Erik Kravets, M.A.*

U.S. Constitutional Originalism and the Intentional Fallacy

Originalists have deployed literary criticism in an effort to gain insight into what the Founding Fathers, the authors of the U.S. Constitution, originally intended their document to mean. However, this approach is problematic: (1) determining authorially intended meaning requires consultation of sources outside of the text, a task traditionally belonging to literary biography; (2) lawyers lack the training and expertise necessary to evaluate external and contextual evidence, which results in poorly reasoned verdicts; (3) elevating external and contextual evidence to the level of a source of constitutional law over the internal evidence of the text demonstrates a faulty use of critical theory. More recently, due to these weaknesses, originalists have promoted the mislabelled 'original meaning' over 'original intent' which, in fact, also suffers from the intentional fallacy and ought to be called 'original understanding'.

At the heart of originalism is the question of textual interpretation. The judge is confronted with a text and asked to apply it to contemporary legal disputes, much as literary scholars are asked to explain the meaning of texts to a contemporary audience. Where is this meaning to be found? Originalists acknowledge three different sources as legitimate: a) either the intent of the authors, b) the meaning of the text at ratification or c) the understanding of the text's legal subjects at ratification.[1]

Although popular at the beginning of the 21st century, 'original intent' has largely fallen by the wayside; even Antonin Scalia, once an ardent proponent of 'original intent', has retracted his older viewpoint in favor of less extreme 'original meaning': *"The theory of originalism [...] gives [the constitution] the meaning that its words were understood to bear at the time they were promulgated."*[2] And, *"You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words."*[3]

Also, more recently: *"Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people."*[4] Scalia is not referring to the grammatical meaning of the U.S. Constitution either. In District of Columbia v. Heller, he writes: "*[T]he public understanding of a legal text in the period after its enactment or ratification [...] is a critical tool of constitutional interpretation.*"[5] Scalia's real ambition is to elevate external and contextual evidence like cultural history and literary biography above textual interpretation of the U.S. Constitution. Scalia's originalism temporally fixes the meaning of the U.S. Constitution to the understanding of the U.S. Constitution's audience at ratification.

Describing that as 'textualism' is, to say the least, misleading. If the text were the foremost source for interpretation, no historical references would be needed. Indeed, for literary critics, external and contextual evidence lead away from the text, cf. Wimslatt and Beardsley: *"[W]hat is (1) internal is also public: it is discovered through the semantics and syntax of a poem, through our habitual knowledge of the language, through grammars, dictionaries, and all the literature which is the source of dictionaries, in general through all that makes a language and culture; while what is (2) external is private or idiosyncratic; not a part of the work as a linguistic fact: it consists of revelations (in journals, for example, or letters or reported conversations)[...]."*[6] A textualist would accept the text and use etymology, grammar and the systematic relationship of the clauses to each other to uncover meaning. The meaning the words *"were understood to bear at the time they were promulgated*" are external to the text; in this capacity, the text is reduced to the starting point for historical enquiry.

As to whether a text's meaning is static, this is an old argument for literary scholars but a relatively new one for lawyers and judges. In the 1930s and 1940s, critics frequently sought to reconstruct the author's intended meaning for his text. This forced the critic into the realm of cultural history and psychology. To foreclose other modes of understanding the text, however, became known as the "intentional fallacy".

Applied to constitutional law, 'original intent' and 'original meaning' are nearly identical, for if the text's actual and intended meaning diverged, this would imply that the subjective experiences of the author and his audience were different; 'original meaning' then is only an alternative to 'original intent' insofar as it ignores the possibility that the author expressed himself incorrectly. Meanwhile, 'original understanding' ignores the author's internal dialogue as well as any mistakes he made in expressing himself, focusing instead entirely on the subjective audience. Both 'original intent' and 'original understanding', then, are subjective theories, for both intent and understanding occur within the writer's or reader's internal dialogue; 'original meaning', on the other hand, is objective since meaning is judged by neutral third-party observers.

