Pragmatism v. Originalism: A Mistrial

David Boersema
Pacific University

Abstract
Judicial interpretation is fundamental to the nature and working of law. The doctrine of originalism holds that judicial interpretation is best informed by adhering to the original intent or understanding of the framers of the law. In this paper, I will look at arguments both for and against originalism. I will then claim that, although there are very strong pragmatist arguments against originalism (in large part because of a faulty view of language), the two are not necessarily at odds. This will not be an endorsement of originalism, but, rather, a claim that, for all its flaws, originalism is not necessarily antithetical to pragmatism.

In 2007, Shirley Katz, a high school teacher in southern Oregon, went to court to challenge her school's policy that prevented her from bringing her legally owned pistol to her workplace. She had a concealed weapons permit and claimed that she needed to bring her weapon to school because she feared for her personal safety; she had taken out several restraining orders against her former husband and she feared that he might appear at her workplace and that she would be in danger. Besides this practical reason, she claimed that she had a constitutional right to bear arms. (After two years of litigation, the Oregon Court of Appeals eventually ruled against her request and in favor of the school district's prohibition against allowing weapons at the school.)

The Second Amendment to the United States Constitution reads as follows: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

What, exactly, does this mean? The content of the expression "bear arms" consists of two words, *bear* and *arms*. Does *bear* arms mean: "own," "possess," "carry,"

"produce," "sell," and perhaps other terms? Does bear *arms* mean: "knives," "handguns," "torpedoes," "battleships," "biological toxins," and perhaps other terms? In addition, what is meant by "the people" in the amendment's wording: is it meant distributively (that is, to each and every person) or collectively (that is, to the population of citizens as a whole)? Does the Second Amendment say, or at least imply, that I, Dave Boersema, have the right to own and keep in my home semi-automatic weapons or the ingredients for constructing chemical explosives? How are questions such as these to be answered?

The Supreme Court of the United States has answered, or at least addressed, them on a number of occasions. For instance in 2008, in the case of *District of Columbia, et al. v. Heller*, the Court overturned a District of Columbia law that banned handgun possession by making it a crime to carry an unregistered firearm and prohibited the registration of handguns; separately it provided that no person may carry an unlicensed handgun, but authorized the police chief to issue 1-year licenses; and required residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed a suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibited carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibited the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. But the Heller case addressed only federal laws; it left open the question of whether Second Amendment rights protect gun owners from overreaching by state and local governments. Two years later the U.S. Supreme Court extended their ruling and ruled that The Second Amendment's guarantee of an individual right to bear arms applies to state and local gun control laws. On what basis did and could the Court make such rulings?

1. Legal and judicial interpretation

Legal language, because it is language, requires interpretation. In addition, because legal language is not (merely) descriptive, but is (also) exhortative, it especially requires interpretation. Laws and statutes (at least many of them) do not simply state what is the case, but are one of our codified means to regulate our behavior, to say what ought to be the case. Laws and statutes do not tell us what we in fact do, but tell us what we should (or should not) do. Besides that fact that laws and statutes are exhortative, they are – by necessity it seems – broad and often vague. As noted above, the extension of the term *arms* can range from knives to biological weapons. Problems of the extension of laws and statutes go beyond the problem of the extension of legal terms. Because laws exhort rather than describe, we have the dual, and perhaps conflicting, desiderata of consistency and plasticity of them. That is, on the one hand, we desire to treat like cases alike, so we want and expect judicial interpretations of legal language to exhibit consistency. If it is legally permissible for Smith to bring a gun to work, then (all else being equal) it should be legally permissible for Jones to do so, as well. Likewise, if it is legally impermissible for Smith to run red lights while driving, then, too, it should be legally impermissible (all else being equal) for Jones to do so. If laws and statutes are means to regulate our behavior, then we need some level of consistency in their interpretation and enforcement.

