Two hermeneutical motives[1] in *Reading the Constitution*[2]

Tell me what is your stance on interpreting and I'll tell you who you are.[3]

Dean John F. Manning suggests that what divides textualists from purposivists is their emphasis on different elements of context:

> "Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied. . . . textualists give determinative weight to clear semantic cues even when they conflict with evidence from the policy context. Purposivists allow sufficiently pressing policy cues to overcome such semantic evidence."[4]

Manning argues for textualism—giving precedence to semantic context—on the ground that "legislative supremacy is most meaningfully served by attributing to legislators the understanding that a reasonable person conversant with applicable conventions would attach to the enacted text in context." Whereas purposivism, he says, "cannot deal adequately with legislative compromise because semantic detail, in the end, is the only effective means that legislators possess to specify the limits of an agreed-upon legislative bargain. When interpreters disregard clear contextual clues about semantic detail, it becomes surpassingly difficult for legislative actors to agree reliably upon terms that give half a loaf."[5] Interpreters' disregard gums up the legislative works with indeterminacy, unreliability.

Manning writes that "In our constitutional system federal courts act as faithful agents of Congress."[6] The components of any well-functioning system must operate reliably, dependably, faithfully; automatically not autonomously. A principal hermeneutical motive, thematic commitment, of textualism is *automaticity.* The automaticity/plasticity pair I take from David

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[1] After Lovejoy's 'dialectical motives': "You may, namely, find much of the thinking of an individual, a school, or even a generation, dominated and determined by one or another turn of reasoning, trick of logic, methodological assumption, which if explicit would amount to a large and important and perhaps highly debatable proposition in logic or metaphysics." Arthur O. Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* ([1936] 1960) 10. *See also* 'thematic commitments' in Gerald Holton, *Thematic Origins of Scientific Thought: Kepler to Einstein* (rev. ed. 1988).

[2] Stephen Breyer, *Reading the Constitution: Why I Chose Pragmatism,* Not *Textualism* (2024).

[3] Actually, he said 'on translating':—*Sage mir, was du vom übersetzen hältst, und ich sage dir, wer du bist*. Martin Heidegger, *Hölderlins Hymne »Der Ister«*; *Gesamtausgabe Band* 53: 76: https://www.beyng.com/gaselis/?vol=53.00&pg=76 .

[4] John F. Manning, "What Divides Textualists from Purposivists?" 106 *Columbia Law Review* 70, 76 (2006).

[5] *Id.* 92.

[6] *Id.* 71.

Bates's most recent work.[7] Through Bates's account we recognize that pair as instancing the polarity of exploitation/exploration described by James March.[8] So, again, Manning says that

> "semantic meaning uniquely enables interpreters to respect the centrality of legislative compromise in the design of the constitutional structure and in the legislative rules of procedure that complement it. . . . Textualists, in short, take the semantic meaning seriously because they believe that the obligation of the faithful agent is to respect not the legislature in the abstract, but rather the specific outcomes that were able to clear the hurdles of a complex and arduous legislative process."[9]

The constitutionally vested interpreter of statutory language must be a reliable component of the system, a dependable servo-mechanism. Justice Breyer describes Manning's point in just this cybernetic tenor when he writes,

> "Thus, in principle, textualism could help develop a kind of feedback loop between lawmakers and judges that could lead to a set of interpretive rules or principles, operating nearly irrespective of legislative subject matter. And their existence would help legislators give judges the rulebook they need to make sure that legislative policies are properly implemented."[10]

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[7] Bates starts with Descartes, in whose wake "The concept of automaticity was inseparable from ideas concerning openness, plasticity, creativity, and indetermination—whether in physical science, emerging forms of biological thought, theories of technology, or the philosophy of mind." Again, "Human creativity in cognition was made possible by the absence of *automaticity* in the higher brain. [William] James pointed to the extraordinary degree of plasticity characteristic of organic tissue in his theory of psychological habit. Humans became automata, in a sense, but the ground of acquired automation was in fact the protoplasmic plasticity." Alan Turing's paper 'Computing Machinery and Intelligence' "needs to be read less as a foundational text of the future discipline of 'artificial intelligence' . . . and more as an attempt to resolve the twisted, almost paradoxical relationship between determination and indetermination, organization and disorganization—that is, *automaticity* and *plasticity*—in relation to various systems: biological, mechanical, and 'intellectual' (i.e., informational) spheres."
David W. Bates, *An Artificial History of Natural Intelligence: Thinking with Machines from Descartes to the Digital Age* (2024) 32, 168, 279; italics in original.

