Original Intent, Judicial Subjectivism, and the Establishment Clause: Implications for Educational Leaders

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Abstract

The purpose of this article is to 1) examine the interpretive method applied to the United States Constitution referred of as "Original Intent" and the degree, if any, to which it is superior in objectivity than other methods, 2) discuss whether the application of the interpretive method would have an effect preferred by conservative or liberals particularly regarding the Establishment Clause and the role of religion in the public schools, and 3) consider some implication for leaders in the education. The article will rely on a review the literature regarding constitutional interpretive philosophy and church-state related issues as well as analyses of historical documents and Supreme Court opinions. It is position of this article that original intent possesses its own brand of subjectivity, thus making it no more superior than other interpretive methods in that regard. Original intent furthermore is likely to have an effect that favors conservatives who wish to return religion back to the public schools. Educational leaders, regardless of their political affiliation, are called upon to be engaged in political activism, especially in the election or nomination process of Justices.

Introduction

Educational leaders today are acutely aware of the array of significant relationships and inter-relational dynamics that directly and indirectly impact the educational enterprise. These significant relationships exist among a variety of individuals, institutions, and organizations at the federal, state, and local level. Significant relationships of import to education are often accompanied by inter-relational dynamics inclusive of diverse perspectives and interests are energized by agendas to compete and collaborate.

Educational leaders today are also cognizant of the need to keep abreast of the educational developments under consideration before state and federal legislatures and the need to assess the possible implication of these developments for educational leaders, especially in light of the fact that state and federal legislatures and other major mechanisms of governance possess the power

to drastically impact the educational enterprise and as a consequence personal and professional lives. The power these governing bodies have made them high profile "watch-points" for educational development.

In recent years, state and, perhaps more importantly, federal courts have become an increasingly significant watch-point. Many disputed enactments of state legislatures have been challenged in state and federal courts, some of which have reach the United States Supreme Court. Educational leaders generally have either followed the practice of watching legal disputes work their way through the court system or have relied on other reliable sources to explain court opinions and are their implications.

The substance of court opinions and an analysis of the implication of them is unquestionably an important part of the "staying on top" of developments in the state and federal judiciary. An equally important part of court-watching, and one often overlooked, is the identification of the interpretive jurisprudence of justices, meaning their beliefs and presuppositions about constitutional interpretation that under gird if not altogether govern the practical outcome of opinions rendered. Educational leaders would be well served by fully understanding not only the nature of the interpretive method employed by members of a court, but also by an understanding of the political and religious implications of employing particular interpretive methods such as stare decisis, moral philosophy, plain language, structural analysis, neutral principles, and original intent.

The task of constitutional interpretation, regardless of the interpretive method used, will inevitably contain elements of subjectivity deemed impermissible in the pursuit of justice. Justices cannot escape the subjectivism inherent in task of applying methods, principles, and philosophies of constitutional interpretation or the subjectivism engendered through their early

years if socialization and continual socialization thereafter. It is incumbent upon educational leaders to be aware of the subjectivism of interpretative methods employed as well as misleading portrayals of the superiority of one method over another. Portrayals can influence perceptions and incomplete portrayals of can lead to an inaccurate understanding of the interpretive methods themselves.

The interpretive method of original intent offers such a misleading portrayal. Original intent has been portrayed by members of the judiciary as objective and even superior to alternative methods of constitutional interpretation. Politicians have presented the employment of the interpretive method as a means of moving the country in the "right" direction. These portrayals of original intent are somewhat skew and if not counter-balanced by other portrayals could led to an improper understanding of the nature of original intent and the political implications of its employment for educational law, policy, and practice.

In this article, I intend to counter-balance an inaccurate portrayal of original intent by pointing out its subjective nature and I intend to use the Establishment Clause as exemplary of how this subjectivity undermines claims that original intent is superior in objectivity and stability to other interpretive methods. I argue that the task of ascertaining the original intent of the Establishment Clause involves a process in which justices engage in "judicial subjectivism," meaning, an unprincipled selection and assemblage of historical documents from which versions of original intent have been derived and the impermissible judicial discretion of associating a defective version of original intent, one based upon an interpretation of a defective assemblage of historical document, with constitutional language.

As a result of this methodological-discretionary defect on the part of justices, the *authentic meaning* of the Establishment Clause, I argue, cannot be ascertained with clarity sufficient

enough to merit legal authority and without the needed legal authority there can be no legitimate application of original intent to modern legal disputes. I also contend, *in arguendo,* that even if sufficient clarity of the farmer's intent could be divined by utilizing some appropriate methodology, the normative meaning determined would still be limited in its applicability to modern legal disputes by virtue of an insurmountable hermeneutic problem.

Finally, I suggest that educational leaders be well informed about the nature and effect of the subjectivity of all interpretive methods and admonish that they bring a degree of scrutiny if not constructive skepticism to claims of superiority of original intent over other methods of interpretation. I suggest that a major "check and balance" to the effect of subjective elements of all interpretive methods on education law and policy rests in the political activism of informed educational leaders. I encourage educational leaders to become particularly politically active regarding the election or appointment of justices.

The Nature, Perception, and Popularity of Original Intent

Original intent, generally, has been referred to as a method of constitutional interpretation that views the constitutional text as a written instrument containing the expressed state of mind of its drafters and ratifiers. Original intent represents a two-fold construct, one substance-oriented, and the other function-oriented. Regarding substance, the term has been most commonly used to refer to the original understanding the framers of the United States Constitution intended constitutional language to embody. Regarding function, the term encompasses a process involving a judicial determination of the most likely substantive meaning or meanings of constitutional language and a reliance upon such meaning in the resolved of modern legal disputes.

A distinction however could be made perhaps between original intent and what I refer to as the *authentic meaning* of constitutional language. I use the term to refer to a framer-derived, as opposed to justice-derived, meaning of constitutional language. Contrary to claims of having ascertained the "original" or true intent of constitutional language, the inevitable subjectivisms brought to the interpretive task render the *authentic meaning* unascertainable.

Original intent, absent of the a*uthentic meaning*, is fundamentally a justice-derived theoretical abstraction of human phenomena. Humans, not histories or texts, have intent. Justices, using assemblages of historical documents, create theories about the framers intent based upon static historical documents, the use of which at best provides a less than adequate understanding of the phenomenological aspect of the human intent and its embodiment in constitutional language.