One the other hand, we also desire some level of plasticity in the interpretation and enforcement of legal language. The extension of legal terms changes over time. For example, new technologies generate new understandings and definitions of, say, modes of surveillance; we can now intrude on the privacy of individuals in ways that were not possible only a decade ago. To make or allow for laws and statutes to be applicable to such changing conditions and situations, we want and need plasticity in the interpretation and subsequent enforcement of them.

These dual desiderata of consistency and plasticity are borne out in the legal practices of appeal to both precedent and analogy. We often try to show that the language of statute S – which we have already determined applies to case A – also applies to case B because B is similar enough to A so that the ruling in case A serves as a precedent for case B. The two cases are distinct (A is not the same case as B), but they are similar enough in relevant ways that they can both be seen as instances of the same kind, namely,

the kind of case that falls under the scope of statute S. There is consistency, then, because the statute is applied so as to treat like cases alike; yet, there is also plasticity because they are not the same case and the features of case B might well lead to it functioning as a precedent for a future case C that case A by itself might not have. The point of all of this is simply to remind us that legal language, which by its nature requires interpretation, is such that it involves both consistency and plasticity for it to function. As I will claim later, these two features of interpretation, and indeed of language generally, are fundamental to a pragmatist conception of language, including, of course, legal language. Furthermore, it is the importance of these features that are said to pit pragmatism against the form of legal and judicial interpretation of originalism. Before making that claim, however, it is important to lay out just what originalism is.

There are, and have been, a variety of ways of interpreting legal language. One such way is often labeled *formalism*. Formalist legal interpretation emphasizes (for some formalists, emphasizes exclusively) the literal meanings of the legal language in question. For example, in the case of *United States v. Locke*, the U.S. Supreme Court was asked to determine if the clause of Section 314 of the Federal Land Policy and Management Act which stated relevant documents needed to be filed "prior to December 31" meant that documents filed on December 31 were acceptable or not. (This was important to the parties in the case because it would determine who had legal ownership over particular mining properties in Nevada.) A strictly formalist interpretation of this clause would be that "prior to December 31" entails that any document filed on December 31 would be too late; it would not be prior to December 31. As Justice Marshall remarked in stating the Court's ruling:

> If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.

While such a strict, formal, reading of the language might seem to some to be overly strict and literal, formalists would argue that it is not the appropriate purview of the judiciary to create statutory language. If it is more reasonable to think that the clause should state "prior to the end of December 31," then that is something for legislators to determine, not judges. Of course, some legal language – such as "bear arms" – can be vague and require judicial interpretation, but other legal language – such as "prior to December 31" – is not vague and such language should be taken on face value. If it is regrettable that the statute says what it says, then the legislature should revise the statute, but judges should not reinterpret the clear language that is present.

I raise the point of formalist interpretation as a lead-in to laying out the position of originalism (or, often thought of as original intent). As will be seen shortly, originalism is not identical with formalism, but is akin to it. Before explicitly presenting originalism, however, I want to point out the so-far unstated, but, I think, obvious point that legal language – and the interpretation of it – rests not only on its exhortative function of regulating our behavior, but also on the social context of the separation of powers and the separate spheres of government (something not relevant to non-legal language and interpretation). That is, in the context of American law, it is understood that the legislative branch of government is tasked with creating laws and statutes while the judicial branch is tasked with interpreting them, so that, as Justice Marshall intimated above, the role of judicial interpretation should not extend to, in effect, re-writing them. This points toward the issue of the intents and purposes of laws and statutes and also to whose role (the legislative or judicial) is relevant in determining those intents and purposes.

2. Originalism

The doctrine of originalism, broadly speaking, is the position that the meaning of a given statute – and, hence, its appropriate interpretation and application – is determined by what was intended or understood by the original framers of the statute. This simple characterization actually glosses over a few complications, however, and, indeed, there are somewhat different versions of originalism. One version is perhaps better described as *original intent.* The emphasis here is that the meaning of a given statute is determined

by the intent (or intents) of the original framers of the statute. A second version of originalism is perhaps better described as *original understanding*. The emphasis here is that the meaning of a given statute is determined by the understanding of the original framers of the statute as well as of relevant contemporaries of those framers. In both versions, however, the fundamental aspect is that the meaning of a statute is determined at its inception as a statute.

