

# WHY ORIGINALISM WON'T DIE— COMMON MISTAKES IN COMPETING THEORIES OF JUDICIAL INTERPRETATION

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## I

### INTRODUCTION

**H**ow should judges interpret the Constitution? What should guide them in applying it in specific cases? The single best known answer to these questions is Originalism. Originalism is the view, embraced by Antonin Scalia, Robert Bork, Clarence Thomas and many academic legal theorists, that the meaning of the Constitution should be settled by reference to the original understanding of those who enacted its provisions.<sup>1</sup> Judges are bound

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1. The influential 18<sup>th</sup> century British legal thinker William Blackstone offered a broad endorsement of Originalism in WILLIAM BLACKSTONE, 1 COMMENTARIES \*59, \*61, \*91. As representative of contemporary Originalism, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); ROBERT BORK, THE TEMPTING OF AMERICA (1990); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999); Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed. 1997). For a discussion of Originalism's history, see JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS (2005). Justice Roger B. Taney invoked Originalist principles in *Dred Scott v. Sandford*, writing that the Constitution "speaks not only with the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States." 60 U.S. 393, 405 (1856), *quoted in* David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 139 n.43 (1988). The "duty of the court is, to interpret the instrument they [the drafters of the Constitution] have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted." *Id.*

by the law as ratified. Originalism also is probably the most intensely criticized theory of judicial interpretation; philosophers have issued seemingly devastating attacks on its tacit account of language.<sup>2</sup> To my knowledge, adequate answers to these criticisms have not been given.

Yet the theory has not faded. Indeed, it continues to enjoy vigorous support and, to many, seems the most coherent, sensible theory on offer. Having been subjected to the kinds of criticisms that normally bury a theory, one wonders: Why won't it die? Obviously, the average voter does not read linguistic critiques in philosophy journals. Normally, however, academic attitudes filter down and influence public attitudes through devices such as the editorial page. Moreover, Originalism's continuing support is not confined to the "unenlightened masses;" plenty of respected legal and philosophical minds remain advocates. Thus we might reasonably wonder: What explains its appeal?

A handful of factors probably contribute. At one level, the answer may be political sympathies: Those who support Originalism simply agree with the outcomes of judicial rulings that are purportedly based on Originalism. Others might be drawn to it out of reverence for the Founding Fathers, thinking that since they were wise men, "you can't go wrong" by following their words. Still others might long for answers to seemingly intractable political and legal disputes and believe that fidelity to the Constitution's original meaning provides a definitive means of resolving many of them. And many people, no doubt, see Originalism as the best way to uphold the will of the people: If these are the rules that we made, then these are the rules by which we must abide—no game-playing to manipulate meaning is allowed.

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2. See *infra* note 29.

While each of these reasons may help to explain Originalism's appeal, none of them captures the heart of the issue. The deeper reason that Originalism will not die, I think, is that it has staked out the moral high ground, championing the *objectivity* of interpretation that is essential to the ideal of the rule of law. Anything other than fidelity to the written words, it seems, surrenders us to the rule of mere men (the individual justices on the bench).

Or so things would appear.

What I will suggest is that the very objectivity which explains Originalism's appeal is misunderstood by Originalists themselves. And part of the reason that criticisms have not inflicted more crippling damage is that the leading alternatives also suffer from confusions about appropriate standards of objectivity in the legal domain—which many people sense, I think, and which sends them back to the apparently safer harbor of Originalism.

I merely “suggest” because a full proof of my proposal would require an in-depth exploration of the complex nature of objectivity, which itself would require an extended essay in epistemology. Without offering that, I hope to expose an important misconception about objectivity and to direct more attention in the debate over judicial interpretation to this element of competing theories—their conceptions of objectivity. I will focus on Scalia as the chief representative of Originalism both because of his influence, as a sitting Supreme Court Justice, and because his articulation of Originalism is widely regarded as its most sophisticated defense. Even those who disagree with Scalia frequently pay homage to his intellect and consider his a theory to be reckoned with. Thus, his is the version that I shall reckon with.