What Scalia is proposing, then, is not really 'original meaning' but 'original understanding', for he specifically asks what the audience of the U.S. Constitution at the time of its ratification, and of the ratification of its amendments, would have "fairly understood" the passage in question to mean. This is 'original understanding', not 'original meaning'. For the latter, it would be necessary to ask what a given passage means without heed to the constitutional framers or the historical voting population. The original meaning is derived by reference to the text, the historical meaning of words, and the way in which grammar was used at a given time in its linguistic development. Hardly any self-professed 'originalists' adhere to this approach, however; rather, they conflate 'meaning' and 'understanding'. They do not ask, correctly, 'What did this passage mean?' Rather, they ask, 'What did this passage mean to 'x'?' Scalia correctly dismisses a duty to discover the hidden intentions of the U.S. framers; truly, it would be intellectually consistent on his part to likewise dismiss a duty to instead discover the historical electorate's understanding of a particular clause.

The argument that a text should only be understood in the manner of its contemporaries is weak. The implication is that the li-

* The author is ref. iur. at the Appeals Court District of Stade and can be reached at erik@kravets.de.

1 Lawrence B. Solum, What is originalism? The evolution of contemporary originalist theory, in: Grant Huscroft/Bradley Miller, The Challenge of Originalism: Theories of Constitutional Interpretation 12, 14 ff (2011).

2 Scalia, speech at Catholic University of America, 18/10/96.

3 Ibid.

4 Scalia, speech at Woodrow Wilson International Center for Scholars in Washington, D.C., 14/03/2005.

5 District of Columbia v. Heller, 554 U.S. 570, 602 (2008).

6 William Wimsatt/Monroe Beardsley, The Intentional Fallacy, in: The Verbal Icon: Studies in the Meaning of Poetry 3, 9 (1954).

mits of the text's author's intention or the limits of the text's audience's understanding form the bounds of the text's meaning. In Wittgenstein's words, "The limits of my language mean the limits of my world."[7] Both approaches assert that a text only can exist in history, and that later readers are 'wrong' if they discover a new meaning in the text. Yet 'intention' and 'understanding' are subjective terms; it is rash to acclaim an author's or audience's inner dialogue as 'truth'. Objectively, a text may contain meanings which a neutral critic can uncover. Moreover, an author may inadvertently include meanings in his text, and likewise, an audience may inadvertently miss a meaning in the text or even be incapable of formulating a concept that a word has the potential to embody. For a literary parallel, 'original understanding' is like arguing that a novel's only 'true' meaning is the one given to it by the *New York Times Review of Books* in the immediate aftermath of its publication.

7 Ludwig Wittgenstein, *Tractatus logico-philosophicus* § 5.6 (33rd Edition, 1963): "Die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt."

As argued previously, a textualist, an advocate of 'original meaning', would first and foremost use language and grammar to uncover the meaning of the U.S. Constitution. Scalia claims to advocate this approach, but due to misunderstanding 'textualism' and 'original meaning', his verdicts actually are based on subjective 'original understanding'. It would be sensible for 'original understanding' advocates to consult linguists and cultural historians as well as literary biographers in advance of reaching a verdict. This approach would be more rigorous and considerably more accurate; otherwise, 'original understanding' is merely a vessel to be filled with amateur ideas, which even in the best case is not an appropriate basis for interpreting a constitutional text. Scalia and 'originalists' claim to know the understanding of the historical U.S. electorate with a degree of certainty that defies credibility. Yet the opinions held by a body of individuals as vast as the entire voting public can, indeed, be reconstructed only in terms of a spectrum of ideas regarding the evolution of concepts in intellectual history.

*Timo Steinbiß/ Bastian Bubel**

Neue Herausforderungen für die Private Equity-Industrie

Bericht über die Sitzung der Fachgruppe Tax Law auf der Fachgruppentagung am 10. März 2012 in Frankfurt/Main unter der Leitung von Herrn Dr. *Friedrich Hey* (Debevoise & Plimpton LLP) und Herrn Dr. *Daniel Weyde* (Clearly Gottlieb Steen & Hamiltons LLP)

Anlässlich der Fachgruppentagung 2012 traf sich die Fachgruppe Tax Law im House of Finance der Goethe-Universität. Der Schwerpunkt der diesjährigen Vorträge lag auf den aktuellen Entwicklungen im Bereich Private Equity.