Justices nonetheless who employ original intent as an interpretive method presume that 1) the framers intended constitutional language such as the Establishment Clause of the First Amendment to have a particular meaning, 2) the meaning intended by relevant individual and/or collective mental states are discoverable through linguistic and historical analysis, 3) intended meaning, once ascertained, should be relied upon in the resolve of modern legal disputes, and 4) in the absence of the actual mental states of the framers that have been identified, principles at a level of abstraction consistent with their mental state should be substituted for what the framers did not or could not have intended.

Perceptions of Original Intent by Originalists

Originalists, nonetheless, even those not totally satisfied with the method, generally view original intent as a viable interpretive method having fixed meanings, principles, and values that

provide stability of application to originalistic jurisprudence. They have characterized the meaning that the framers intended the language to have as "fixed," “stable” (Scalia, 1986) "objective," "fair," (BeVier, 289-290) and conducive to judicial restraint (Bork, 1990). Original intent has been presented as the "law" of the Constitution and when compared to its alternatives considered as "the lesser evil."(Scalia, 1986)

Justice Antonin Scalia asserted that the purpose of constitutional guarantees is precisely to prevent the law from reflecting certain changes in original values that the society adopting the constitution thought fundamentally undesirable. He also argued that the constitution has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. It is the Court's responsibility, he contended, to find it (1986).

Chief Justice William Rehnquist, an originalist, also viewed the constitutional meaning as being fixed and unchanging. He pointed out that the Bill of Rights has erected protections for specified individual rights against actions of the federal government. According to Rehnquist, a mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment should not change the meaning of the Constitution (1976).

Original intent has also been viewed as an interpretive method of integrity. Lillian R. BeVier argued that original intent demonstrates honesty and candor in that it adheres to what the Founders had decided the law should be, rather than the irredeemable hypocrisy and dishonesty of many non-originalist who deliberately mask their real agenda. For BeVier, original intent also possesses the virtue of objectivity and fairness. Original intent requires an adherence to criteria external to judges who apply them and thus fairly makes these criteria accessible to all litigants. The criteria of original intent constrain all the participants in the game-including the referees

(BeVier, 1996). Original intent, thus, is considered legitimate because it is deemed a method of integrity.

For proponents of original intent, the interpretive method has a judicial restraining component. Robert Bork asserted that the interpretation of the Constitution by applying the method of the original understanding is the only way to preserve the Constitution, the Separation of Powers, and the liberty of the people. Without it, Bork contended that not only would the Bill of Rights be pared, but judges would then be allowed to judge based on their own desires. For Bork, judges are not a dictatorial oligarchy, but guardians of our liberties. By this he meant liberties prescribed to those to whom they are granted under the doctrine of original understanding (1990).

Justice Scalia argued that original intent establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself. For this reason, original intent is preferable over non-original intent that would lead to extreme results allowing judges to make law what they want it to be. In this sense, original intent is superior to interpretive method without a mechanism to restrain judges (1989).

The perception that original intent is superior to other interpretive methods because the meaning derived is fixed, stable, objective, and fair misrepresents the judicial subjectivism inherent in the pursuit of ascertaining original intent. What the educational leader should keep in mind is the fact that the so claimed fixed, stable, objective, and fair versions of original intent are the result of an unprincipled selection and assemblage of historical documents from which versions of original intent have been derived and the unjustified judicial choice to associate an interpretation of these assemblages as the “original intent” of constitutional language. It is this

judicial subjectivism that undermines claims of the superiority of original intent over other alternative interpretive approaches.

Political and Religious Significance of Original Intent

Original intent has had substantive and symbolic significance for religious and political conservatives in the United States. The employment of original intent as a method of adjudicating disputes regarding the Establishment Clause is particularly popular among conservative Protestant Americans; for such an employment could be the legal basis for the return of Protestant Christian practices in the public schools. A return of such practices to public schools of this country would signify a reclaiming of our nation back for God, the snatching of public schools from the clutches of Christianity's "archenemy," secular humanism, (Estep, 1990) and the establishment of biblical morality in the government and the nation (Carter, 1993). The mere prospect of the employment of original intent has particular political appeal for the religious and political constituency that believes that the United States is a Christian nation being led astray by the liberal legal and social culture.

The perceived need to return America back to its religious heritage arose partly because of the removal of various Christian forms of religious expression from public schools that began over four decades ago (LaHay, 1982). The Christian religion has been a part of the common schools from its beginnings. As late as 1955, seventy-seven percent of the public schools in the United States had some form of Judeo-Christian expression (Conway, 1956). The practice of these forms of religious expression came to a halt, at least legally, soon thereafter.

Since the 1960s, the work and legacy of the Warren Court resulted in the removal of practices such as reciting the Lord's Prayer, engaging in non-denominational prayer, and

standing for moments of silence. Other Constitutional bans such as the teaching of creationism and creation-science, and the posting of the Ten Commandments became a signal to Christian conservatives that the Court was willing to permit, if not encourage, the "religion" of secular humanism).

In the early and mid-1990s, a large number of Americans favored a return of religion to the public schools. In one poll, seventy-eight percent surveyed said that voluntary Bible classes should be taught on school grounds. Concerning prayer in schools, seventy-eight percent favored the idea. Almost ninety percent, moreover, favored a moment of silence (Gibbs, 1991).

The value of religion in the public schools and Public Square has not gone unnoticed by politicians. Conservative congressional and presidential candidates have capitalized on this religious fervor by making promises to promote traditional religious values and expression in education and society at large (Tumulty, 1994). In November of 1994, due in part to the efforts of organizations like the Christian Coalition, Heritage Foundation, Christian Legal Society, American Center of Law and Justice, and the Federalist Society, the Republican Party gained control of the U.S. House and Senate.

Republican presidential candidates for the 1996 presidency, Alan Keyes and Pat Buchanan campaigned on themes of bringing God back into our society. Even during the Presidential Debate of 2000 between Vice-President, Albert Gore and then Texas Governor, George W. Bush pledged, if given the opportunity, to pack the U.S. Supreme Court with strict constructivists, those who adhere to the doctrine of original intent. The July 1, 2005 resignation of often “swing-vote” Supreme Court Justice Sandra Day O’Connor and the September 3rd death of Chief Justice William Rehnquist, President Bush has provided with an opportunity to nominate conservative John G. Robert to the Supreme Court as Chief Justice.