## II

## ORIGINALISM

Let me briefly elaborate on Originalism's basic thesis and rationale. The defining doctrine, again, is that the meaning of the Constitution should be settled by reference to the original understanding of those who ratified it.<sup>3</sup> In the words of Scalia, "Originalists believe that the Constitution should be interpreted to mean exactly what it meant when it was adopted by the American people."<sup>4</sup> Originalists oppose the notion that judges must engage with a "living constitution" that evolves.<sup>5</sup> The only fair way to apply the law, they maintain, is to remain faithful to its original meaning, since that is what was democratically enacted.

It is helpful to distinguish three species of Originalism: Original Intent, Public Understanding, and Textualism. According to the Original Intent view, "a judge is to apply the Constitution according to the principles intended by those who ratified the document."<sup>6</sup> According to the Public Understanding view, it is not the lawmakers'

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3. *E.g.*, RANDY BARNETT, RESTORING THE LOST CONSTITUTION 89 (2004); DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 9 (2005); WHITTINGTON, *supra* note 1, at 35. Debates about proper judicial interpretation often concern interpretation of all law, including federal statutes and regulatory rulings as well as provisions of the Constitution. Though I will predominantly speak of the Constitution, much of what I argue here could be equally applied to interpretation of other forms of law.

4. Scalia, quoted in Steven Kreytak, *At A&M, Scalia Rails Against Judicial Reinterpretation*, AUSTIN AM.-STATESMAN, May 6, 2005, at B1.

5. William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976), reprinted in READINGS IN THE PHILOSOPHY OF LAW 520, 520–22 (John Arthur & William H. Shaw eds., 3rd ed. 2001). Rehnquist contends that the notion of a "living constitution" typically means that those interpreting the Constitution should rely on their consciences or on their sense of the "conscience of the people" in making decisions. This empowers judges to be a "roving commission," second-guessing all other agencies of government on what is best for the country. *Id.*

6. BORK, *supra* note 1, at 143. Bork himself does not advocate reliance on any particular lawmakers' subjective intent, but on the generally understood meaning of the relevant language at the time the law was enacted. He is thus an advocate of the Public Understanding view. *Id.*

intent that is salient, but the ordinary, commonplace, public understanding of words' meaning.<sup>7</sup> Should a discrepancy ever arise between the particular intent that animates lawmakers in enacting a certain law and the public understanding of the language of that law, the latter should rule.<sup>8</sup> Scalia, the champion of Textualism, rejects both of these, but targets his fire on Original Intent, in particular. Accordingly, I shall not consider the Public Understanding school further in this Article, apart from one observation much later that should make clear why this neglect is justified.

Scalia emphasizes the difference between a speaker's intent and the words that the speaker actually uses in order to argue that judges must abide by the law's words. Scalia recognizes that a person can say something that he did not mean. We are all familiar with the experience of saying something, or hitting the "send" button on an email message, and only then realizing that we did not say exactly what we meant to, that we had expressed ourselves clumsily. (For example, "I meant to be sympathizing with him; it came across as if I were criticizing him.") Of the two—what lawmakers intended and what they actually wrote down and ratified—only the latter counts as law, Scalia insists.<sup>9</sup> The text is what citizens and judges alike are to be guided by.<sup>10</sup>

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7. *See id.* at 144 ("[W]hat the ratifiers [of the Constitution] understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.").

8. BORK, *supra* note 1, at 144–46.

9. *Id.* at 22–23.

10. *Id.* Scalia is also sometimes labeled a "formalist" because he insists on strict adherence to the form of law. This is not an alternative to Textualism, but part and parcel of respecting the written law. *Id.* at 25, 46; *see also* FARBER AND SHERRY, DESPERATELY SEEKING CERTAINTY 29–54 (2002).

Why should we accept Textualism? Without recounting all of Scalia's arguments, a few highlights will convey the core of his reasoning.

