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Fancy Theories of Interpretation Aren't

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ON STATUTORY INTERPRETATION

FANCY THEORIES OF INTERPRETATION AREN'T

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We are awash in fancy theories of statutory interpretation. The latest one to come to my attention—and it is notable only because it is, as it claims to be, so typical of the genre—is that proposed by Jane Schachter in the Harvard Law Review.[1] Professor Schachter, like fellow fancy theorists Eskridge,[2] Frickey,[3] Sunstein,[4] Dworkin,[5] and many others,[6] attacks the unfancy intentionalist model with the now boringly familiar claims about the conceptual difficulties of aggregating the individual intentions of multi-member legislatures, applying intentions to changed and unforeseen circumstances, and determining the level of generality at which intentions should be characterized. At times, echoing claims made by the others listed above, she appears to deny altogether the facticity of the legislators' intentions: There is no "there" there to which the intentionalist theory of interpretation can refer. The meaning of statutes is not a fact but is a normative construct based on one's favorite normative principles. One interprets a statute "as if" it had been written by an idealized republican deliberative body, by Hercules, by one who wants to cabin the influence of special interests, etc.

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1. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

2. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1985).

3. *See* Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

4. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

5. *See* RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657 (1990).

6. *See generally* Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION 357-404 (Andrei Marmor ed., forthcoming 1995).

The problems with fancy theories are that they are not theories of interpretation, they are not internally consistent, and they are not held sincerely. They are not theories of interpretation because they impose what the interpreter wants the statute to mean on the statute qua words (or marks). If I know what the legislature *should* have determined (according to my favorite republican theory, Rawlsian principles, contemporary values, etc.), the fancy theories let me claim that the statute in fact means what it should have meant. The statute, in short, is dispensable. But if it's dispensable, how can I be interpreting it?[7]

The fancy theories are internally inconsistent because they never really let go of legislative intent at the same time they are denying its existence. What marks count as "the statute"? Why, those the legislature intended. Is the statute—are the marks—written in English? Well, yes, if that's what the legislature intended. Somehow the problems with legislative intentions don't stand in the way of determining what marks count as the statute and in what language the statute is written. But if the legislature can have linguistic intentions, and if we should be bound by those, why can it not have substantive intentions that should also bind us?[8]

The lack of sincerity in fancy theories is given away by the fancy theorists when they hedge their fancy theories by applying them only if the statute is not otherwise clear or unambiguous. Schachter again and again, after denying there is anything to statutes except what the fancy theories construct, says things such as the fancy theory is to be used "to resolve ambiguity" or "to choose from among competing, plausible interpretations." Well, ambiguity is an epistemic complaint that suggests a meaning currently hidden from view by, say, an unfortunate choice of words. An ambiguity does not suggest the absence of an intended meaning but only a lack of clarity about that meaning. Nor is imposing an external set of values resolving an ambiguity. And how can we limit fancy theories to choosing among "plausible interpretations" when all interpretations are the products of the fancy theories? If plausibility comes from what we know about legislative intent, then there is a "there" there after all.[9]

Fancy "as if" theories of interpretation aren't theories of interpretation. They are attempts to trade on the authority of statutes to enact the interpreter's own preferences and to treat the world of brute fact—what the legislature determined ought to be done—as though it *is* nothing more than

7. *See id.* at 400.
8. *See id.* at 365, 378-79.
9. *See id.* at 394-95.

what the interpreter thinks it ought to be. Fancy theories have a place perhaps in determining the limits of legislative authority, the presumptions through which legislation should be filtered for external policy reasons, and the rules that should apply whenever a statute fails to be meaningful (perhaps because it is the product of inconsistent or nonaggregable intentions).[10] However, although fancy theories in these ways can be theories *about* statutes, they are not theories of statutory interpretation. And in their slips of the tongue, the fancy theorists reveal that even they know this.

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10. *See id.* at 382-91; Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319, 325-27 (1993).