Fulfilling promises made to religious and political conservatives however is likely to effect conservative activism by a Supreme Court, an activism that uses a method of constitutional interpretation, the results of which would be conducive to fulfilling these promised conservative ends. Original intent is an interpretive method conducive to achieving conservative ends. Why would a President seek to appoint Justices according to the method of interpretation they would likely employ?

Original Intent and Favorable Outcomes

There seems to be a relationship between interpretive methods applied to the Establishment Clause and the favorable outcomes produced. For instance, the application of original intent to the Establishment Clause has yielded generally judicial outcomes that favored political conservatives. Alternatives to original intent such as the, Political Philosophy, Textualism, Moral Philosophy, Stare Decisis, and Neutral Principles generally have been applied to the Establishment Clause, at least during the Warren Court era, to further the judicial activism favoring political liberals. Proponents and critics of these alternatives interpretive methods, as will be seen in the next discussion, have been quite candid about subjectivism inherent therein.

Suffice it to say here that the benefit of favorable outcomes resultant from the selection of any of these interpretive methods, as well as original intent, necessitates a majority of the members of the court in order to give effect to the politically favorable outcome of the method. Educational leaders could perhaps play an indirect role in affecting the nature of those outcomes by keeping abreast of vacancies on the state and federal courts, acquiring information regarding

the interpretive jurisprudence of candidates, and bringing political activism to bear on the appointment or selection process, thereby impacting the jurisprudential stance of the majority.

Alternative Interpretive Methods to Original Intent

The methods of interpreting Constitutional language employed by the Supreme Court fall within two major philosophical categories. The first, the interpretivist philosophy, assumes the premise that constitutional interpretations should rely on constitutional language, values, principles, history, and the original intent of its framers and/or the original understandings of the framers and ratifiers of the Constitution. Originalists would then be considered interpretivists.

The second, the non-interpretivist philosophy, assumes the premise that constitutional interpretation should be guided by values and processes *outside* the "four corners" of the Constitutional text, such as, inferences drawn for the structure and design of government or by a reliance upon moral or political philosophy, natural law, neutral principles, or the doctrine of stare decisis. Both interpretivist and non-interpretivist methods of interpretations have been applied to cases evoking the Establishment Clause. What follows is a description of alternative interpretive methods deemed inferior to original intent.

Political Philosophy or Structural Analysis

One non-interpretivist method has been referred to as the political philosophy method or the structural analysis method. Some non-interpretivist interpreters look to the nature of the Constitution's design and structure and from it infer the purpose of the Constitution. For instance, inferences drawn from the structure of the unamended Constitution has led to conclusions like the process-based theory articulated by Ely Hart. Hart asserted that the Constitution is

overwhelmingly concerned with process and structure, regardless of the obvious existence of the substantive issues of slavery and religion. He contended that the selection and accommodations of substantive values should be left to the political process (Hart, 1980).

The process-based approach to the Constitution is not without its critics; Laurence Tribe is one of them. Laurence Tribe questioned the legitimacy of the process-based approach. He argued that the Constitution evinces a substantive commitment to religious liberty and its prohibition of religious establishments, abolition of slavery, institutions of private properly, and contractual expectations. These substantive issues, for Tribe, cannot be overlooked (Tribe, 1980).

The structural analysis approach has also made inferences from the amended Constitution. Inferences drawn from the addition of the Bill of Rights and the Civil Rights amendments has led to the rights-based theory of constitutional interpretation. Ronald Dworkin, a rights-based theorist, contended that the Constitution is primarily concerned with the identification and preservation of specific substantive rights, explicitly and implicitly embedded in the Constitution. He argued that the Constitution, especially the Bill of Rights, was designed to protect individual citizen and groups against certain decisions that a majority of citizens might want to make, even when the majority acts in what it takes to be the general canon interest (Dworkin, 1978).

Between the process-based and rights-based theories are other "dualist" and critical views about the nature of the Constitution. These theories are also derived from inferences from the structure of the Constitution. These theories claim that 1) the Constitution is concerned with creating and maintaining a deliberative democracy, 2) that it began as a racist and sexist document, but evolved into a document that respected individual freedoms and human rights, and 3) that it is concerned with liberalism and progressivism.

For dualists, the Constitution is democratic first and rights-protecting second. Dualists believe that the Court furthers the cause of democracy when it preserves constitutional rights against the erosion by political elites in government. The Constitution, for dualists, is concerned with protecting the rights of the majority against elitist interests of those who tended, in an unconstitutional manner, to usurp the collective will of the majority.

Drawing inferences from the structure of the Constitution has led to critical views about the nature of the Constitution. These critical views have characterized the document as racist and sexist, whose redeeming value rests in its malleability in a changing society. Justice Thurgood Marshall viewed the document in its beginning form as racist and sexist (1987). He asserted that even the government that the framers devised was defective from the start and that the Constitution required several amendments, a civil war, and momentous social transformation to attain, in modern times, a system of Constitutional government that had respect for individual freedoms and human rights. The Constitution according to Marshall, should not be celebrated because of its status at its conception, but because it, with its Bill of Rights and other amendments, and the manner in which the Supreme Court construes its provisions, has become a "living" document.

For critic Robin West, the Constitution apparently leaves untouched the very conditions of subordination, oppression, and coercion, which relegate some "lesser lives" to drudgery, fear, and self-hatred. The Constitution thereby fails to prohibit subordinating abuses of private power. In the name of guaranteeing constitutional protection of individual freedom, it also aggressively protects the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination (West, 1992).

What is important for the educational leader to note is the fact that justices regardless of whether they adhere either to the process-based, right-based, and dualist approaches of constitutional interpretation bring to the interpretive task a predisposition reflective of their view of the nature of the Constitution and what they have determined it was designed to do. They then engage in the interpretive task through a process, rights, or dualist lens, the outcome of which could have implications for the law and policies affecting educational leaders.