It is an uncontroversial desideratum that lawmakers be clear when writing legislation. Scalia asks, why do we urge that? He answers: because it is words that constitute the law.<sup>11</sup> If all that mattered were lawmakers' intent, we could disregard what they said and simply try to read their minds. But this exposes the folly of the Original Intent view. We must distinguish between what a lawmaker meant and what he actually enacted in order to be faithful to the Rule of Law.<sup>12</sup> It would be "tyrannical" to have the meaning of a law determined by what lawmakers intended, rather than by what they ratified.<sup>13</sup> A government of laws means that the unexpressed intent of lawmakers carries no authority. "Men may intend what they will," Scalia writes, "but it is only the laws that they enact which bind us."<sup>14</sup>

Moreover, the sovereignty of intentions would leave us vulnerable to just the sort of judicial activism that all Originalists oppose. When judges try to discern the original intent, Scalia contends, they invariably end up finding the intent to be something that they (the present judges) approve of.<sup>15</sup> When a judge looks for what a law "meant" rather than what it said, he will tend to ask "[w]hat should it have meant?" and will conclude that it meant something that he deems best.<sup>16</sup>

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11. Scalia, *supra* note 1, at 17 ("It is the *law* that governs, not the intent of the lawgiver.").

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 18.

16. *Id.*

Further, Scalia maintains, by taking the power of making law away from the people, the alternatives to Textualism are undemocratic.<sup>17</sup> Congress will sometimes enact foolish laws, he readily admits, but it is not the role of the courts to tell us when it does.<sup>18</sup> The courts' role is to interpret and apply the law—it is not to second guess whether a given law should be a law.<sup>19</sup>

Scalia's positive view is essentially that judges should follow the text and nothing but the text. Judges must abide by the letter of the law—period.<sup>20</sup> In doing this, he allows, “context is everything.”<sup>21</sup> For instance, the First Amendment forbids abridgement of “freedom of speech, or of the press,”<sup>22</sup> yet handwritten letters, though they are neither speech nor activities of the press, are properly protected, in his view.<sup>23</sup> This is not strict constructionism, Scalia explains.<sup>24</sup> A text should not be construed strictly—nor leniently.<sup>25</sup> A law should be read “reasonably, to contain all that it fairly means.”<sup>26</sup> At the same time, Scalia holds that the Eighth Amendment's ban on “cruel and

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17. *See id.* at 22 (“It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”). This theme runs throughout nearly all Originalist reasoning.

18. *Id.* at 20.

19. *Id.* at 22. Advocates of Originalism sometimes liken the judge's role to that of an umpire. We would not approve of a baseball umpire who, because he believed that steroids unfairly advantage batters, called batters out after two strikes rather than three, in order to balance things out with pitchers. Analogously, Originalists maintain judges are to enforce the rules, not to make them.

20. *Id.* at 20, 22.

21. *Id.* at 37.

22. U.S. CONST. amend. I, cl. 2.

23. Scalia, *supra* note 1, at 38.

24. *Id.*

25. *Id.* at 23.

26. *Id.*

unusual punishment”<sup>27</sup> applies only to punishments that would be considered cruel and unusual by the Constitution’s authors.<sup>28</sup>

### III

#### CRITICISMS OF ORIGINALISM

Scalia’s Textualism has been subjected to penetrating criticisms from a number of thinkers.<sup>29</sup> The most piercing focus has been on its implicit theory of language.

Scalia contends that the distinction between an author’s intention and his words’ meaning shows that what matters is not what an author means, but only what his text says.<sup>30</sup> Having an intention to do “x” does not ensure success at doing “x”; therefore, intentions are not the issue.<sup>31</sup> Textual meaning is something public, Scalia reasons,

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27. U.S. Const. amend. VIII.

28. Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 145–46 (Amy Gutmann ed., 1997).

29. For specific responses to Scalia’s arguments, see Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115 (Amy Gutmann ed., 1997) and Laurence Tribe, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65 (Amy Gutmann ed., 1997). For criticisms that target either Scalia directly or important elements of his views, see Stanley Fish, *Fish v. Fiss*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 251–68 (Sanford Levinson & Steven Mailloux eds., 1988); RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 269–70 (1980) (suggesting that judges play an important role in shaping statutory law when it is unclearly written); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 765–73 (1982) (arguing that judges must interpret both the social and written text); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 228–38 (1980) (arguing that Nonoriginalist interpretation better serves constitutional disputes than Originalist interpretation); Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992); David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919 (1998) (arguing that the plain meaning approach does not apply well to novel circumstances and that language is often underdefined); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 504 (1989–90) (“Because language ‘by itself’ lacks meaning, and in light of the existence of gaps or ambiguities in hard cases, interpretive principles of various sorts are desirable and in any case inevitable.”).