Of course, even the notions of intent and understanding are rather imprecise. As Walter Sinnott-Armstrong has noted, the intent and the purpose of a statute are not necessarily the same thing. For a given statute, the purpose of the framers of it might be, say, to accomplish some goal, but the intent of the framers might well be something different. For example, the purpose of a statute might be to reduce (or increase) government oversight of, say, health care provisions; the intent of the framers, however, might simply be to appease certain voters in order to get re-elected. In addition, there might well be multiple, even inconsistent, intents if there are multiple framers of the statute. That is, if the framers are a body of legislators, each of those legislators might well have his or her own intent, perhaps inconsistent with the intent of other legislators, in the framing of the statute. Similar complexities arise when considering the notion of understanding. The point here, of course, is simply to state the obvious fact that there are complexities and complications just in saying that originalism looks to the original intent or understanding of a statute. Those complexities and complications are not crucial, however, to the concerns of this paper.

A more thorough and precise statement of originalism is given by Princeton legal theoriest Keith Whittington, in his *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Whittington states:

> The critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification. The primary source of those understandings is the text of the Constitution itself, including both its wording and structure. The text is supplemented by a variety of secondary sources of information, however. Historical sources are to be used to elucidate the understanding of the terms

> involved and to indicate the principles that were supposed to be embodied in them. The guiding principle is that the judge should be seeking to make plain "meaning understood at the time of the law's enactment." (p. 35)

Several points immediately emerge from Whittington's statement of originalism. First, it is clear that he does not equate the meaning of a statute with the original intent, but rather with original understanding (or understandings, plural). Meaning, even original meaning, is social; and even moreso, understanding, even original understanding(s) is social. The emphasis on understandings recognizes this aspect of language, while the notion of intent (or even intents, plural) seems much more private and subjective. Language, and especially legal language, with its exhortative role, must function at a social, public level. It requires interpretation and application; hence, understandings are foremost, certainly over intents.

A second point that emerges from Whittington's statement is that originalism is not the same thing as formalism, as noted above, although it is related to it. As Whittington says, a primary source of understandings is the text of the statute itself, what the words say and what the words mean. However, those words themselves are not the only source for appropriate understandings; the text is supplemented by a variety of secondary sources of information.

A third point that emerges is that originalism is not resistant to new and varied interpretations and applications of the language of the statute. The point is that interpretations and applications cannot be inconsistent with the original meaning and understandings of the statute. For example, the Second Amendment speaks of the right to bear arms. Obviously, the framers of that language did not and could not have intended or understood arms to include nuclear weapons or, for that matter, even semi-automatic handguns. It is not inconsistent for a modern court to make a judgment regarding whether or not the Second Amendment allows an individual to bear nuclear weapons or semi-automatic handguns by saying that bearing such weapons as those are, or are not, protected by the statute. That is, if it can be shown that bearing such weapons is inconsistent with the original understandings of the framers of the Second Amendment, then bearing such weapons can appropriately be ruled as not protected by the amendment.

The courts, of course, have ruled that bearing semi-automatic weapons is not inconsistent with the amendment and, so, have ruled that it is protected. They have not made such a ruling regarding the bearing of nuclear weapons.

