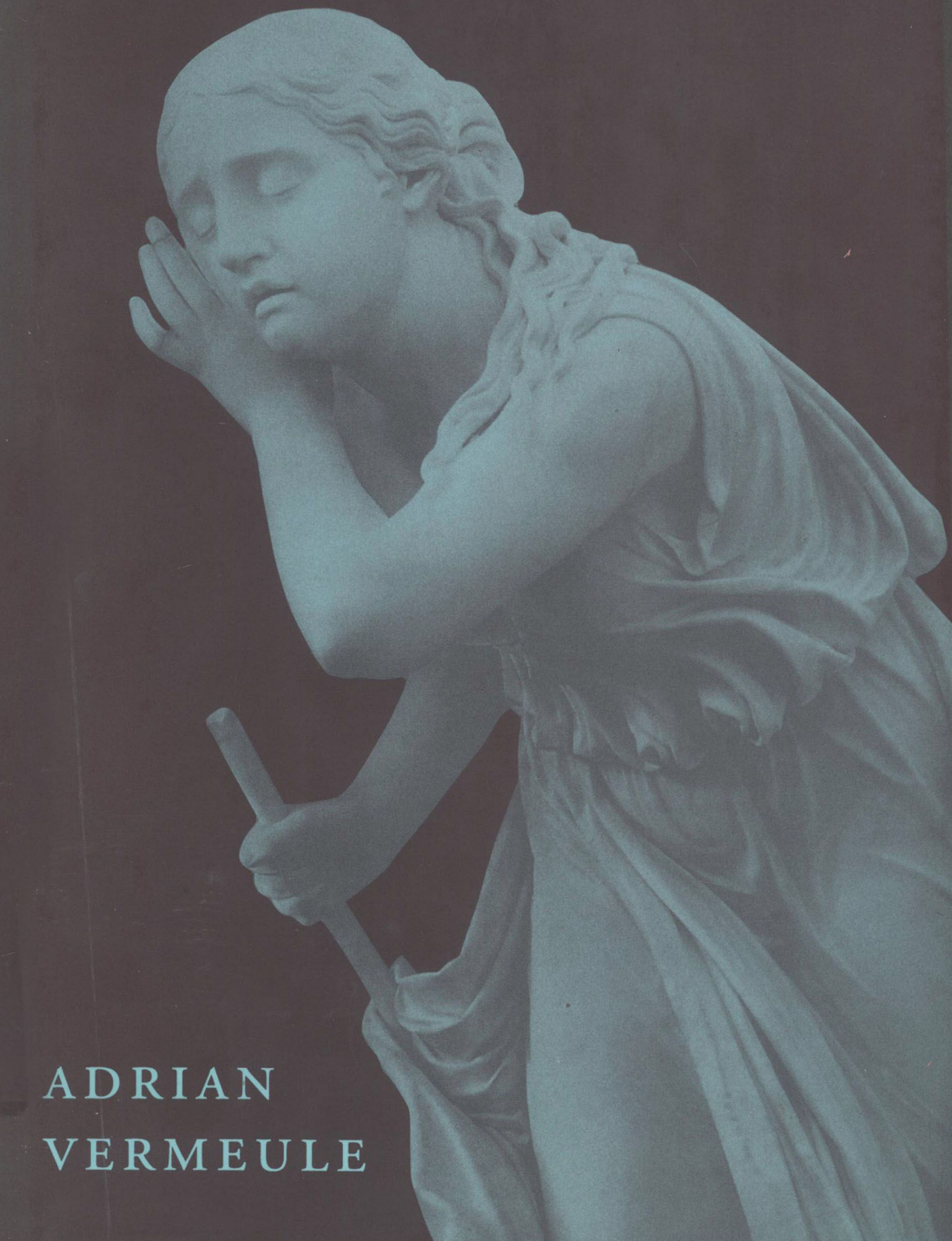
Judging under Uncertainty

AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION



ADRIAN VERMEULE

Judging under Uncertainty

An Institutional Theory of Legal Interpretation

Adrian Vermeule

Harvard University Press
Cambridge, Massachusetts
London, England

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Vermeule, Adrian, 1968–
Judging under uncertainty : an institutional theory of
legal interpretation / Adrian Vermeule.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-02210-6 (alk. paper)
1. Judicial review—United States.
2. Law—United States—Interpretation and construction.
3. Judicial process—United States. I. Title.
KF4575.V47 2006
337.73'12—dc22 2005055117

Judging under Uncertainty

For my family

Acknowledgments

Thanks are due, above all, to my extended family, including Kun Ja Lim; Blakey Vermeule; Cornelius Vermeule; Emily Vermeule, who will always be a vital presence; my wife Yun Soo, whose capacities for support and tolerance are seemingly infinite; and my children, Emily and Spencer, the best playmates ever.