[8] "A central concern of adaptive intelligence within a path-dependent, meandering history is the relation between the exploration of new possibilities and the exploitation of old certainties. Exploration includes things captured by such terms as search, variation, risk taking, experimentation, play, flexibility, discovery, and innovation. Exploitation includes such things as refinement, choice, production, efficiency, selection, implementation, and execution."
James G. March, *A Primer on Decision Making: How Decisions Happen* (1994) 237.

[9] "What Divides?" 103, 108.

[10] *Reading the Constitution* 25-26.

In cybernetic terms the 'rulebook' is composed of 'instruction tables.'[11] Breyer doesn't buy it. He cites an empirical study concluding that such a feedback loop does not exist,[12] and gives his reasons for believing it hardly likely to come into existence. And, he adds, we must not forget that "technology changes, society changes, life changes. The scope of words that encapsulate important values may themselves have to change, in part or in whole, if we are to maintain those values."[13]

Breyer observes that some textualists "such as Justice Scalia, whether considering a statute or the Constitution, add that the judge should try to express the decision's holding in the form of a broad black-and-white rule. They believe that this kind of rule . . . will diminish the judge's power to substitute the judge's view of 'what is good' for 'the law'."[14] Again, those who favor textualism, "such as Justice Scalia, often argue that judges in their opinions should try to create or follow broadly applicable, black-and-white rules. Rules are easier to follow than precedents standing alone. They can more easily be explained to a client. And their use can, like textualism and originalism, reinforce the idea that legal questions have a *single best answer*. You either follow the rule or you don't."[15]

Open or shut, on or off, one or zero. Against this Breyer insists repeatedly that "law is not a hard science." "Most truly difficult legal questions," he says, "may have better or worse answers, but they do not have clear 'right or wrong' answers."[16] He cites with approval the Episcopal Church's policy toward proposed changes in her Forms of Public Worship, *viz.*: "seeking to keep the happy mean between too much stiffness in refusing, and too much easiness in admitting variations in things once advisedly established, she hath, . . . upon just and weighty considerations her thereunto moving, yielded to make such alterations in some particulars, as in their respective times were thought convenient."[17] Presumptive refusal is a kind of automaticity, as laxity in granting is of plasticity.

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[11] "Turing suggested (presciently) that by telling it *exactly* what to do, all the time at every moment, we would never be able to take advantage of the machine's true powers. Turing was advocating here . . . that the instruction tables that the computer was to execute should have only an 'interim' [*sc.* defeasibly presumptive] status. That is, the instruction tables ought to be able to *modify themselves,* Turing insisted, 'if good reason arose.' This would lead to some interesting, and entirely unforeseen, new computing operations. It was the break with its own instructions that constituted true intelligence." *An Artificial History* 266; italics in original.

[12] *Reading the Constitution* 26.

[13] *Ibid*.

[14] *Id.* 17.

[15] *Id*. 28; italics in original.

[16] *Reading the Constitution* 195. "There are not many differences in mental habit," Lovejoy says, "more significant than that between the habit of thinking in discrete, well-defined class-concepts and that of thinking in terms of continuity, of infinitely delicate shadings-off of everything into something else, of the overlapping of essences, so that the whole notion of species comes to seem an artifice of thought not truly applicable to the fluency, the, so to say, universal overlappingness of the real world." *The Great Chain of Being* 57.

[17] https://www.bcponline.org/ 9-10.

Breyer advocates legal interpretation that is "pragmatic, undogmatic, and adaptive." So "A good pragmatic decision must take account, to the extent practical, of the way in which a proposed decision will affect a host of related legal rules, practices, habits, institutions, as well as certain moral principles and practices, including the practical consequences of the decision, such as how those affected by the decision will react;" must take account of, in addition to text, "history, tradition, precedent, purposes, and consequences."[18] Breyer quotes Justice Holmes more than once for the proposition that a law's "general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."[19]

Breyer summarizes his criticism with one sentence: "I have found the legal world too complex, too different from the world the textualist assumes, to believe that the theoretical virtues the textualists mention can justify the textualist approach."[20] For Heidegger, a 'world' is deeper than something assumed or posited; world is ontologically prior, 'how it is to me.' From Breyer's 'finding' we may conjecture that the two legal worlds of pragmatists and textualists differ in their respective *Grundbefinden*, their 'how it fundamentally feels to me,' their thrownness.[21]

The general purpose of the law is to "help members of our society live together more productively and in peace;" so that "society can develop and community life can flourish."[22] In his Robert B. Silvers Lecture, a précis of the book, Breyer adds, "It's an experiment, the country."[23] As noted by March, experimentation is oriented to the exploration pole; in Bates's schema plasticity.