A stronger version of originalism would be that it is not sufficient for an interpretation or application of a statute that it merely not be inconsistent with the original understandings, but that it is implied by the original understandings. A well-known point of contention between weaker and stronger versions of originalism, as well as between originalism and other forms of judicial interpretation, is the case of a constitutional right to privacy that was brought to light in the decision of *Griswold v. Connecticut*. The Supreme Court justices who ruled in favor of the plaintiff claimed that an individual's right to privacy was a penumbral, implicit right, which could be justified by the language of First, Ninth, and Fourteenth Amendments, while the dissenting justices and also (famously) the staunch originalist Robert Bork, insisted that such a right was not implied by those Amendments or any other source of original understanding of them. For the present purposes, however, I am taking originalism in the broader, looser, and, I think, more inclusive, sense. What I want to claim is that originalism is, in large part, dependent upon a mistaken view of language, indeed, a view that is, in large part, contrary to a pragmatist view of language. However, I also want to claim that originalism is not necessarily inconsistent with a pragmatist view of language; that is, one can give a pragmatist reading of originalism. This is not an endorsement of originalism (for I think they would be rather strange bedfellows), but rather a weaker claim that a pragmatist view of language would not necessarily jettison originalism as an appropriate form of judicial interpretation.

3. Originalism's linguistic underpinnings

As portrayed by the statement above by Keith Whittington, originalism is beholden to a view of language that is very similar to the modern causal theory, or direct reference theory. (As an aside: While there are some differences between what some philosophers of language take a causal theory to be and a direct reference theory to be, I will treat them as synonymous here.) As Whittington remarks, the critical originalist directive is that the meaning of a statute is determined, so to speak, at the birth of that statute. Subsequent

interpretations and applications of the language of the statute must be either implied by or at least consistent with the original understandings. This sounds very similar to the view of reference – and I will expand that to meaning generally – associated with the work of Saul Kripke and other causal theorists. Kripke gives a "rough statement" of such a view:

> A rough statement of a theory might be the following: An initial baptism takes place. Here the object may be named by ostension, or the reference of the name may be fixed by a description. When the name is "passed from link to link", the receiver of the name must, I think, intend when he learns it to use it with the same reference as the man from whom he heard it. (*Naming and Necessity*, p. 96)

The sense in which this is a *causal* account of reference is that the passage of a name from link to link is said to secure a causal connection between the name of an object and the object. The initial baptismal act of naming the object (by ostension, perhaps) establishes the causal connection in the first place. Later uses of the name must be connected to the object in some sort of causal chain stretching back to the original naming act. As noted above, Kripke does not explicitly propose a *theory* of reference. However, others (e.g., Michael Devitt) have attempted to forge a causal theory of reference based on Kripke's picture. According to Devitt:

> The central idea of a causal theory of names is that our present uses of a name, say "Aristotle", designate the famous Greek philosoher Aristotle, *not* in virtue of the various things we (rightly) believe true of him, but in virtue of a causal network stretching back from our uses to the first uses of the name to designate Aristotle. It is in this way that our present uses of the name "borrow their reference" from earlier uses. It is this social mechanism that enables us all to designate the same thing by a name. (*Designation*, p. 25)

This simple statement of a causal account indicates what Devitt takes to be the basic elements of the account. Reference, or designation, is explained in terms of *d-chains* (short for "designating chains"). There are three types of links in a d-chain: (1) groundings, which link the chain to an object, (2) abilities to designate, and (3) communication situations in which abilities are passed on or reinforced (i.e., reference borrowing).

In a grounding, Devitt tells us, a person perceives an object (preferably face to face), correctly believing it to be an object of a certain very general category. The grounding consists in the person coming to have "grounding thoughts" about that object as a result of the act of perceiving the object. A grounding thought about an object, according to Devitt, "includes a mental representation" of that object brought about by an act of perception. The thought is one which a speaker would express using a demonstrative from that language. To use one of Devitt's examples: "Consider the case of our late cat. We acquired her as a kitten. My wife said, "Let's call her "Nana" after Zola's courtesan." I agreed. Thus Nana was named" (ibid, p. 26). In this instance, Devitt perceived that cat and correctly believed it to be a cat. Furthermore, it was paramount that Devitt saw it as a member of the very general category that contains cats. Having perceived it, Devitt was causally affected by it. As a result of seeing the object, and hence being causally affected by it, Devitt came to have "grounding thoughts" about it (i.e., he came to have a mental representation of the object). The name, having been grounded, can now be used by speakers to refer to the object because a causal link has been established between the initial use of the name and the object, and a causal link can be established between later uses of the name and the initial use. For instance, having named the cat "Nana", Devitt could then exercise his new ability to refer to Nana by saying, "Nana is hungry." He could speak to his friends about Nana, thus enabling them, in turn to refer to Nana. These friends (and their uses of "Nana") are causally linked to Nana by perceiving (hearing) Devitt's utterances in which reference to Nana is made. Since to