Special thanks are also due to several friends and colleagues. Eric Posner is a model of academic rigor whose work on contract interpretation has indirectly inspired much of what follows. Antonin Scalia kindled my interest in the subject, both in person and through his superb academic and judicial writings. David Strauss has provided a model of collegiality and thoughtfulness; his work on common-law constitutionalism informs the whole book (sometimes as a clear and powerful statement of views I reject, but that sort of help is often the most helpful of all). Cass Sunstein has been an invaluable colleague and intellectual companion over the past seven years. One of the articles that form the backbone of the book was co-authored with him. Although I am not sure whose ideas were whose, there are good grounds to suspect that the original and incisive ones were his. I also draw upon his independent work throughout; special mention should be made of his work on the empirical determinants of formalism and on agencies as common-law courts. Fred Schauer has also provided inspiration for the ideas here. I should particularly mention his work on rules, formalism, and interpretive absurdity, all of which appears within. His clearminded contributions frequently shine through the dense clouds of my argument. Any errors are my own.

Helpful comments on the whole manuscript came from Matthew Adler, Will Baude, Adam Cox, John Donohue, Carolyn Frantz, Jack Gold-

smith, Don Herzog, Eric Posner, Fred Schauer, David Strauss, Cass Sunstein, and two anonymous reviewers. Justin Rubin and Sean Heikkila provided superb research assistance, showing great patience with my foibles and passing humors. In writing what follows, I have drawn upon several previously published articles, although in each case with heavy revisions and in many cases radical surgery. The articles include the following: "Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*," 50 *Stanford Law Review* 1833 (1998); "Interpretive Choice," 75 *New York University Law Review* 74 (2000); "Hercules, Herbert, and Amar: The Trouble with Intratextualism," 111 *Harvard Law Review* 730 (2000) (with Ernest A. Young); "Institutional Design of a Thayerian Congress," 50 *Duke Law Journal* 1277 (2001) (with Elizabeth Garrett); "Judicial Review and Institutional Choice," 43 *William and Mary Law Review* 1557 (2002); "Interpretation and Institutions," 101 *Michigan Law Review* 885 (2003) (with Cass R. Sunstein); "The Judiciary Is a They, Not an It: Interpretation and the Fallacy of Division," 14 *Journal of Contemporary Legal Issues* 549 (2005); "Three Strategies of Interpretation," 42 *San Diego Law Review* 607 (2005); and "Constitutional Amendments and the Constitutional Common Law," forthcoming in *Legislatures and Constitutionalism: The Role of the Legislature in the Constitutional State* (T. Kahana and R. Bauman, eds.) (Cambridge University Press). I thank the many colleagues, too numerous to list, who provided comments on these works.

Judging under Uncertainty

Contents

Introduction

In this book I advance an institutional argument for a version of formalism in legal interpretation, principally the interpretation of statutes and the Constitution. I define "formalism" at length in later chapters. In the version of formalism offered here, judges should (1) follow the clear and specific meaning of legal texts, where those texts have clear and specific meanings; and (2) defer to the interpretations offered by legislatures and agencies, where legal texts lack clear and specific meanings. These positions run contrary to the mainstream of American legal theory, which favors flexible, policy-saturated judicial interpretation of statutes and the Constitution, is often suspicious of deference to administrative agencies in statutory interpretation, and generally rejects deference to legislatures in matters of constitutional interpretation.

Institutions and Legal Interpretation

By offering an institutional argument for legal formalism, I mean to advance two distinct theses, one methodological, the other substantive. These two theses are partially independent as a logical matter. One can adopt an institutional approach to legal interpretation without subscribing to formalist conclusions, although the version of formalism I offer presupposes and derives from the institutional approach.