Herr Prof. Dr. Heribert Anzinger (TU Darmstadt, Fachgebiet Finanz- und Steuerrecht) hielt einen Vortrag zu der überraschenden und für die Private Equity-Industrie richtungsweisenden Entscheidung des BFH vom 24. August 2011 (Az.: I R 46/10), in welcher der BFH insbesondere zur Frage der abkommensrechtlichen Behandlung von Private Equity-Fonds Stellung genommen hat.

Der zweite Block widmete sich den geplanten Änderungen im Versicherungsaufsichtsrecht durch Solvency II. Einen Schwerpunkt bildeten die neuen Kapitalanlagegrundsätze und Kapitalanforderungen für Versicherer, die einen maßgeblichen Einfluss auf die wirtschaftliche Attraktivität von Private Equity-Anlagen für Versicherungen haben werden. Herr Rechtsanwalt David Sehrbrock (Wissenschaftlicher Mitarbeiter am Lehrstuhl von Prof. Dr. Wandt/House of Finance, Frankfurt/Main) berichtete zu Solvency II aus juristischer Sicht. Herr Armin Kabel (Risikomanager) und Herr Holger Waldeck (Leiter Interne Revision) von der Helvetia Versicherungen erläuterten die praktischen Auswirkungen der Neuerungen für die Versicherungswirtschaft in Deutschland und Europa.

Frau Rechtsanwältin Patricia Volhard (Pöllath+Partners, Frankfurt/Main) hielt anschließend einen Vortrag zur AIFM-Richtlinie, deren aufsichtsrechtliche Anforderung die Private Equity-Industrie vor neue Herausforderungen stellen wird.

* *Timo Steinbiß*, LL.M. (Taxation) ist Rechtsanwalt bei Cleary Gottlieb Steen & Hamilton LLP; *Bastian Bubel* ist Wissenschaftlicher Mitarbeiter bei Cleary Gottlieb Steen & Hamilton LLP.

I. Private Equity-Fonds im Abkommensrecht – Folgerungen aus BFH v. 24.8.2011 – I R 46/10

Gegenstand der BFH-Entscheidung war insbesondere die abkommensrechtliche Beurteilung eines in England ansässigen Private Equity-Fonds in der Rechtsform einer englischen Limited Partnership, an dem unter anderem zwei deutsche Steuerpflichtige als Kommanditisten beteiligt waren. Aus Sicht des deutschen Steuerrechts erzielten die Steuerpflichtigen gewerbliche Einkünfte, da die Limited Partnership gewerblich geprägt war. Nach der Entscheidung des BFH sind diese Einkünfte jedoch nach dem DBA mit Großbritannien freizustellen, weil sie Unternehmensgewinne einer englischen Betriebsstätte darstellen.

Diskutiert wurde insbesondere, ob dem BFH darin zu folgen ist, dass die Einkünfte des Private Equity-Fonds abkommensrechtlich als Unternehmensgewinne angesehen werden können und ob der Private-Equity Fonds trotz des Fehlens von eigenem Personal und Geschäftsräumen eine Betriebsstätte in Großbritannien hatte.

Bezüglich der abkommensrechtlichen Qualifikation der Einkünfte als Unternehmensgewinne bestätigte der BFH seine Rechtsprechung, wonach die Fiktion der gewerblichen Einkünfte nach nationalem Recht nicht im Abkommensrecht gilt, und setzte sich damit zum dritten Mal in Widerspruch zu der Auffassung der Finanzverwaltung (vgl. BMF-Schreiben vom 16.04.2010). Bei der Frage, ob der Private Equity-Fonds originär gewerbliche Einkünfte erzielt, wendete der BFH die zum deutschen nationalen Recht entwickelten Kriterien zur Abgrenzung von gewerblicher und vermögensverwaltender Tätigkeit an. Bei Anwendung dieser Kriterien gelangt der BFH zu einer gewerblichen Tätigkeit des Private Equity-Fonds.

Herr Prof. Anzinger hob hervor, dass die Anwendung dieser Kriterien dem BFH nur teilweise geglückt sei. Fragwürdig