perceive is to be causally affected, they are now causally linked in a sense to Nana. These friends now have the ability to refer to Nana *because* of this causal linkage.

This view of reference – and, again, I want to expand this to meaning broadly – is, I hope, clearly consistent with, if not presumed by, a standard originalist view of judicial interpretation. Linguistic meaning is established in some sort of baptismal event; for statutory language this would be the drafting and ratification of the statute. The semantic meaning of the language in the statute is, at least in one sense, independent of the speaker meaning(s) of those who framed the statute. That is, the text of the statute means what it means; the meaning is not necessarily identical with the intended meaning of any of the framers. Again, as Whittington notes, the primary source of understandings – here read "meanings" – is the text itself, along with secondary sources for supplementary information about what the text means. Any and all future interpretations and applications of the statute must ultimately connect back up with the original meanings and understandings found expressed in that text (and secondary sources).

4. Pragmatist concerns

An alternative view of language, and, so, an alternative view of judicial interpretation, is present in a pragmatist orientation toward meaning and understanding. Not only is this an alternative view, but also, I think, it is a better view; however, that argument is not the focus here. Further, I say "a" not "the" pragmatist orientation because there is a spectrum of claims and versions of pragmatist conceptions of meaning and understanding. Peirce's is more semiotically-based than is, say, James' or Dewey's; Putnam's is more congenial toward causal components than is Rorty's. For the present purposes, I will take aspects of John Dewey's views about language and meaning as the pragmatist exemplar.

Late in his life, Dewey remarked that, "We take names always as namings: as living behaviors in an evolving world of men and things. Thus taken, the poorest and

feeblest name has its place in living and its work to do, whether we can today trace backward or forecast ahead its capabilities; and the best and strongest name gains nowhere over us completed dominance" (*John Dewey: Collected Works; Late Works*: 16.7). This quotation points to a number of features not only of Dewey's view of names, but of his view of language in general. First, by claiming that names are namings, it points to his insistence that "things" be understood as processes, especially when those "things" (such as language) are human creations and artifacts. Second, as living behaviors they are organic reactions to the world, they are part of our engagements as agents in the world. Third, names, language, behaviors, all have "work to do." They are the result of, and also a means, of our inquiry (which is never disinterested) and purposive agency. Fourth, names have capabilities. They are, as for Dewey all language is, tools. We use them in the context of our purposive conduct. And, again, this is not just about names, but also about language and meaning broadly speaking.

These four features highlight Dewey's overall understanding of language, which, in *Knowing and the Known* (1949), he defines as: "Language: To be taken as behavior of men (with extensions such as the progress of factual inquiry may show to be advisable into the behaviors of other organisms). Not to be viewed as composed of word-bodies apart from word-meanings, nor as word-meanings apart from word-embodiment. As behavior, it is a region of knowings. Its terminological status with respect to symbolings or other expressive behaviors of men is open for future determinations" (ibid.16.266). As a number of Dewey scholars have noted, Dewey's conception of language is grasped only in the context of his theory of inquiry and the naturalistic, evolutionary stance that he takes as the starting point for all inquiry.

Besides being a process, language, for Dewey, is also an organic reaction to the world. It is worth quoting Dewey at length on this point. From *Experience and Nature* he claims:

> Language is a natural function of human association; and its consequences react upon other events, physical and human, giving them meaning or significance. Events that are objects or significant exist in a context where they acquire new ways of operation and new properties. Words are spoken of as coins and money.