30. Scalia, *supra* note 1, at 17–18.

31. *Id.* at 29–30.

not a private desire, and surely the law must be public—promulgated and knowable to those who will be required to obey it.<sup>32</sup>

While Scalia is clearly correct that a person's intent in communicating does not guarantee success, it does not follow that meaning is independent of intent. It is true that words have meaning (this is what we seek in dictionaries) and that a speaker, on a particular occasion, may or may not intend to express the same thing that the words that he uses actually convey. But this should simply be a signal of the possibility of equivocating between what a word means and what a *person* means, when using that word on a specific occasion. People frequently use words to convey non-standard meanings of those words, such as through sarcasm, code and colloquial metaphors (for example, a sarcastic “no, I *love* waiting for you” to express one's annoyance, or “hold the phone” to signify “pause before proceeding” rather than “do not relinquish that telecommunications device”). Code can be as formal as military procedure for how soldiers taken prisoner are to use any opportunity for communication to outsiders or as informal as that developed between a husband and wife to transmit signals to one another about the desire to leave a social gathering. The colloquial metaphors that use language in non-standard ways are numerous, such as, “cool your jets,” “he was on 78,” or “raise the roof.”

The point is, under the conventions of our language, almost any sequence of words can communicate more than one meaning, depending on the circumstances. Given this, how are we to interpret expression which has a meaning that is not transparent (as often occurs in the cases litigated in appellate courts)? To reasonably interpret what was written, we must appeal to the larger context.

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32. See *id.* at 17 (“It is the *law* that governs, not the intent of the lawgiver.”).

Authors' intents can be an important part of that. I do not mean to suggest that intent is everything or that the written words are unimportant. The point is simply that words *by themselves* cannot furnish all that is needed to answer the questions that arise in hard cases.

Recall Scalia's argument that the reason that we urge legislators' clarity of expression is recognition that the text is what governs—this is why it is imperative for authors to get their language right.<sup>33</sup> Notice, though, what the instruction to “be clear” means is: be clear *about* the intended meaning, about what you want to get across. For that is the task when writing laws: communicating thoughts, judgments about the kinds of actions that should and should not be legally permissible. Indeed, Scalia himself recognizes this when he allows that handwritten notes are constitutionally protected, although they are not specified in the language of the First Amendment;<sup>34</sup> and again when he maintains that a law increasing penalties for “use” of a firearm during a drug trafficking crime should apply only to using a firearm as a firearm (shooting it) and not to trading a firearm (although the law in question does not articulate that distinction);<sup>35</sup> and again, when he allows that judges may sometimes infer “scrivener's error” in sloppy writing of a legal provision (such as writing “offense” when “criminal offense” is clearly what was meant) and rule accordingly (that is, by interpreting the law as if lawmakers had written something different from what they actually did).<sup>36</sup>

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33. *See supra* notes 11–16.

34. Scalia, *supra* note 1, at 37–38.

35. *Id.* at 23–24.

36. *Id.* at 20–21. Scalia acknowledges the validity of a distinction that Dworkin draws between two types of Originalism, Semantic and Expectation. *Id.* at 144. Scalia explains that he rejects “Expectation Originalism,” the belief that judges should be guided by what they think an

The upshot of all this is that meaning does depend on context, as Scalia professes to acknowledge, but he fails to see that this fact undermines the very theory that he embraces. The basic truth that Scalia fails to appreciate is that words cannot explain themselves. The distinction that Scalia stresses, between words and intent, is valid. Yet when we are trying to understand words' meaning, it is not the case that we can be interested in one or in the other. It would be a mistake to think that intent is all, yet Scalia is mistaken to think that words are all. Properly, the search for lawmakers' intent is a *means* of determining their text's meaning.<sup>37</sup>

