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Metaphor and Method: How Not to Think about Constitutional Interpretation

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METAPHOR AND METHOD: HOW NOT TO THINK ABOUT CONSTITUTIONAL INTERPRETATION

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Mr. Besso's observations[1] advance the discussion of state constitutional law. In addition to describing and analyzing theoretical developments in this area, he offers an original contribution to the evolution of theory. Although Mr. Besso is generally accurate in examining my remarks about interpretive strategies of constitutional decision-making in *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*,[2] those remarks can easily be misunderstood. I offer the following considerations in an effort to clarify further the nature and relationships of the various interpretive strategies identified in my article.[3]

It is hard to avoid implicit metaphors when we talk about interpretive strategies in decision-making. Our guiding metaphors, often subliminal and unintended, are not innocuous. The dangers of seduction by metaphor are well known;[4] at the heart of Wittgenstein's revolution in philosophical method is a critique of and warning about the power of metaphor.[5]

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1. Michael J. Besso, *Commenting on the Connecticut Constitution,* 27 CONN. L. REV. 185 (1994).

2. Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law,* 26 CONN. L. REV. 635 (1994).

3. The six strategies, as Mr. Besso correctly notes, include two originalist strategies—textualism and framers' intent—and four non-originalist strategies—appeal to evolving history, appeal to shared social goals, a multiple factors approach, and a focus on interpretive independence. These strategies, all distinguishable in state constitutional jurisprudence, are described in some detail in *Deviation and Autonomy, supra* note 2.

4. Two interesting and influential works on the pervasiveness of metaphors in our reasoning are ROBERT J. FOGELIN, FIGURATIVELY SPEAKING (1988) and GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).

5. Wittgenstein speaks of similes and pictures rather than metaphors when he refers to the expectations that we bring to our linguistic practices, expectations that sometimes introduce a

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In thinking about interpretive strategies, two metaphors can be espe-
cially suggestive and misleading. The first is the metaphor of routes, as
for example routes on a map. To describe and distinguish six interpre-
tive strategies seems to imply that a judge may choose among six alter-
native routes to arrive at her destination, her decision. Moreover, to
think of alternative routes is to consider the destination to which each
route, in turn, leads and to compare them as better or worse outcomes.

The six interpretive strategies do not work in this way at all. It is
easy to see that the metaphor of routes gives them a false homogeneity.
For example, the multiple factors method cannot be seen as an alterna-
tive route to the other methods insofar as it incorporates the other met-
hods.[6] Also, a strategy that emphasizes its reliance on goals or one that
stresses interpretive independence is also ill-characterized by the meta-
phor of routes, since both strategies are unspecific about direction.[7]

If the metaphor of routes can be faulted because it implies that the
strategies lead to clearly defined alternative destinations, the metaphor
of tools is also misleading.[8] According to this way of conceptualizing
methods of interpretation, the six interpretive strategies are alternative
tools; if one tool turns out not to fit the task at hand, another stands
ready. This way of thinking is flawed because it too, like the metaphor
of routes, gives the methods a misleading homogeneity. The originalist
strategies *do* involve prescriptions, directions for proceeding as (mis-
leadingly) simple as an injunction to consult old dictionaries
(textualism) or the records of constitutional debates (intentionalism).[9]
On the other hand, the multiple factors approach, the appeal to goals,

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misleading homogeneity:

> 112. A simile that has been absorbed into the forms of our language produces
> a false appearance, and this disquiets us. "But *this* isn't how it is!" — we say. "Yet
> *this* is how it has to *be!*" . . .

> 115. A *picture* held us captive. And we could not get outside it, for it lay in
> our language and language seemed to repeat it to us inexorably.

LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 47-48 (2d ed. 1958).

6. Morawetz, *supra* note 2, at 644-46.

7. *Id.* at 642-44.

8. Wittgenstein uses the metaphor of tools differently, to make clear the heterogeneity of
language. My point is the opposite, namely that to think of interpretive strategies as tools is to
treat them (mistakenly) as interchangeable or fungible.

> 11. Think of the tools in a tool-box: there is a hammer, pliers, a saw, a screw-driver,
> a rule, a glue-pot, glue, nails, and screws. — The functions of words are as diverse as the
> functions of these objects . . . .

WITTGENSTEIN, *supra* note 5, at 6.