> Now gold, silver, and instrumentalities of credit are first of all, prior to being money, physical things with their own immediate and final qualities. But as money, they are substitutes, representations, and surrogates, which embody relationships…Language is similarly not a mere agency for economizing energy in the interaction of human beings. It is a release and amplification of energies that enter into it, conferring upon them the added quality of meaning…Gestures and cries are not primarily expressive and communicative. They are modes of organic behavior as much as are locomotion, seizing and crunching. Language, signs and significance, come into existence not by intent and mind but by over-flow, as by-products, in gestures and sound. The story of language is the story of the *use* made of these occurrences; a use that is eventual as well as eventful…The heart of language is not "expression" of something antecedent, much less the expression of antecedent thought. It is communication; the establishment of cooperation in an activity in which there are partners, and in which the activity of each is modified and regulated by partnership. (ibid., 1.138-141)

In terms of language having "work to do," Dewey is explicit about this when he speaks of naming: "Naming does things. It states…Naming selects, discriminates, identifies, locates, orders, arranges, systematizes. Such activities as these are attributed to 'thought' by older forms of expression, but they are much more properly attributed to language when language is seen as the living behavior of men" (ibid. 16.134). (This view of naming, and of language generally, is certainly reminiscent of (though it predates) Wittgenstein's notion of language games as well as of the speech-act views of Austin and Searle.)

The fourth feature of language noted above, that of language as a tool, is ubiquitous throughout Dewey's writings. As early as 1897 (*Early Works*, 5.73) and as late as 1949 (*Late Works*, 16.134), he describes language as a tool. As a tool, language is purposeful; it is used to accomplish something. In addition, like tools, language has physical features that are separable from their use in the purposive behavior of the tool-user.

Dewey's emphases, then, when focusing on language, are varied. One emphasis is on the nascence of language. As his remarks about gestures and cries noted above reveal, he takes language to be one of many organic behaviors that emerged out of our interactions with our natural and social environments. In his 1922 *Human Nature and Conduct*, he reiterates this position: "Men did not intend language; they did not have social objects consciously in view when they began to talk, nor did they have grammatical and phonetic principles before them by which to regulate their efforts at communication. These things came after the fact and because of it. Language grew out of unintelligent babblings, instinctive motions called gestures, and the pressure of circumstances. But nevertheless language once called into existence is language and operates as language. It operates not to perpetuate the forces which produced it but to modify and redirect them" (*Middle Works*, 14.56).

Besides pointing to the nascence of language, Dewey, as already noted, emphasizes the sociality of language, both in its genesis and in its functions, especially its communicative function. Both these emphases are captured by his characterization of language as a behavior in "the region of knowings," and this is why commentators have insisted that his understanding of language be placed in the context of his theory of inquiry.

Another emphasis of Dewey is on the publicity of language, indicated in his definition mentioned above as having a terminological status "open for future determination." This points to publicity in two respects. First, "terminological status" refers to its terminal status, that is what, say, a name will ultimately mean or refer to. Second, "terminological status" refers to a word's status as a linguistic term, say, as a name. In both senses, what Dewey is getting at is that what counts as being a linguistic term and what is it's meaning or reference is a matter of future determination, i.e., by its public, social functioning in the interactive discourse of language users. It is not a matter of simply what a single person means "in his head" so to speak, nor is it a matter of simply what the given semantic content or role that it has had in the past. This, I take it, is a crucial distinction between Dewey's view of language, indeed of a pragmatist view in general, and the causal view of language outlined in the previous section.

Given this brief (and incomplete) outline of Dewey's remarks, an overall pragmatist perspective on language, meaning, and interpretation emerges. Meaning is future-oriented, although connected to past and present interpretations and understandings; meaning is a process, not (only) a product; meaning is a matter of social negotiation; meaning is a triadic relation involving agents, intersubjective understandings, and also an external world; the "lived nature" of language points to interpretations and understandings fitting into working categories, not simply onto a given set of states of affairs; language and linguistic meaning are forms of coping with the world as well as disclosing the world. While there are points of overlap between the causal view of language noted earlier and this pragmatist view of language, there are also obvious and difficult-to-reconcile differences between them.