The non-interpretivist approaches are used less often than the interpretivist or language-oriented methods of interpretation. Among scholarly thought are views that assert that constitutional meaning should be determined by relying on the text but without consideration of the original intent of the framers. These alternative interpretive methods have been referred to as textualism, stare decisis, neutral principles, and/or moral philosophy.

Textualism or Verbal Analysis

An acknowledged, but minimally relied upon method of interpretation, especially when relied upon solely, is textualism. Members of the Supreme Court and legal scholars, regardless of inferential guidance from the structure of the constitution, find deriving meaning of various provisions of the Constitutional text at the center of the interpretive task. As one might expect, textualists, those who rely on the "plain language," assert that the text is the only step in interpretation, while others claim that it should be combined with other methods of interpretation.

Textualism or the "plain language" method has also been deemed to possess significant constraining measure on constitutional interpretation. For Frederick Schauer, even though language itself does not tell us precisely what goes within the boundaries of language, it does tell

us when we have gone outside. The language of the text, thus, remains the most significant factor in setting the size of the interpretive frame. An interpretation, furthermore, is legitimate only in so far as it purports to interpret some language of the document and in so far as the interpretation is within the boundaries at least suggested by that language (1985).

Legal scholars have pointed out the subjectivism of relying on the interpretive method of textualism. Sanford Levinson criticizes the plain word of the text approach in understanding a written constitution. He argued that the law is, in some meaningful sense, a branch of literature and therefore subject to the same interpretive problems involved in seeking a "truthful" or "correct" interpretation. One of the most prominent of these problems is the tendency of the interpreter to shape the text to serve his own purpose. For Levinson, Supreme Court Justices, whether intellectually dishonest or majestically visionary, present their political vision to which we have been subdued (1982).

Moral Philosophy or Prudential Analysis

The literature on constitutional theory also consists of advocates who contend that moral philosophy should be the guide for Constitutional interpretation. Thomas Grey contended that the text of the constitution and unwritten higher law principles had constitutional status and that the inherent morality of natural law was understood to be those higher law principles.

Grey, in addition to making a distinction between the four-corner interpretive approached (the belief that only the materials contained within the text should be relied upon) and the external source based, non-interpretive approach, criticized the moral philosophy interpretive model. He argued that the inherent morality of natural law could not be reconciled with constitutional doctrine protecting unspecified essentials of fundamental liberties inconsistent

with the morality of natural law. Grey also viewed Equal Protection, 6th, 9th, 14th and 15th Amendment doctrines as developments of the "living" Constitution and thus, unattributable to the framer (1975).

Stare Decisis or Doctrinal Analysis

Constitutional theorists have also subscribed to the postulate that constitutional interpretation should be guided by stare decisis. Henry Paul Monaghan is among those who made this argument. The Supreme Court, according to this doctrine, should look to previously decided cases for guidance in adjudicating future cases. Monaghan argued that stare decisis operates to promote system-wide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society. He also contended that when certain issues are central to our society to have them overruled would likely have the effect of threatening the legitimacy of Judicial Review (1988).

In addition to being a stabilizing force, holding to the principle of stare decisis sent the message to the "reasoning elites' that the Court itself is subject to law and is thus legitimated. This type of legitimation, Monaghan argued, will minimize existing cynicism. Nonetheless, for Monaghan, if the Court is viewed as unbounded by precedent, and the law amounted to no more than what the last Court said, both judicial independence and public confidence will be greatly weakened. (1988)

Neutral Principles or Purposive Analysis

The essential factor of legitimacy of an interpretative method for some legal researchers is the degree to which the method is principled. This meant that judicial process must rest every

step in reaching a judgment on analysis and reason in a manner that allowed a neutrality to transcend the immediate results achieved. Mark Tushnet argued for the application of the "neutral principle" interpretive method of the Constitution. He argued that if neutrality is to serve as meaningful guide, it must be understood not as a standard for the content of principles, but rather as a constraint on the process by which principles as selected are justified and applied. Tushnet further asserted that a theory of neutral principles, in application, required judges to commit to a particular decision for the rest of their career. To do otherwise would make judges vulnerable to criticism alleging that they are incompetent, non-neutral, or creators of craft interpretations (1983).

The alternative interpretive methods discussed above have been deemed inferior to original intent because an impermissible degree of subjectivity brought to the interpretive task by employing methods that have relied either on consideration outside the “four corners” of the text or considerations internal to justices that are evoked by the language of the text or considerations evoked by the language of the text. Reliance on such considerations has led to the perception of these alternative interpretive methods as unstable, unfair, and unreliable.

Subjectivism of Original Intent

The portrayal of original intent as fixed, objective, fair, and reliable deceptively minimizes the subjectivity involved in the ascertainment of original intent, a subjectivity rooted in the unprincipled selection and assemblage of historical documents from which versions of original intent have been derived and the impermissible judicial discretion of associating a defective version of original intent with constitutional language.

The operative methodology from which originalists derive original intent presumes that, not only can a framer or the framers be identified, but that the meaning he or they intended constitutional language to have can be derived from a wide range of historical documents alleged to contain such intent. As before mentioned, Justices, using historical documents, create theories about original intent. Members of the Supreme Court could not, at least in any meaningful way, include every available historical source considered to contain the intent of the framers.

Furthermore, unless it is assumed that anything and everything a framer says is pertinent to a determination of the normative meaning of a particular constitutional provision, such as the Establishment Clause, some mechanism that discriminates between relevant and irrelevant sources is needed in deriving a version of original intent. A mechanism of this nature could also have the effect of producing a "restrained" assemblage of historical documents, one in which the historical documents themselves evince a connection between constitutional language and the process by which the intent of its author(s) is embodied in that language. A restrained assemblage would at least place justice-made versions of original intent on more sound methodological grounds.

Human Intent and Language

As stated earlier, the interpretive method of original intent is fundamentally a theoretical abstraction of human phenomena. Intent is a human function. Texts, however, can convey intended meaning. When they do, two features are usually evident by the text, namely the purposive content generated through deliberative processes and an intended recipient of the purposive content. The purposive content is the emotive essence or the meaning to be conveyed in language resultant from self-deliberative or collaborative processes. The meaning to be

conveyed is generated in light of the recipient of the purposive content. The process of converting the purposive content of the "intender" into language likewise occurs with a particular or perspective "intendee" in purview. The self- or collective-deliberative encounter that generates the purposive content, as will be evident in the following discussion, is generally consistent with the nature of the document that expresses the purposive content.