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author expected to happen, as a result of his words, while he affirms "Semantic Originalism," the belief that judges should be guided by what they think an author intended to *say*. *Id.* This makes sense of Scalia's position on scrivener's error, insofar as in that sort of case, Scalia holds that judges may infer that a law's authors misspoke, rather than that they mis-legislated, which would be a very different kind of judgment. *Id.* at 21. Unfortunately, this finesse does not rescue Scalia from contradiction in regard to the First Amendment and firearms cases. For in those cases, judges who rule as Scalia says they should are not, in fact, respecting Semantic Originalism. They are, rather, projecting their beliefs about what the authors of the relevant laws expected to happen. Dworkin makes a similar criticism. DWORKIN, *supra* note 29, at 124–27. More will be said in regard to Scalia's view of First Amendment interpretation later.

37. For a similar criticism, see Sosa, *supra* note 29, at 923 ("The search for legislative intent can be considered not so much an alternative to textual interpretation as a means to that very end.").

Because it is sometimes other spoken or written words that help to supply the context, one might be tempted to think that Scalia is right to hold that judges can attend exclusively to words, in order to discover the meaning of a law. This conclusion would be hasty, however. First, notice that a variety of factors can furnish the context that enables us to accurately understand words' meaning. Consider, for example, the messages that silence can send, or the absence of certain words accompanying a statement, as when a cold, abrupt "thank you" is uttered with no elaboration, in a way that conveys disappointment or disdain. Also consider the expressive role of action, such as winking while saying something, kicking a person under the table, or inserting a smiley face after a line of email text. Consider omission, as in not undertaking the action that would normally accompany a certain statement (for example, saying, "oh, let's all rush to see that" while clearly making no effort to move, let alone to rush). On other occasions, knowledge of the speaker's past experience, larger purposes, or ignorance in a certain domain can also inform what his words on a particular occasion signify. While other words do sometimes supply the context required for valid interpretation, many times, it is other features that perform this service.

The deeper point, however, is that even in those cases in which it is other words that supply the needed context, those other words themselves require interpretation. Meaning cannot be explained solely by words *all the way down*. At some point in the reaches of such an explanation, one will have to appeal to the human intentions by which words carry the meanings (even in their most straightforward and typical usages) that they do.

Many authors, as I have noted, have criticized Scalia along these general lines.<sup>38</sup> I do not endorse all of their arguments and some of them stand on premises that I consider no more valid than Scalia's. The criticisms that I have distilled here, however—of this strongest form of Originalism—are fatal. The fact that Originalism has not succumbed to these attacks is testimony to the deep-seated appeal of its apparent objectivity—of the idea that the rule of law is a law of rules that are objectively interpreted and consistently applied.<sup>39</sup> It is also testimony to the failure of the leading alternatives to offer anything clearly stronger, on this score. To see why the alternatives are not widely considered improvements on Originalism, I will conduct a quick survey. I should stress that this is meant not as a thorough exposition or analysis of these schools, but only to extract the essence and expose the absence of objectivity in each of them.<sup>40</sup>

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38. See articles cited *supra* note 29.

39. See generally Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

40. Some thinkers, of course, deny the possibility of objectivity. Legal Realists hold that legal rules and legal reasons are merely post-hoc rationalizations for judicial decisions. Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50, 50 (Golding & Edmundson eds., 2005). John Chipman Gray held that the law consists of rules laid down by the courts and that all else, such as statutes and precedents, are merely sources of the law. Whoever holds ultimate authority to interpret the law, Gray held, is in fact the law *giver*. HLA Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 5 (1977), reprinted in ESSAYS IN JURISPRUDENCE 123, 129 (HLA Hart ed., 1983). The repudiation of objectivity in the legal realist view is perhaps most graphically reflected in Oliver Wendell Holmes' statement that a law was constitutional unless it made him "puke." Richard Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, in THE BILL OF RIGHTS AND THE MODERN STATE 433, 447 (Stone, Epstein & Sunstein eds., 1992). Legal Realists rarely make the short list for appointment to federal benches, of course, because it is difficult to square respect for the rule of law with claims that the law is whatever a particular judge says it is.