5. Mistrial

What, then, about originalism and its relationship to these different conceptions of language, meaning, and appropriate judicial interpretation? Up to this point, I have remarked that originalism seems to share a view of language, meaning, and interpretation that is closely aligned with the causal view. In addition, I have suggested that a pragmatist view is different than (at least, predominantly different than) a causal view. It would seem to follow that originalism would be, if not outright inconsistent with this pragmatist view, then at least difficult to reconcile with it. And, indeed, originalists take that stance. For instance, Keith Whittington has written critically of what he sees as the pragmatism of Richard Posner. As part of his critical claims that pragmatism incites judicial activism, by seeing the practice of the judiciary as "good public policymakers," Wittington cites the following passage from Posner's essay, "What Has Pragmatism to Offer Law?":

> The first is a distrust of metaphysical entities ("reality," "truth," "nature," etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the

> difference they make…The third is an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to "objective," "impersonal" criteria.

For Whittington, and originalists generally, this view advocates a role and function for the judiciary that is simply inappropriate; it makes them lawmakers, not law-interpreters. It fosters a view of the judiciary as being unconstrained by statutory language or even by judicial precedent, because judicial rulings are not tethered or moored by them.

This apparent antagonism between originalism and pragmatism is also borne out by the claims of pragmatist-oriented judges, such as Oliver Wendell Holmes. In his well-known essay, "The Path of Law," Holmes explicitly spells out his "bad man" theory of law, noting that legal duties and rights are nothing but predictions about what will happen given certain behaviors. He refers to law as "systemized prediction," and famously remarked: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict." It is not the language of a statute that matters; it is actual judicial rulings. For originalists, this focus and emphasis on actual judicial practice and on making a difference simply is inappropriate judicial activism. For originalists, even if a statute is misbegotten or infelicitous, it is not the role of the judiciary to correct it or change it or ignore it. That is the role of the legislature. Well-meaning judges are simply out of line when and if they go beyond interpreting and ruling on the basis of what was understood by the framers of the statute. As Marx said (and, yes, it was Karl Marx), the road to hell is paved with good intentions.

Now, in spite of the apparent antagonism between originalism and pragmatism, I want to claim that they are not necessarily inconsistent. I believe this is true even at the level of focusing on conceptions of language generally and not merely legal interpretations and understandings. First, from the originalist angle, as Whittington noted, appropriate judicial interpretations are really about understandings. This points to the relational nature of language, meaning, and legal interpretation. It is not about private or subjective, or even intersubjective, intent, but rather about social, communal understanding. Second, as already noted several times, judicial interpretation is not

merely any interpretation of some linguistic event, but is interpretation within a structured context, including concerns about predictability and future action. As an analogy, in the context, say, of a game of baseball, the umpire ought not interpret particular actions (say, a given pitch or attempted tag of a base runner) on the basis of what he or she thinks would be a good outcome. The umpire should be constrained by the rules of the game as well as by the facts of the occasion. For instance, there was the infamous Steve Bartman incident, which occurred during a palyoff game between the Chicago Cubs and the Florida Marlins in 2003. In the eighth inningof Game 6 of the National League championship series, with Chicago ahead 3–0 and holding a three-games-to-two lead in the best of seven series, several spectators attempted to catch a foul ball off the bat of Marlins' second baseman Luis Castillo. One of the fans, Steve Bartman, reached for the ball, deflecting it and disrupting a potential catch by Cubs outfielder Moisés Alou. If Alou had caught the ball, it would have been the second out in the inning, and the Cubs would have been just four outs away from winning the National League pennant. Instead, the Cubs ended up surrendering eight runs in the inning, giving up the lead. They went on to lose the game. When they were eliminated in the seventh game the next day, the "Steve Bartman incident" was seen as the turning point of the series. While (at least for Cubs fans) this was an unhappy moment, the umpire was appropriately constrained by the rules of the game, including the explicit language of those rules, in making a ruling about interference of play. Being constrained by the "legal" language would not be, for originalists, necessarily inconsistent with desiring coherence and predictability for future behaviors or understandings. Indeed, in the Steve Bartman incident, while there was a dramatic response directed toward Steve Bartman (including death threats), there was no such response that condemned the umpire or the ruling by him. His interpretation and ruling were taken to be appropriate, while Steve Bartman's action were not. The point, again, is that for originalists, judicial interpretation must be seen not only based on the original understandings of the statute – and, perhaps, the contexts and conditions under which it was drafted and ratified – but also on the fact that judicial interpretation is housed within a broader social context of the role of the judicial branch of government vis-à-vis other branches of government and their appropriate roles.