9. Morawetz, *supra* note 2, at 639-42.

and the assumption that courts have interpretive autonomy are all ways of deciding that involve vague and ambiguous prescriptions, if they can be seen as prescriptions at all.[10]

If bad metaphors, such as the metaphors of routes and tools, lead us to conceive interpretive methods too homogeneously, how can we better understand the internal relationships of these strategies, methods, or aspects, of interpretation?[11]

Consider first the implications of a decision-making strategy that claims to focus on shared social goals. The theorist who describes such a strategy does not claim to instruct decision-makers about the identity of these goals. Rather, she points out that the common feature of *every* decision is that it resolves a present case and sets a precedent for the future. She implies that it would therefore be irresponsible for a decision-maker to ignore the ways in which a decision affects shared social ends.

Similarly, a theorist who claims to demonstrate that decision-makers have interpretive independence[12] describes another condition of decision-making but does not claim to prescribe how that independence is to be exercised. It is more appropriate to say that the theorist, in this case as in the previous case, is not so much offering a *method* of decision-making but rather casting light on a feature or characteristic of it. By contrast, a theorist who advocates a textual or intentionalist approach is indeed offering a method but is also opening herself to controversy, since the method may or may not yield results, and the results may or may not achieve defensible social goals.

Thus, the relationships among the six so-called interpretive strategies are complex. Some, namely the originalist strategies, seem to identify methods of decision-making in the sense of *means* or procedures

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10. The vagueness of this statement seems to me unavoidable. Textualism and intentionalism are prescriptions in the sense that they direct the decision-maker to particular resources for resolving disputes. On the other hand, the invocation of shared social goals or of the evolution of historical trends directs the responsible decision-maker to reflect on certain considerations or ideas, but barely counts as a prescription in the first sense.

11. As the discussion in the rest of the text implies, it is less misleading to speak of *aspects* of interpretation than of *methods* or *strategies* because the latter terms invite the objectionable metaphors under consideration.

12. This means that "judges referring to the special history, values, or goals embodied in the state constitution and its traditions may appeal to them to warrant deviation from the apparent constitutional mandate [of an analogous federal constitutional provision] or to assert the autonomy of the state interpretive process." Morawetz, *supra* note 2, at 646.

for decision-making. Others, namely the non-originalist strategies, draw our attention to aspects or characteristics of decision-making—the facts that it is part of an evolving history, that it implicates goals, and that it may be exercised independently of federal precedents about federal law.[13] One can certainly not simplify the complexity by saying that the originalist methods refer to *means* and the non-originalist methods refer to *ends* because, of course, the non-originalist methods implicate means as well as ends.[14]

In sum, any account or theory of decision-making that adequately represents both the framework and the choices that face decision-makers will involve heterogeneous elements. Originalist and non-originalist aspects of decision-making are not simply competing methods but aspects of a complex process. How those aspects fit together will undoubtedly remain controversial.

It is easy to be seduced by metaphor, and it is particularly easy to see the so-called strategies of decision-making outlined in *Deviation and Autonomy*[15] as alternative routes to a decision or as alternative tools for decision. Mr. Besso's references to a hierarchy of approaches seem to presuppose a metaphor of this kind.[16] He is hardly alone. Seduction by metaphor is perhaps unavoidable when virtually all theorists presuppose that originalist and non-originalist methods of decision-making are in competition. Clear thinking about the roles of social goals, evolving history, and originalist admonitions in decision-making require that we resist the lure of metaphor.

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13. The asymmetry among the so-called interpretive strategies is further reflected in the observation that any given text-based decision or decision based on framers' intent may seem undesirable or unwarranted in the light of its effect on social values, or more simply in the light of its consequences. In other words, backward-looking considerations may seem to conflict with forward-looking (utilitarian, pragmatic) goals. Thus, pursuit of originalist strategies may produce an antinomy and a need to justify such strategies if they lead to "bad" results. Pursuit of such non-originalist strategies as the evolution of history or shared social goals can produce no such antinomies and no such "bad" results; they are defined in a way that incorporates forward-looking justifications.

14. However unspecific or open an injunction to consider the evolution of history or shared social goals may be, such an injunction *does* in some sense point toward means of decision-making and answers the question, "How shall I decide?".

15. Morawetz, *supra* note 2.

16. Besso, *supra* note 1, at 185. Mr. Besso refers to the methods or strategies of decision as tools. His recommendations do indeed presuppose that we can try to choose among the strategies as tools, first one, then another.