## IV

## LEADING ALTERNATIVE THEORIES

## A. Popular Will

One competitor to Originalism is what I will call “Popular Will” theory, advocated by John Hart Ely, Bruce Ackerman, and to some extent, Justice Stephen Breyer, among others.<sup>41</sup> This is the belief that proper judicial decision-making must regard the will of the people as all-important.<sup>42</sup> It prescribes judicial deference to the wishes of those who passed a law and to the wishes of the people today. Ely defends a “participation-oriented, representation-reinforcing” approach to judicial review in which the courts’ role is to improve the efficacy of the democratic process.<sup>43</sup>

Popular Will theory does not endorse unqualified deference; Ely and Breyer contend that the court should sometimes take a more activist role in leading public sentiment, so as to protect the right to vote or affirmative action, for example, before public sentiment has shown a demand for this. Its justification for doing so, however, is service to the democratic character of our government. Such decisions will enhance the people’s ability to govern themselves.<sup>44</sup>

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41. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); *see also* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

42. Truly, this sentiment is what lies beneath Originalism insofar as it holds that the reason we should defer to the original understanding is that that expresses the people’s wishes. Popular Will theory is a more naked appeal to democracy as the decisive factor.

43. ELY, *supra* note 41, at 87, 73–76. Breyer contends that “courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts.” BREYER, *supra* note 41, at 5.

44. ELY, *supra* note 41, at 73–104, 135–79; BREYER, *supra* note 41, at 10.

*How* activist may judges be in seeking to serve the popular will? Doesn't the Constitution constrain them? Of course the Constitution matters, advocates allow, but why is the Constitution our law? Because the people accepted it as such. The Constitution was submitted to the citizenry for ratification—evidence that in our system, the people are sovereign.<sup>45</sup> And, according to Ackerman, the people can alter the Constitution through extended, thoughtful public deliberation about an issue—what he calls episodes of “higher lawmaking”—without “hypertextualist” fidelity to the provisions of Article V (which concerns amending the Constitution).<sup>46</sup> Ackerman argues that the Constitution does not entrench any rights. Nothing in it prohibits it being amended in ways that do away with certain now-asserted rights. From this, he draws the conclusion that the Constitution regards the people as sovereign, above even the Constitution itself—which is why judges should be guided by the people's wishes.<sup>47</sup>

The threat to objectivity from this approach is obvious. To the extent that a court does simply defer to the will of the people—reflected either through laws they have enacted in the past or current sentiment expressed during an episode of “higher lawmaking”—it is exchanging the rule of law for rule of the mob. To the extent that courts sometimes block popular will (remember, they are not to be abject deferrers), not by reference to law, but by the judges' ideas of how best to facilitate democracy (such as through affirmative action), they are grafting their own values onto the law. Neither variation

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45. ELY, *supra* note 41, at 6–7.

46. See, e.g., 1 ACKERMAN, *supra* note 41, at 50–56. The “hypertextualist” characterization is cited in Farber and Sherry, *supra* note 10, at 98, 100.

47. 1 ACKERMAN, *supra* note 41, at 15–16.

upholds the rule of law.<sup>48</sup> In either its more or less deferential mode, Popular Will theory elevates the wishes of the people, as midwifed by a judge, above the objective application of the law.