Besides some thawing of the apparent antagonism between originalism and pragmatism that might come from the direction of originalism, there are also components of pragmatist interpretation that also speak to a philosophical détente. For example, William James, often taken as one of the pragmatists least constrained by objective facts (for instance, with his remarks on truth as being only the expedient in the way of our thinking or a good consequences as supposedly sufficient for acceptable beliefs), insisted on "older truths" as a basic component of the expedience and justifiability of a belief. AS Hilary Putnam noted in his *The Threefold Cord*:

> James wrote that he never denied that our thoughts have to fit reality to count as true, as he was over and over again accused of doing. In [a] letter he employs the example of someone choosing how to describe some beans that have been cast on a table. The beans can be described in an almost endless variety of ways depending on the interests of the describer, and each of the right descriptions will *fit* the beans-minus-the-describer and yet also reflect the interests of the describer. And James asks, Why should not any such description be called true? James insists that there is no such thing as a description that reflects no particular interest at all. And he further insists that the descriptions we give when our interests are not theoretical or explanatory can be just as *true* as the ones we give when our interests are "intellectual." "And for this," James wrote, "we are accused of denying the beans, or denying being in any way constrained by them. It's too silly!" (p. 5)

Another contemporary pragmatist, Karl-Otto Apel, has also insisted that meaning has three ineliminable and irreducible components: subjective intention, linguistic convention, and reference to things. As he summarized his conception in his 1981 essay, "Intentions, Conventions, and Reference to Things: Meaning in Hermeneutics and the Analytic Philosophy of Language,":

> [O]ne may only come to the conclusion that the key notions of *subjective intention*, *linguistic convention* and *reference to things* (in a broad sense) are of

> equal importance for the understanding of meaning.They complement each other and restrict each other as regulative principles of inquiry within the context of the so-called hermeneutic circle of meaning-disclosure. For, in order to initiate the hermeneutic enterprise of understanding and explicating the meaning of utterances or of written texts, it is possible, in principle, to start out from each angle, so to speak, if a certain preliminary understanding of the language can be taken for granted. But it seems equally necessary in this enterprise to oscillate between the three viewpoints and regulative principles, in order to correct and deepen one's meaning-conjectures.

Quite simply, a pragmatist view of language, meaning, and judicial interpretation does not ignore, and is certainly not inconsistent with, meaning and understandings that are installed and instilled at the drafting and ratification of a statute. A pragmatist view of judicial interpretation could accommodate and even insist upon original understandings as sacrosanct, if that were accepted in contemporary judicial judgment and carried with it acceptable consequences.

There is nothing inherently and necessarily inconsistent between originalism and pragmatism. That said, however, I am not arguing for originalism or even for endorsing originalism. Originalism itself is a means toward other ends and those other ends are not neutral, but more often than not, part of a political philosophy and set of values, usually (though not necessarily) associated with conservative agendas. The goals of consistency and also plasticity that are the desiderata of judicial interpretation are, I think, better attained by a pragmatist orientation of both language and of law than by other orientations, but making the case for that is a matter for another day.