The methodological thesis is that institutional analysis is indispensable to any account of legal interpretation. The question in law is never "How should this text be interpreted?" The question is always "What decision-procedures should particular institutions, with their particular capacities, use to interpret this text?" Put negatively, legal theory cannot reach any

operational conclusions about how judges, legislators, or administrative agencies should interpret texts unless it takes account, empirically, of the capacities of interpreters and of the systemic effects of interpretive approaches.

My target here is *first-best conceptualism:* the attempt to deduce operating-level rules of interpretation directly from high-level conceptual commitments—for example, commitments to democracy, or the rule of law, or constitutionalism, or an account of law's authority or of the nature of legal language. All such deductions fail, because intermediate premises about the capacities and interaction of legal institutions are necessary to translate principles into operational conclusions. An inescapable problem for first-best conceptualism is the possibility of *second-best effects.* Interpreters situated in particular institutions make mistakes when implementing any first-best account, and the rate of mistakes will vary with changes in the decision-procedures the interpreters use, as will the cost of reaching decisions. There is no decision-procedure for implementing any high-level interpretive commitment that is best a priori, or that can be deduced from conceptual commitments. The best decision-procedure will vary with the facts about institutional capacities and systemic effects. The upshot is that conceptualism can never provide a full account of the operating-level interpretive procedures that judges should use. The normative theory of legal interpretation turns upon empirical questions and factual findings.

Sometimes we can go further. Given some empirical findings about institutional capacities and systemic effects, interpreters may bracket their high-level commitments, agreeing to disagree or even remaining resolutely agnostic about first principles. Such bracketing or agnosticism is possible where, and because, empirical findings would point proponents of any (plausible) first-best account to the use of particular interpretive procedures. Disagreement at the level of first principles proves irrelevant to the extent that proponents of different views reach converging agreement upon decision-procedures at the operating level of the legal system.

I shall suggest, for example, that both interpreters who hold that the aim of statutory interpretation is to recapture legislators' intentions and interpreters who deny that thesis should be able to agree that judges should not read internal legislative documents for evidence of legislators' intentions. This is a second-best claim: fallible judges are less likely to

recapture legislators' intentions successfully by using such documents than by refusing to use them. In domains such as this one, an old debate at the level of political theory—do legislators' intentions make the law?—turns out to be irrelevant to the question what interpretive procedures judges should use, for strictly empirical reasons.

Overall, the methodological thesis suggests that the marginal value of further conceptual work in legal theory is much less than the marginal value of new empirical work. Ever-more-refined conceptual analysis has long dominated legal theory, even though the principal first-best positions are well understood, while empirical work on the institutional determinants of interpretation is still in its infancy. The former, I suggest, has passed well beyond the point of diminishing marginal returns, while the latter now promises large intellectual dividends.

The Institutionalist Dilemma

If all this is right, what exactly are judges to do? Academics can afford to wait until empirical findings emerge. Judges, however, must interpret legal texts now. Which procedures they should follow will vary with findings about institutional capacities and systemic effects. Such findings, however, do not currently exist, for the most part. The sheer complexity of the legal system means that the empirical questions at issue are often "trans-scientific": although they are empirical in principle, they are unresolvable at acceptable cost within any reasonable time frame. Worse, judges are boundedly rational: their capacity to process the information they can obtain is limited, in part because of cognitive failings. While those failings are shared by all decisionmakers, they are exacerbated by the case-by-case decisionmaking procedure that defines adjudication—a procedure that emphasises the salience of particulars and hampers judges in discerning the systemic effects of the interpretive approaches they adopt. The overall picture, then, is that boundedly rational judges must necessarily adopt some interpretive decision-procedure or other, on empirical grounds, but without the necessary information. This is the *institutionalist dilemma:* judges cannot escape the enterprise of choosing interpretive decision-procedures under conditions of uncertainty and bounded rationality.

In emphasizing this dilemma, I hope above all to push legal theory beyond *the stalemate of empirical intuitions.* To the extent that legal theory takes account of empirical and institutional issues, theorists often record

their intuitions about the facts of the matter and then move on. Where A's empirical intuitions diverge from B's, and no findings are available to settle the matter, conventions of academic discourse often suggest that the issue be dropped with the shrug "It's empirical." This is a reasonable course for academics, but not for decisionmakers in the legal system (like judges) who face some category of decisions that can neither be postponed nor avoided.