A diary or autobiography represents the emotive essence of the individual and an objective that purposive content be encoded in language. Diaries and autobiographies generally result from self-deliberations. Private letters and wills may have as their object an individual or group, but like diaries and autobiographies, these documents generally do not require deliberation with anyone other than the intender of the document in order to produce the purposive content. In these documents, the purposive contents are private and the nature of the documents selected to express the intent are personal. While modern diaries and autobiographies may be written in light of market values and intended for consumers as recipients, authors of such documents during the time of the framers generally considered them private and personal.

Contracts are generally agreements between two or more parties that create an obligation to do or not do something. These agreements are enforceable or otherwise recognized by law. Contracts are typically the result of mutual deliberative processes and a meeting the minds. The purposive content and the identification of the intendees are essential to the binding nature of the document.

Statutes are law passed by a legislative body and most often is the product of consensus reached between one or more legislative bodies. The purposive content of statutes is generally referred to as legislative intent and is subject to an intent-altering deliberative process inherent in

the legislative process. Legislative bodies generate the purposive content and encode it into language with those they represent and the public at larger in purview.

The nature the United States Constitution, its construction, and the intent of its provision differ from the documents before mentioned. Its procedural and substantive content is the result of internalization of the national intent by representatives, a deliberative process, and a presentation of the Constitution back to the States for approval and ratification.

The intender, in light of a recipient-even if the recipient is oneself, generates the purposive content of diaries, autobiographies, private letters, wills, contracts, and statutes. The self or collaborative deliberative process generates substance of the intent. When this human intent is directed towards the intendee in purview, it becomes the purposive content that is then embodied in language. The purposive content of these documents is an expression of human intent, given purpose, and expressed in language. A relationship exists between the intender of the purposive content and the intendee in purview. The intended meaning that the intender seeks to convey and the purposive content must be understood within the context of the relationships between the intender and the intendee, a relationship wherein the parties are cognizant of each other as intender and intendee.

Constitutional and Non-Constitutional Intent

If the objective of the interpretive task is to determine the meaning that the framers intended a certain constitutional provision to embody, then what I have referred to as the evidence of "constitutional intent" of a historical document must be present in reaching this objective. Constitutional intent refers to emotive essence, the purposive content, those beliefs, hopes, fears, values, and perspectives on a particular subject directly intended by the framers to be the

embodiment of constitutional language. An essential criterion, then, by which to identify the presence of constitutional intent within a historical document is **evidence within the historical document itself that evinces the mutual cognizance of the relationship between intender and intendee and evidence that connects the purposive content** of the framer to the embodiment of that intent in constitutional language.

Historical documents consisting of "non-constitutional intent" are those that were not directly intended by the framer to be associated with constitutional language despite their associations to constitutional language by justices. They contain no evidence that evinces the mutual cognizance of the relationship between intender and intendee nor connects the purposive content of the framer to the embodiment of that intent in constitutional language. Any selection of historical sources deemed to possess the intent of the framer without inquiry regarding the nature of the historical source selected and its nexus to the purposive content, within the context of the framer's cognizance of the intender-intendee relationship, will likely perpetuate unprincipled assemblages of historical sources and unacceptable versions of original intent.

Subjectivism in Document Selection, Assemblage, and Interpretation

A number of historical documents have been cited in the Supreme Court cases from 1878 to the present as having contained the original intent of the framer or framers. Such documents include references to James Madison's *Memorial and Remonstrance*, his *Letter to the Rev. Jasper Adams* (1832), Patrick Henry's *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784-1785), and *Virginia Bill of Rights (1776).* The Supreme Court has also cited the *Declaration of Independence* (1776), Jefferson's *Notes on the State of Virginia* (1782), the *Virginia Statute of Religious Liberty* (1787), and his famous *Letter to the Dansbury Baptist*

(1802). Other historical documents used included the *Old Deluder Satan Act* (1647), *Mayflower Compact,* the *Northwest Ordinance of 1787,* and *Bill for the Incorporation of the Protestant Episcopal Church* (1786).

The Court has even made references to monarchs from Ferdinand and Isabella to George III, state constitutions and laws, the *Book of Common Prayer*, the ideology of Natural Law, personalities such as Sir Walter Raleigh, George Mason, and Elihu Roots and events such as the Protestant Reformation and the Spanish Inquisition in support of a version of original intent. Almost all of these historical documents, however, contain non-constitutional intent and should be deemed impermissible in ascertaining a version of the original intent of the framers. These documents were written by different intenders, with different intendees in purview, during different time periods, containing different and often unrelated purposive content. It is inconceivable to think that the author of the *Book of Common Prayer* or the *Old Deluder Satan Act* intended those documents to be associated with the Establishment Clause. Even if one could conceive of such, there is no historical evidence within those documents or the deliberative process that generated them that connect the purposive intent contain therein to the Establishment Clause.

To press the point to its most radical end, even Jefferson's famous *Letter to the Dansbury Baptist* (1802), from which came the well celebrated "wall of separation between church and state" metaphor, is not only void of elements of Constitutional Intent, but was written over a decade after the original intent was embodied in constitutional language. It is implausible to think that a framer, at the time of drafting the language, could have had in mind what Jefferson would say some ten years in the future.

While it would be quite permissible for a historian to retroactively reconstruct a normative meaning of the Establishment Clause, a Supreme Court Justice must require historical evidence that connects the *Letter to the Dansbury Baptist* to the intent formation process of the drafter of the language. Had Madison, by some psychic vision, made reference to Jefferson's *Dansbury* letter during the deliberations of the First Congress, such an event would have at least produce historical evidence to connect Jefferson's intent to language. In order to avoid such judicial subjectivism, the metaphor should be used less by Justices in reference to the Establishment Clause and better perhaps, not used at all in the adjudication of Establishment Clause cases.