For Heidegger human existence itself is the experiment, the proper dignity of humankind is a **question** for humankind, always:[24] "the totality of involvements [e.g., laws and their interpretation] itself goes back ultimately to a 'towards-which' in which there is no further involvement . . . The primary 'towards-which' is a 'for-the-sake-of-which' [*ein Worum-willen*].

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[18] *Reading the Constitution* xxvi, 10-11, 195-196.
[19] *Id.* 5.
[20] *Id.* 26-27.
[21] "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921) 127: https://upload.wikimedia.org/wikipedia/commons/c/ca/Cardozo-Nature-Of-The-Judicial-Process.pdf . On *Befinden* and *Grundbefinden see* Katherine Withy, "Finding Oneself, Called," in *Heidegger on Affect* (ed. Christos Hadjioannou 2019).
[22] *Id.* 29, 108. A paraphrase of certain objectives stated in the Constitution's preamble.
[23] https://www.nypl.org/events/programs/2024/03/26/stephenbreyer ; also here (paywall) where he omits the lecture's reference to Camus, *The Plague,* and Nazis: https://www.nybooks.com/articles/2024/05/23/choosing-pragmatism-over-textualism-stephen-breyer/ .
[24] Sean Kelly is writing the book; *see* https://www.youtube.com/watch?v=ofRyyPi30k4 (Evelyn Barker Memorial Lecture at University of Maryland, Baltimore County; April 11, 2024).

But the 'for-the-sake-of' [*das »Um-willen«*] always pertains to the Being of Dasein, for which, in its Being, that very Being is essentially an issue [*dem es in seinem Sein wesenhaft um dieses Sein selbst geht*]." Human existence—being an issue for itself—is the sole authentic (*eigentlichen und einzigen*) for-the-sake-of-which.[25] The sole authority (*einzigen Autorität*) a free existing (*ein freies Existieren*) can have consists in the possibilities extractable from its very existence (*den wiederholbaren Möglichkeiten der Existenz*).[26] "Higher than actuality stands *possibility*."[27] In Justice Cardozo's optimistic phrase 'an expanding future.'[28] So for Heidegger, **everything** human is interpretation. "Human existence is itself a self-interpreting, self-articulating being [*das Dasein selbst ist sichauslegendes, sichaussprechendes Seiendes*]."[29] From what I can find out, this claim is staked farther toward the pole of exploration and plasticity than anyone in the West had ever got before Heidegger.

This is not to say that Breyer would go so far, but he does endorse Justice Robert Jackson's view that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[30] In the era recently ended the correlative notion once shone in *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[31] These sentiments taken together go a considerable distance toward Heidegger's viewpoint. They suggest the notion of the Constitution as a politico-legal clearing, a space for the experiment to proceed. So to heideggerize Chief Justice Marshall's words:—'we must never forget that it is a *Lichtung* we are expounding.'

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[25] *Being and Time* 116-117; *Sein und Zeit* 84: https://www.beyng.com/pages/de/SeinUndZeit/SeinUndZeit.084.html

[26] *Sein und Zeit* 391: https://www.beyng.com/pages/de/SeinUndZeit/SeinUndZeit.391.html . *Cf.:*

but rather seek
Our own good from our selves, and from our own
Live to our selves, though in this vast recess,
Free, and to none accountable, preferring
Hard liberty before the easie yoke
Of servile Pomp. Our greatness will appeer
Then most conspicuous, when great things of small,
Useful of hurtful, prosperous of adverse
We can create, and in what place so e're
Thrive under evil, and work ease out of pain
Through labour and indurance. *Paradise Lost* II.252-262, General Mammon *loq.*; a new *nomos* for a New World.

[27] *Sein und Zeit* 38: https://www.beyng.com/pages/de/SeinUndZeit/SeinUndZeit.038.html ; H.'s emphasis.