Judges should, I suggest, choose interpretive decision-procedures through a repertoire of tools for choice under conditions of limited information and bounded rationality. The repertoire is drawn from a variety of disciplines. It includes the allocation of burdens of proof; cost-benefit analysis, supplemented by the principle of insufficient reason; the maximin criterion for choice under uncertainty; satisficing; arbitrary picking, as opposed to choosing; and the use of fast and frugal heuristics. The repertoire is eclectic, and many of the tools are fallback counsels for situations where fully rational decisionmaking is impossible. I claim only that judges using these tools will act reasonably, whether or not they act rationally in any strong sense.

Formalism, Consequentialism, and Rules

What decision-procedures do these tools for interpretive choice select? My substantive thesis is that when the analysis is done, the best decision-making strategy for judges in America, given their current circumstances and the current state of empirical knowledge, is a version of formalism. The tools I have described all suggest that judges should stick close to the surface-level or literal meaning of clear and specific texts, resolutely refusing to adjust those texts by reference to the judges' conceptions of statutory purposes, legislators' or framers' intentions or understandings, public values and norms, or general equity. Where texts are intrinsically ambiguous, the legal system does best if judges assign the authority to interpret those texts to other institutions—administrative agencies in the case of statutes, legislatures in the case of the Constitution. Overall, judges should sharply limit their interpretive ambitions, in part by limiting themselves to a small set of interpretive sources and a restricted range of relatively wooden decision-rules.

This set of prescriptions amounts to "formalism" in a particular sense of the term. Following existing work by legal philosopher Fred Schauer

and others, we may distinguish two senses of formalism. In the first, formalism refers to the attempt to deduce legal rules from intelligible essences, such as "the nature of contracts" or "the rule of law," while excluding considerations of morality and policy. This is emphatically not the sense in which my proposals are formalist. Indeed, formalism in this sense is a species of first-best conceptualism, and as such is one of my principal targets. I shall claim, for example, that the essentialist version of formalism is alive and well in recent attempts to derive rules of interpretation directly from the Constitution's text and structure.

In another sense, however, formalism refers to a rule-bound decisionmaking strategy. Crucially, formalism in this sense itself can be justified only on empirical grounds, indeed consequentialist grounds; the argument for decisional formalism must be that it will produce better consequences for the legal system than will alternative decisionmaking strategies. In this sense my conclusions are formalist indeed. The basic idea, only apparently paradoxical, is that judges acting under conditions of grave uncertainty and bounded rationality should restrict the range of information they attempt to collect and reduce the complexity of their behavioral repertoire, on the ground that further increments of information, complexity, and flexibility produce definite costs for only speculative gains. So judges should follow simplistic, even wooden decision-rules. Such rules may produce poor results in particular cases. Their justification is that they produce the best results overall—with "best" defined according to a converging agreement, at the operational level, among interpretive approaches that differ at the level of first principles.

My premises are thus firmly consequentialist. Indeed they are rule-consequentialist: judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall. One contrast here is with an act-consequentialist account of interpretation, which counsels judges directly to choose whichever interpretation produces the best consequences in the case at hand. Throughout Part I, I critique this sort of act-consequentialist approach to judging, on the ground that judges' limited information and bounded rationality cause them to go badly wrong when they attempt to assess the consequences of decisions in particular cases. The best decisionmaking approach proceeds by indirection: rather than attempting to assess consequences in each particular case, judges should adopt the interpretive rules that, if followed, produce the best possible consequences for the interpretive system overall. There

is no paradox in this counsel. Judges can know the limits of their own knowledge, and when they do, they can make a second-order decision to follow the rules that are best in light of their limited competence as first-order decisionmakers.

Rule-consequentialism also entails that interpretive approaches should be evaluated over a whole array of outcomes, not merely over particular decisions. Where rule-consequentialism makes sense, it is because imperfect decisionmakers will do better overall with rules. Even if those rules are best overall, it will always be possible to point to particular cases in which a perfect decisionmaker would produce a better outcome in that very case than would an imperfect decisionmaker applying the best overall rules to an array of cases that includes the case at hand. This kind of perfectionist reasoning from particular cases is a mistake, however. Throughout the chapters that follow, I suggest that judges' intuitions misfire under *the distorting force of particulars,* in part because the vivid facts of particular cases trigger cognitive distortions.

As for analysts of legal interpretation, we ought to get clear about the best decision-procedures and then let the chips fall where they may in particular cases. The consequence is that I construct a top-down argument that moves from decision-procedures to applications, rather than a bottom-up argument rich with concrete cases and examples. Because the concrete so often misleads, I regard this as an intellectual virtue, though others will not.