Moreover, there seems to be a significant legal difference between an assemblage of historical documents to be used as the basis of original intent by an historian and an assemblage to be used as the basis of original intent by a Justice. Historians are free to consider the full scope of available ideas of individuals or to reconstruct a host of events using a number of kinds of historical data such as private letters, diaries, academic records, interviews, and the direct observation of the historian himself or herself. From these resources, the historian could reconstruct trends in thought or offer an intellectual history covering an extended period of time. Furthermore, the conventions of the profession of history grant him or her freedom to merge ideas and events in varying degrees of association, however tentative. It is not uncommon for historians to be granted recognition for the mere suggestion of a new probable historical association, providing that some historical evidence serves as its authority.

Federal Court Justices do not have such luxuries and should not venture to take them. Article III of the United States Constitution is silent regarding which interpretive method should be employed, thus, leaving this selection to common conventions and judicial preferences of individual justices. In the employment of original intent, thus, justices are free to construct any

assemblage of historical documents and derive a version of original intent from an interpretation of the documents contain therein.

Federal Court Justices, however, have not been empowered by the Constitution to take the liberties of historians. Their fundamental task, particularly regarding the Establishment Clause, begins with constitutional language and ends with an interpretation of it. The employment of such impermissible methodological liberties is a discretionary choice on the part of justices that amounts to judicial subjectivism. The employment of a version of original intent resultant from judicial subjectivism, however, is fair game. The silence in Article III regarding employment of particular interpretive methods coupled with the virtually unquestioned value for jurisprudential freedom of justices legally legitimizes judicial subjectivism.

The apparent unprincipled selection and assemblage of historical documents from which versions of original intent have been derived and the unjustified judicial choice to associate an interpretation of these assemblages as the "original intent" of constitutional language is sufficient to undermine claims that original intent is superiority of alternative methods of interpretation by virtue of its objectivity.

Original Intent and The Establishment Clause

Different Versions of the Original Intent of the Establishment Clause

The Establishment Clause of the First Amendment of the United States Constitution states, "Congress shall not make any law respecting an establishment of religion or prohibiting the free exercise thereof." There is another judicial task that occurs between the selection and assemblage of historical documents by justices and the discretionary choice to associate that version to the Establishment Clause.

The interpretive task itself is not what poses the major problem for originalists. The major problem for historians, legal scholars, and particularly Justices of the Court, is sustaining the claim of the stability and objectivity of original intent in the face of multiple interpretations of the Establishment Clause based on many of the same historical documents. The following three versions of original intent have been offered: Protestant Promotionalism, non-preferentialism, and strict separatism, the very presence points to the unreliability of original intent. Even if the framer intended multiple meaning, originalists still face the insurmountable challenge of resolving the conflict between opposing versions and justifying the employment of one as the "true" version. The claim of having ascertained an authentic meaning that is fixed, stable, and thus reliable cannot be maintained. What follows is a presentation of the three major versions of original intent.

Protestant Promotionalism is the view that framers never intended the Establishment Clause to prohibit the federal government from the promotion or the encouragement of the Protestant Christian religion. The framers were conventional Christians and social conservatives who attempted by the First Amendment to allow the federal legislature to express its Christianity promotive purposes in terms of non-sectarian piety.

Proponents of this view attempt to reduce the impact of the prohibition of the Establishment Clause by noting that in 1789, a religious establishment was to promulgate a creed or dogma, to require official asserted doctrine, to collect rates or some tax in support of religion, and to require attendance to worship with assistance of government, not the promotion of Protestant Christianity. The First Amendment, at noted by M.E. Bradford, was designed to ensure that federal action would not prevent worship, the chartering of churches within the states and to make sure that congress would not speak on the subject of religious establishment. Government

promotion of religion in the chaplaincy, national days of prayer, prayer in congress, religion in schools, the evangelization of the "heathen" and general promotion protestant pietism was not barred by the First Amendment (1993).

For Protestant Promotionalists, not only were the framers of the Establishment Clause Christians, but they viewed America a Christian nation founded on the principles of God's Word. The framers, they claim, intended that the Bible and the Christian religion be a part of public life and public schools (Church of the Holy Trinity v. United States, 1892). Protestant Promotionalists also contend that the civil laws of the America were inspired by the Bible and were consistent with the premise that American is a Christian nation (Barton, 1989).

Some Protestant Promotionalists would even support religious judicial activism. Scott C. Idelman asserted that the use of religious values is a legitimate, constructive, and even necessary element of judicial decision-making (1988). Stephen Carter argued that although the religiously devout judges ought to be free to make judicial decisions on the basis of knowledge of religious faith and moral conviction, they must justify them in terms of the received norms of judging (1989).

A second category has been referred to as non-preferentialism. For non-preferentialists, government must be neutral among religion, but not between religion and disbelief (Laycock). The essence of non-preferentialism can be found is in the claim that government should be free to encourage or subsidize religious belief as long as it does so equally. For the non-preferentialist, the First Amendment was intended by its framers to constitutionally forbid the establishment of a national church or religion, or the placing of any one religious sect, denomination, or tradition into a preferred legal status, essentially characteristic of a religious establishment (Cord, 1986).

Adherers to this non-preferentialist position rely upon a number of historical sources of support their position. The resolutions passed by the Maryland, Virginia, New York, North Carolina, and Rhode Island ratifying conventions, the original drafts of Madison's religion amendment, the debate within the first House and Senate, and Madison's final statement on the floor of the first House of Representatives are viewed as support for the "no-preference" interpretation.

The central distinction between the Protestant Promotionalism position and that of the non-preferentialism rests in the degree to which government remains neutral in its relationship to all protestant religions. The former would allow the government to permit a type of Protestant Christian "orthodoxy" it determined needed to be promoted, to the exclusion of the unorthodoxed brand of Christianity or other religions. The latter require neutrality regardless of the nature of the perceived orthodoxy as long as the religion is some brand of Christianity.

A third category of the framers' intent of the Establishment Clause has been referred to as a strict separationism. According to the strict separationist position, the framers regarded freedom of religion as incompatible with a governmental establishment. The struggle for religious liberty and for the disestablishment of religious bodies was a part of the same evolutionary process that culminated in the First Amendment.

According to Leo Pfeffer, the *English Act of Toleration*, the emergence of a multiplicity of sects, the influence of the unchurched, the Great Awakening, deistic rationalism, social contract theory, state revolutions against establishments, and the beliefs of the framers, before, during, and after the constitutional conventions, indicated that the Establishment Clause was intended to mean religious freedom and separation between church and state (1967). According to Leonard Levy, the Constitution erected the wall of separation between church and state (1994). The wall

ensures the government's freedom from religion and the individuals freedom of religion. For Levy, the individual's religious freedom and religion's own destiny cannot flourish without the government's freedom from religion (1994).