[28] "A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future." *The Nature of the Judicial Process* 83; italics in original.

[29] *Prolegomena zur Geschichte des Zeitbegriffs*; GA 20: 418: https://www.beyng.com/gaselis/?vol=20.00&pg=418 .

[30] *Reading the Constitution* 271, note 24.

[31] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

Now to stake the anti-thema:—'we must never forget that it is a *Ge-Stell* we are expounding.' *Ge-Stell* here as the instruction table of connected processes for categorizing, assessing, ordering, and disposing—*rechnende Denken*. As Justice Thomas writes, concurring in *Dobbs,*

> "the Due Process Clause at most guarantees *process*. It does not, as the Court's {now wobbling} substantive due process cases suppose, 'forbi[d] the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided.' . . . Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion. . . . For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold* {contraceptives}, *Lawrence* {homosexual conduct}, and *Obergefell* {same-sex marriage}. Because any substantive due process decision is 'demonstrably erroneous,' . . . we have a duty to 'correct the error' established in those precedents . . . After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated."[32]

The overruling of *Roe v. Wade* puts at risk, in play, myriad rights; or more exactly in Justice Thomas's view, many infirm-reliance interests. The program of originalist revision which Thomas urges is to be a cleansing, a purgation. Prof. Adrian Vermeule explicitly disavows textualism and originalism and yet shares the originalist's revulsion for substantive due process. Under the 'common good constitutionalism' advocated by Vermeule, "The [Supreme] Court's jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable." For instance the above-quoted claim "from the notorious joint opinion in *Planned Parenthood v. Casey* . . . should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after."[33] Unclean; let it be cast out.

Breyer treats the phenomenon of change in American constitutional law under the description 'paradigm shift,' referring the reader to Kuhn's *The Structure of Scientific Revolutions.* Breyer sketches the history of three earlier shifts—the *Lochner*, New Deal, and Warren Courts—and then considers whether the textualist-originalist movement has caused or is now causing

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[32] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215; 331, 332, 333 (2022); emphasis in original: https://www.supremecourt.gov/opinions/21pdf/597us1r58_gebh.pdf .

[33] The essential vice is "the progressives' overarching sacramental narrative, the relentless expansion of individualistic autonomy;" a narrative which treats "constitutional law as an engine of continual liberation, or of equalization;" a program in pursuit of "liberating individuals from the unchosen bonds of tradition, family, religion, economic circumstances, and even biology;" that is to say a "Whiggish 'living constitutionalism' that promotes individualism, radical autonomy, and identitarian egalitarianism – the aims of the progressive movement in the Anglophone world." Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (2022) 41-42, 36, 22, 37.

another paradigm shift. He doesn't think so, and his reasoning relies in part, notably, on a feedback loop.[34]

'Paradigm shift' is a species of *Verwandlung,* transformation.[35] Transformation is endemic to us in that *automatic plasticity* is built into human existence. Human being is erring (*der Mensch irrt*), Heidegger says. Not because human being has somehow fallen from Grace or any other innocent state of being. Rather because "error belongs to the inner constitution of the human 'open' [*Da-sein*] into which path-dependent [*geschichtliche*] humanity is let."[36] Bates lights a helping candle in this darkness. Heidegger is talking about, in Bates's phrase, radical error; error at the root of, organic to, human existence. "Without a clear vision of the truth in front of us," Bates writes,

> "in moments of true exploration or radical uncertainty, error may be the kind of straying that leads to a real *discovery*, as in the discovery that was never envisioned before, and never anticipated—a break in knowledge that opens up a new path that is discontinuous with the history of past truth. . . . Radical error is then the very mark of the mind's capacity to discover something new by liberating itself from all concreteness, of experience, of normative knowledge. [the very liberation condemned by Vermeule] As Heidegger elsewhere stated, '*Wer groß denkt, muß groß irren.*' Erring, straying into unknown territory: this indicates something special about the human mind, its ability to take itself beyond its own limited forms of knowledge, to *break with itself*. This leap into the unknown is always a risk and—this seems clear—cannot be *automated*."[37]

Cannot be automated in a **machine** (yet?). But **is** automatic in human being—not instruction-table automatic but as 'continually spontaneously generated.'[38] *Sinn* and *Irre* go together in all our sense-making.[39] Yet where there is *Irre,* there grows danger. Automaticity as

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[34] *Viz.*: judicial opinions→scholars' commentary→practitioners' arguments→tweaked opinions→⋯ . "The circle will be repeated, with each repetition filtering judicial rules and pronouncements through sieves of public commentary, criticism, and experimentation." *Reading the Constitution* 259.