## B. Dworkin

Another alternative to Originalism is Ronald Dworkin's theory, which emphasizes values in the law. Dworkin views judicial rulings as akin to a chain novel, a cooperative enterprise to which a series of authors contribute, over generations.<sup>49</sup> In a chain novel, one person starts a tale, another fills in chapter two, another chapter three, and so on. Each develops the tale further, consonant with what has gone before.<sup>50</sup> Similarly, Dworkin contends, a judge must make his decisions as part of an ongoing story. His role is both to interpret what has been said so far and to move the narrative forward. This places two important demands on a judge: his contribution has to "fit," that is, it must be something that other authors might have written, and his contribution must aim to make the law the best it can be. Judges should strive to create a unified story and a good story—advancing the law by resolving new disputes in desirable ways, remaining faithful to law and rulings of the past.<sup>51</sup> The shield

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48. Note that Ackerman's proposal that we can have unwritten amendments would logically license unwritten repeals of laws, as well—which makes clear how volatile and inscrutable the law becomes, under his theory. In fact, while the Constitution does allow the people to lawfully alter the Constitution, it does not authorize their doing so by disregarding Article V. Article V stipulates that, regardless of what the people may wish at a given time, any changes must be made in accordance with its provisions. By ratifying a Constitution that included an explicit amendment process, the people committed themselves to following the rule of law even at those times when they wished to make changes in that law.

49. RONALD DWORKIN, *LAW'S EMPIRE* 225–75, 355–99 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–149 (1977).

50. Dworkin refers to television soap operas as a more familiar model for us: Although script writers can vary from episode to episode or season to season, they seek continuity in the situation, characters, and plot development. He believes they are not as disciplined in their work as chain novelists, however. DWORKIN, *LAW'S EMPIRE*, *supra* note 49, at 229.

51. *Id.* at 230–31.

against judicial activism rests in the requirement that a judge *continue* the story that has emerged thus far. He is not a solo author, free to initiate a totally new tale, but must be guided by the decisions that have been handed down previously.<sup>52</sup>

Dworkin is less sanguine than Scalia about the extent to which language alone can guide a judge. The meaning of law is not always apparent on its face, he contends. Often, it can only be understood in light of the larger purposes of law. “Lawyers are always philosophers,” Dworkin writes.<sup>53</sup> A judge should regard provisions of the Constitution and precedent as expressions of an underlying philosophy of government, and he should rest his decisions on the relevant principles of that philosophy. When the language of a law does not readily tell a judge how to apply it, the question to pose is not about intentions or words, as Originalists maintain. Rather, the question to be guided by is, “which decision is required by our system’s political philosophy?” Whereas Scalia would have judges heed only the text, Dworkin authorizes judges to read between the lines. Abstract principles (such as the commitment to individual rights) are as much a part of the law as any other provisions of the Constitution.<sup>54</sup> Consequently, judges should seek out those principles and interpret with integrity.<sup>55</sup>

Originalists, predictably, view Dworkin as granting license for judges to ignore what the law says. If judges “are authors as well as critics” (as Dworkin characterizes them)<sup>56</sup> and if they may read

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52. *Id.* at 239.

53. *Id.* at 380.

54. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 49, at 147–49.

55. See DWORKIN, LAW’S EMPIRE, *supra* note 49, at 225, 243. He calls his theory “law as integrity” because he sees the law’s provisions not as piecemeal threads, but as strands of a single integrated fabric into which a judge must weave his particular rulings.

56. *Id.* at 229.

between the lines, they may depart from the law. Correspondingly, Originalists see Dworkin's theory as anti-democratic and classify him with judicial activists who advocate an unruly "living constitution."<sup>57</sup> Yet even non-Originalists have reason to reject Dworkin's theory. For it grants too much power to individual judges. Insofar as Dworkin urges judges to "continue the legal narrative" so as to make the law the best it can be, he is granting them a lawmaking role. They are authors, in his account, to "write the story" not only bound by previous law, but by their judgments about what an ideal story would be. If Dworkin had left the instructions to judges at "make your ruling fit," or even "make it fit with the philosophy implicit in previous laws," he would be on firmer ground. Once he instructs judges to seek to make law the best possible, however, he is authorizing the introduction of extra-legal considerations.

In Dworkin's defense, one might suppose that he means for judges to rule in ways that make the law "best" only *relative to* our existing legal system, as constrained by the provisions of the Constitution. Examination of his writing does not bear out this more restrained reading of his position, however. Throughout the elaboration of his theory, Dworkin repeatedly characterizes a judge's role as to make the law "the best it can be" without any qualifications tying that assessment to existing law.<sup>58</sup> At various stages, he characterizes the judge's role as making the law "better on the whole" and "best, all things considered;" "aesthetic" judgments may

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57. Scalia, for instance, insists that the Constitution contains no "philosophizing" of the sort found in the Declaration of Independence and that Dworkin would have judges rely on. Scalia, *supra* note 1, at 134.