Reliance upon many of the same historical sources has yielded at least three versions of original intent. The co-existence of the Protestant Promotionalist, Non-preferentialist, and Strict-separationist versions serve as clear evidence that the authentic meaning in unascertainable and that the original understanding of the Establishment Clause is not fixed or stable enough to merit legal authority. The multiplicity of interpretations of the Establishment Clause employing original intent can be found in the majority, dissenting, and concurring opinions of the landmark Supreme Court case, *Everson v. Board of Education of the Township of Ewing.* (1957)

Everson

The Supreme Court, at times, has centralized the intent of the framers in the resolve of Establishment Clause cases by using it as the primary interpretive tool. The Court centralized original intent in the Supreme Court case *Everson,* a case, the precedence and liberal interpretation of which has significantly affected religious expression in the public schools. At other times, the Court has decentralized the use of the intent of the framers by giving the interpretive method a supplemental role while relying upon other interpretive methods to resolve legal disputes.

From *Reynolds v. United* States (United States Supreme Court) in 1878 to *Everson* in 1947, the Supreme Court has generally tended to adjudicate the substantive issues regarding religion from a posture of limited-government and pro-states rights. In deferring to the states, the Court has regularly affirmed the legitimacy of state statutes and the common law jurisprudence pertaining to contracts, torts, and property or relied on other federal congressional powers to

determine the degree to which states rights were trumped explicitly by the Constitution. When the Court did interpret the Religion Clauses themselves, it employed original intent from the presumption that "this [the United States] is a Christian nation"(Church of the Holy Trinity v. United States) and contended that the framer never intended religious freedoms, especially "pseudo-Christian" religions, to trump civil law (Zorach v. Clauson, 1952).

For the last four decades, however, the Supreme Court has employed an interpretive method of analyzing the Establishment Clause other than original intent. It has employed the doctrinal approach-one based on precedent established in case law. Specifically, the modern court has created analytical formulas such as the Lemon Test, but has articulated discomfort with it. In lieu of the Lemon Test the Court has selected other doctrinal analytical formulas that focus on governmental "endorsement," "coercion," or "neutrality."

Even while interpreting the Establishment Clause using the doctrinal approach, the Court has sporadically infused original intent analysis into its dicta. However unlikely at present, an adoption of the doctrine of original intent would undoubtedly result in significant changes in the current body of law regarding issues concerning religion in the public schools as well as impact other policy decisions for leaders in education. An informed understanding of original intent is therefore of significant import for the educational leader of today.

In *Everson,* the Court reconstructed a version of original intent by its use of a number of historical sources. The Court interpreted them in a manner to bring about a broad interpretation of the Establishment Clause. Secondly, the Court conveyed this broad understanding in doctrinaire language which itself, in future cases, could be construed to provide an even broader interpretation than the historical sources allowed. The *Everson* precedent thus served as a catalyst in the shift from original intent to a doctrinal approach to Establishment Clause cases.

The Court in *Everson*, construed the framers' intent of the Establishment Clause to mean that the Federal government cannot 1) set up a Church, 2) pass laws to aid one or all religions, 3) prefer one religion over another, 4) influence a person to go or not remain away from church, 5) force a person to profess belief or disbelief, 6) punish a person for entertaining or professing belief or disbelief, 7) levy a tax of any amount to support religious activities and institutions, and 8) openly or secretly participate in the affairs of any organization or religious groups.

Both the majority and the minority of the Court referred to a number of historical documents to support their version of original intent. Justice Black for the majority and Justice Jackson and Rutledge in concurring and dissenting opinion relied on a number of historical references. What should be noted about the assemblages of both opinions are not only the similarities of the historical documents selected, but also the different interpretations given to the same historical documents.

The subjective and unprincipled manner in with the Justices selected, interpreted, and constructed a version of original intent may in itself have informed courts of a need to decentralized the use of the framers' intent, use the interpretive method merely as adorning dicta, and employ and alternative interpretive method deem more principled. This is what indeed happened in almost all of the subsequent Establishment Clause cases. The *Everson* case, nonetheless, had a pivotal impact on education law regarding religion in the public schools. Its version of intent gave rise to a broad construction of Establishment Clause language, the likes of which still haunts members of the Court who wish to overturn its legacy.

Hermaneutical Problem

The ascertainment of original intent of the Establishment Clause involves a process in which justices engage in "judicial subjectivism," meaning, an unprincipled selection and assemblage of

historical documents from which versions of original intent have been derived and the impermissible judicial discretion of associating a defective version of original intent with constitutional language. Original intent cannot be ascertained with clarity sufficient enough to merit legal authority and without the needed legal authority there can be no legitimate application of original intent to modern legal disputes. Even if sufficient clarity of the farmer's intent could be divined by utilizing some appropriate methodology, the normative meaning determined would still be limited in its applicability to modern legal disputes by virtue of an insurmountable hermeneutic problem.

Changes in the world and worldviews over time have constituted a hermeneutical problem for originalists. This hermeneutical problem is rooted in an inability to accurately translate, from a text, what was meant *in* one time period to what should be meant *for* a future time period. This irresolvable problem for the originalists lies in the reality that human intent is confined to a world and worldview of what was or could have been humanly intended.

Originalists have attempted to resolve the hermeneutical problem by generating principles at various levels of abstractness and generalities in a way that does not undermine the application of principles themselves. Paul Brest contended that in applying the doctrine of original intent the interpreter-historian's task is three fold: (1) to immerse oneself into the world of the adopters to try to understand constitutional concepts and values from their perspectives; (2) ascertain the adopters' interpretive intent and the intended scope of the provisions in question; and (3) translate the adopters' concepts and intentions into our time and apply them to a situation that the adopters did not foresee (1980).

Brest contended however that strict originalism is unworkable because of the limits in application of constitutional provisions to particular events or transactions with which the

adopter were familiar. He also acknowledged a tendency to project into the future, concepts and attitudes that the adopter would have never envisioned. Brest, on the other hand, argued that moderate original intent theory would allow certain provision to be interpreted consistently with the adopters' general purpose for the provision, as long as, some historical justification could be found. But where such justification is not found, he contended, the application of moderate originalism is illusory and counterproductive.