Consequentialism and Pragmatism

In principle, these consequentialist premises exclude a domain of (wholly or partially) nonconsequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because few people hold views of that sort. Interpretive consequentialism is an extremely broad rubric, as we shall see. It includes, for example, the interpretive jurisprudence of legal philosopher Ronald Dworkin, who is an avowed consequentialist (contrary to a widespread but mysterious assumption). Perhaps surprisingly, a view that does not come under the capacious umbrella of consequentialism is "pragmatism," at least in the form of "everyday pragmatism" that Judge Richard Posner has recently championed. Posner wants to say that a pragmatic interpretation is one that produces better consequences than the alternatives, but Posner res-

olutely refuses to say what, in his view, counts as a good consequence. This is a puzzling stance (or so I argue in Chapters 2 and 3). As Dworkin argues, interpretive consequentialism requires a value theory that specifies what consequences are good.

Dworkin in turn goes wrong, however, to the extent he suggests that consequentialism requires the interpreter to adopt some particular value theory. A central aim of my project is to suggest, and to show, that consequentialists can make progress on interpretive theory by bracketing high-level disagreements about competing value theories. For empirical and institutional reasons, a range of value theories converge at the operational level, yielding similar recommendations about the decision-procedures judges should use. One can do consequentialist interpretation without settling all questions at the level of first principles, not because competing value theories are themselves dispensable in principle, but because the differences between them turn out to make little difference on the ground.

Values and Facts

Another premise is that we can, throughout the domain covered by this book, fruitfully use the distinction between value theories, on the one hand, and facts, on the other. This distinction drives the argument in several places, most conspicuously in the claim (laid out in Part I and substantiated in Parts II and III) that competing interpretive value theories converge at the operational level, given certain factual premises. Of course, the distinction between fact and value is contentious at the philosophical level and has spawned large literatures. On one view, all "facts" are theory-laden constructs; a simple appeal to "what the facts show" is a nonstarter.

I do not contest that view, nor need I do so, for the view is more limited than some of its most zealous proponents seem to understand. Take the question whether an increase in the minimum wage would increase unemployment. Of course both "minimum wage" and "unemployment" are thick concepts whose very meaning is intertwined with ethical and legal theories. (What, for example, is the baseline from which unemployment is measured?) To make sense of the factual question, we need background assumptions of value. But those background assumptions need not be contentious or sectarian. To the extent that they are

widely shared within a given community, asking what the facts show, relative to the shared assumptions, is perfectly coherent and often useful. It is the routine stuff of policy debates to distinguish the question (1) how much an increase in the minimum wage will increase unemployment from the question (2) whether it would be good to increase the minimum wage by $\$X$ at the price of an increase of Y percent in the unemployment rate.

Sophisticated critics of the fact/value distinction thus confine their criticism to the conceptual level, and willingly acknowledge that distinctions between fact and value are useful at other levels of inquiry.[1] Legal interpretation, I am suggesting, is the type of inquiry in which the distinction between facts and values can be used without too much philosophical anxiety. To prefigure a later example, what the legislative history of a given statute shows about the median legislator's intention is a factual question, in much the same way that the effect of minimum wages on unemployment is factual. The objection to such a question, if there is one, is that it is not a good question for judges to ask, given certain facts about judicial capacities (a topic I take up throughout, especially in Chapters 5 and 7). The crucial problems that surround questions of this sort are institutional, not philosophical.

A Note on Scope

Throughout, my emphasis is on three classes of interpretive problems: statutory interpretation by courts, statutory interpretation by agencies, and constitutional interpretation by courts. This is, in one sense, an arbitrary limitation of the project's natural scope. Straightforward extensions of the institutional approach to interpretation could encompass treaty interpretation and the interpretation of regulations by agencies. The justifications for not examining these contexts are, first, that different institutional variables doubtless matter in those settings, just as there are important differences between the variables relevant to statutory and constitutional interpretation; and second, that my expertise is too limited to permit a confident treatment of these areas.

For the same reasons I do not treat the common law per se, although I discuss the problem of judicial coordination on rules of precedent in Chapter 5, treat the problem of statutory precedent extensively in Chapter 7, and discuss "common-law" approaches to constitutional interpretation