. On the other hand, if intentions are not facts but intellectual constructs, then we must come to further agreement on an authoritative means of

intepreting these constructs in a way that usefully relates them to present-day issues.

These problems are daunting enough. Yet they may not even approach the difficulty of a third problem—the problem of practical authority. As I understand it, a law has practical authority when the subject (that is, the person who supposedly owes obeisance to it) regards the law as a pre-emptive reason for doing as it orders.[8] If the subject recognizes the law as dispositive, no matter what the consequences and no matter what the subject might personally think about the law's wisdom, then (for that person, at least) the law constitutes practical authority. To the degree that the subject obeys only out of a fear that the law will be enforced against her or out of a fear that other negative consequences will attend her disobedience, the law does not constitute true practical authority. In that case, the law has supplied no independent normative reason to obey.[9]

The notion of practical authority is very much subjective—meaning that it focuses on individual perception, however idiosyncratic. Each one of us can have a different view of what is authoritative. I had a friend in college who would not cross the street against a "Don't Walk" sign, even at 2 a.m., when there wasn't a car or police officer in sight. For her, the law against crossing the street against a light held true practical authority. Most of us would have had no compunction at all about crossing the street. The point is simply that we all might potentially find practical authority in the oddest places.

It is true that the problem of practical authority is endemic to all of law, not just constitutional law. (The traffic light story illustrates that.) But there are two critical factors that make practical authority a more serious problem in the constitutional context than elsewhere. One is the ever-widening temporal gap between the Founding and the present. With the passage of each succeeding generation, it becomes harder to understand why people who lived and died so long ago ought to dictate present arrangements. One can scream, "Because it's the law!" That, however, simply is no answer to an absence of practical authority. Either one recognizes it as a pre-emptive reason for present action or one doesn't. By and large, temporal attenuation undermines the perceived "bindingness" of law.[10]

8. *See* JOSEPH RAZ, THE AUTHORITY OF THE LAW: ESSAYS ON LAW AND MORALITY (1979).

9. Not everyone thinks we should recognize practical authority. *See* Heidi Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991).

10. This is a sociopsychological phenomenon, not a philosophical or legal one.

A second factor that exacerbates the problem of practical authority in the constitutional context is the fact of higher stakes. My friend might have found practical authority in the legislative edict not to cross against the light, but would she have found similar authority in an edict prohibiting her from engaging in certain types of consensual sexual intercourse?[11] What attracts most of us to constitutional law is its impact on politics, culture, and society. This same potential makes it harder for us to entrust its determination to someone other than ourselves. The more important the issue, and the higher the political stakes, the more likely it is that individual subjects will insist upon weighing the considerations for themselves. I do not think it much overstates the case to say that we believe the abolition of slavery so important that it cannot be left to any authority. If tomorrow we discovered irrefutable evidence that the drafters and ratifiers of the Thirteenth Amendment intended an exception for the mentally retarded—intended, in other words, to allow their enslavement—I would think most of us would brush the evidence aside as irrelevant. Doubtless we would struggle to frame our objection in originalist or legalist terms, but the reality would be that we do not think it best or right or just that anyone be enslaved, and we do not recognize anyone else as being authorized to decide otherwise.

That is why I feel so glum about new theories of constitutional interpretation. The odds against securing a critical mass of agreement on these premises—whose intentions are authoritative, whether intentions are facts, whether particular laws have practical authority—are long indeed. A single theory that attempts to answer all these questions is virtually doomed. We are probably better off with scholarship that approaches constitutional adjudication from all different perspectives at all different levels, which is exactly the kind of scholarship that appears in this issue. Better off, we might say, a la carte.

Bon appetit!

11. *Cf.* Bowers v. Hardwick, 478 U.S. 186 (1986).