Breast was right to point out that a strict employment of original intent was unworkable because of the limits in application of constitutional provisions to particular events or transactions with which the adopter were familiar as well as the tendency to project into the future, concepts and attitudes that the adopter would have never envisioned. But his justification for the use of moderate original intent however requires the unacceptable use of interpretive theoretical abstractions of meaning as a substitute for the actual state of mind or the authentic meaning of the framers. Moderate originalism, even if governed by some consistency principle, is still a justice-made creation absent of the authentic meaning of those general purposes. All forms of original intent, strict or moderate, must then be views as illusory and counterproductive.

Framers Understanding of the Use of Their Intent

Even if Originalists somehow solved the problem of the hermeneutical gap, they would still have to consider the relative weight of evidence that suggests that the framers never intended the their “intent” be used as a method of constitutional interpretation. Madison would never have intended that his “intent” to be used as a canon of interpretation of the Establishment Clause. He and his contemporaries expected that the newly constructed language would be construed in the usual textualims of the Blackstonian tradition, meaning, applying the principle of literalism as an approach. When originalists, in an attempt to overcome the hermeneutical, depart from the

human parameters of intent by deriving inapplicable abstract principles and then attempt to apply them in the resolve legal disputes, they create theoretical abstractions of original intent that are inconsistent with the limitations of what could have been humanly intended.

Implications for Educational Leaders

Legislatures and courts at the federal and state levels are focal points for legal action in education. Educational leaders charged with professional responsibilities must keep abreast of the ever-changing macro-politics of federal and state legislatures that might affect the general state of educational affairs. The informed educational leaders must also keep abreast of the work of the judiciary that might affect micro-political systems, educational policy, and their own abilities to fulfill their professional responsibilities. Federal and states legislatures enact numerous laws and federal and state courts render hundreds of opinions pertaining to education each year. These law and court rulings generally are then converted into educational policy and implemented throughout educational systems.

Educational leaders must clearly understand the subjectivity involved in the employment of any interpretive method and the outcomes partisan favoritism. Those who understand the subjective nature of original intent and alternative interpretive methods and the political import their employment by federal courts will undoubtedly be equipped to discern underlying motives and maneuvers of political parties operative in the nomination and confirmation process of federal judges, especially Supreme Court nominees. Such discernment could expose motives and maneuvers regarding court-packing efforts of presidential administrations.

The President George W. Bush, within the first two years of his administration, has nominated conservative justices to fill federal court vacancies. During the same time, over a dozen states have initiated measure to have the Ten Commandment posted in some form in

public schools. A court packed with strict constructivists, proponents of original intent, could have considerable impact on deliberations and decision regarding the Establishment Clause under consideration by legislative bodies such as initiatives regarding the posting of the Ten Commandments and other conservative agendas.

Educational leaders should cautiously investigate claims of objectivity regarding original intent as well as other methods of interpreting constitutional provisions such as the Establishment Clause rather than passively accepting them without bringing to bear some level of professional analysis. Claims that original intent is superior to alternatives methods because of its objectivity should be met with even a higher degree of scrutiny, if not outright skepticism.

While viewing the employment of interpretive philosophies and methods with scrutiny and skepticism, the educational leader must also separate the nobility of the profession of a justice and the judicial integrity and sincerity with which they perform their jobs from flaws inherent in the methods of interpretation they employ. Justices are decent and honorable individuals who worked very hard to be fair and just as dictated by their consciences. The educational leader however must be fully aware of the inescapable realism that before justices go to law school their consciences are influenced by early and continual socialization processes. Although professional training and experience are capable of providing a measure of judicial restraint, manifestations of personal and professional subjectivity is inevitable. Educational leaders must not be naïve about this judicial-political reality.

Conclusion

The task of constitutional interpretation, regardless of the interpretive method used, will inevitably contain elements of subjectivity deemed impermissible in the pursuit of justice. An

astute "court-watcher" cannot help but notice the uncanny parallels between the life histories of justices, their interpretive jurisprudence, and the political favoritism that results, however unintentional. Moreover, justices cannot escape the subjectivism inherent in task of applying methods, principles, and philosophies of constitutional interpretation. Respect for legal tradition and the practice of judicial restraint, notwithstanding, Justices bring the personal and professional selves to the bench and in doing so they have affected, throughout federal court history, significant changes in bodies of law particularly in the are of race and religion as related to public schools.

Subjectivity in constitutional interpretation will most likely continue due to a silence in the Constitution and federal law regarding which method of interpretation that should be employed and a reverent respect for jurisprudential freedom. Even during the confirmation process of nominees for the Supreme Court, despite the research findings regarding a nominee's the life history, lower court opinions, other published works as well as interviews with co-workers, friends, and family members, great care has been taken in the selection particular questions and lines of questions to be asked the nominee so as to prevent an invasion upon forbidden private and constitutional domains. Justices are free to follow their consciences regarding the interpretive method they think should be employed.

Originalists who contend that original intent is a "lesser evil" are closer a truism regarding the subjectivity of all interpretive methods rather than originalists who claim that original intent is superior due its objectivity. Proponent of alternative interpretive methods such as Political Philosophy, Textualism, Moral Philosophy, Stare Decisis, and Neutral Principles, while acknowledging the capability of producing conservative outcomes using these methods,

generally admit the propensity of these methods to render meanings of the Establishment Clause, particularly during the Warren Court era, that tended to favor political liberals.

The "check and balance" to the personal and professional subjectivity of justices and the interpretive methods they employ rests in the political activism of the educational leader who keeps abreast of the appointment or election of justices and the working of the courts, especially regarding the employment any interpretive method to any Constitutional provision impacting education directly or indirectly. The educational leader individually and collectively must engage the macro and micro political dynamics in light legislative agendas and the likelihood that legislative agendas will face the interpretive modus operandi of courts. The subjectivism of the court must be "checked and balanced' by the political activism of the informed educational leader. Hopefully, the interchanges between judicial subjectivism of justices and political activism of educational leader will result in a body of education law and policy that best serve all children.

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