[35] The word *Verwandlung*, Sheehan notes, "is a constant drumbeat throughout Heidegger's work, a call to personal and social transformation." Thomas Sheehan, "Rewriting Heidegger," May 13, 2023: https://www.beyng.com/papers/HC2023Sheehan.html#VOLLZUGSSINN . What other than transformation have we been doing for 300 millennia?

[36] *Der Mensch irrt. Der Mensch geht nicht erst in die Irre. Er geht nur immer in der Irre, weil er ek-sistent in-sistiert und so schon in der Irre steht. Die Irre, durch die der Mensch geht, ist nichts, was nur gleichsam neben dem Menschen herzieht wie eine Grube, in die er zuweilen fällt, sondern die Irre gehört zur inneren Verfassung des Da-seins, in das der geschichtliche Mensch eingelassen ist. Vom Wesen der Wahrheit*; GA 9:196: https://www.beyng.com/gaselis/?vol=9&pg=196 .

[37] *An Artificial History* 284, 285; italics in original.

[38] *Cf.* Bates's gloss of Kant: "The pathology of the spontaneous judgment is therefore the only path to a new normative existence." *An Artificial History* 103.

[39] The two great students of human insight, C. S. Peirce and Bernard Lonergan, agree that it is at once the farthest-reaching, most productive form of sense-making and also the most fallible, the riskiest.

rule-following wards off danger and guards purity of action per instruction-table; the most enduring case of which in the West is the Torah, God's Law. "To the one who performs it the Torah is *sam hayyim* (a medicine of life); to the one who does it not, it is a *sam muth* (a poison)."[40] Mary Douglas notes that the positive and negative precepts of *Deuteronomy* and *Leviticus*

> "are held to be efficacious and not merely expressive: observing them draws down prosperity, infringing them brings danger. We are thus entitled to treat them in the same way as we treat primitive ritual avoidances whose breach unleashes danger to men. The precepts and ceremonies alike are focussed on the idea of the holiness of God which men must create in their own lives. So this is a universe in which men prosper by conforming to holiness and perish when they deviate from it."[41]

"Purity is the enemy of change," she writes.[42] Thus originalism appears a sophisticated ritual avoidance of *Irre*, an abstemious hermeneutics of the pristine, whereas funky-fingered pragmatism handles the scut work of an ongoing *Irre*-ridden experiment (if the pleonasm be allowed).

Cardozo spoke of deep forces which make the man, whether litigant or judge. Heidegger said "Every decision sounds in something unmastered, hidden, confusing, else it would be no decision."[43] And Aristotle ἐν τῇ αἰσθήσει ἡ κρίσις, 'the judgment is in the sensibility.'[44] So institutional-jurisprudential rationales notwithstanding, what divides textualists from purposivists may be more in the nature of a Holmesian can't-help, a difference in 'the world as I found it,' thematic commitment, *Grundbefinden*.

DCW 05/11/2024

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[40] H. J. Schoeps, *Paul: The Theology of the Apostle in the Light of Jewish Religious History* (tr. Harold Knight 1961) 175, quoting Rabbi Joshua ben Levi. Not so simple; eternal recurrence of the pickle: "Since some [Rabbis] pronounce unclean and others pronounce clean, some prohibit and others permit, some declare unfit and others declare fit—how then shall I learn Torah?" From a talmudic sermon as quoted in Daniel Boyarin, "One Church; One Voice: The Drive Towards *Homonoia* in Orthodoxy," 33 *Religion & Literature* 1, 2 (2001). House of Scalia or House of Breyer? "Every decision sounds in, etc."

[41] Mary Douglas, *Purity and Danger: An analysis of the concepts of pollution and taboo* (1966) 50.

[42] *Id.* 162.

[43] *Jede Entscheidung aber gründet sich auf ein Nichbewältigtes, Verborgenes, Beirrendes, sonst wäre sie nie Entscheidung. Der Ursprung des Kunstwerkes;* GA 5: 42: https://www.beyng.com/gaselis/?vol=5&pg=42 .

[44] *Nicomachean Ethics* 1109b.