58. See, for instance, *Law's Empire* where he writes: "Your assignment is to make of the text the best it can be, and you will therefore choose the interpretation you believe makes the work more significant or otherwise better." DWORKIN, *LAW'S EMPIRE*, *supra* note 49, at 233; *see also id.* at 229, 239, 255.

legitimately come into play.<sup>59</sup> We do find a couple of passages that support a less legislative reading of Dworkin's judiciary.<sup>60</sup> The ideal judge, he says late in *Law's Empire*, "does not think that the Constitution is only what the best theory of abstract justice and fairness would produce by way of ideal theory. He is guided instead by a sense of constitutional integrity; he believes that the American Constitution consists in the best available interpretation of American constitutional text and practice as a whole."<sup>61</sup> Yet on the very same page, Dworkin immediately abandons this restraint, explaining that the judge should "draw on *his own* convictions about justice and fairness and the right relation between them"—that is, not on those that he finds expressed (whether explicitly or implicitly) in our Constitution.<sup>62</sup>

Dworkin does, at times, seem reluctant to endorse the judicial equivalent of freewheeling literary license. He describes his proposal as prescribing neither "total creative freedom" nor "mechanical textual constraint." Yet within a page of saying this, he allows that judgments of "fit" and of what is "best" are "subjective," "internal to [the judge's] overall scheme of beliefs and attitudes."<sup>63</sup> While judgments of what is best are to be made from the standpoint of political morality, he does not specify that this must be the political morality that is found in the Constitution.<sup>64</sup> The ideal judge, he says

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59. *Id.* at 231, 234.

60. *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 49, at 126; DWORKIN, LAW'S EMPIRE, *supra* note 49, at 397–98.

61. DWORKIN, LAW'S EMPIRE, *supra* note 49, at 397–98.

62. *Id.* at 398 (emphasis added). It is also noteworthy that Dworkin allows that judges may legitimately disagree about the Constitutional theory that is to guide their rulings. There is not a single correct theory to which all judges are bound, in other words. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 49, at 117–18.

63. DWORKIN, LAW'S EMPIRE, *supra* note 49, at 234–35.

64. *Id.* at 239.

several times, is engaged in “creative”<sup>65</sup> interpretation and “constructive”<sup>66</sup> interpretation that aims to “*impose* purpose over the text or data or tradition being interpreted.”<sup>67</sup> Although the law may not be a seamless web, Dworkin writes, the judge must treat it as if it is.<sup>68</sup> In other words, the judge is to rule on the basis of something other than what the law is.

One could debate the exact range of permissible judicial discretion in Dworkin’s theory at greater length. Based on the textual evidence adduced, however, from the standpoint of objectivity, he clearly provides ample ground for concern. Even if we were to set that concern aside, however, and (extremely charitably) take Dworkin to mean that judges are to conform their rulings to our legal system’s political philosophy rather than to the judges’ own philosophy, a fundamental problem remains.

By urging judges to make use of a nation’s underlying political principles, Dworkin elevates those principles over the actual law that has been enacted. For a law that is inconsistent with a nation’s underlying political philosophy may still be consistent with its bedrock law. The Constitution itself might, in some of its provisions, depart from the basic philosophy that informs most of it. Many would argue that it does, in places (in regard to slavery, for instance, or women, or in the Commerce Clause, or the power to raise taxes, or eminent domain). Fortunately, we do not need to enter into such arguments. The important point here is this: The fact that our Constitution may not consistently uphold our guiding philosophy

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65. *Id.* at 228.

66. *Id.* at 255.

67. *Id.* at 228 (emphasis added). He also writes that we cannot clearly distinguish a judge’s interpreting the law from his adding to the law. *Id.* at 232.

68. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 49, at 116.

does not give judges the right to assume the role of philosopher kings. The rule of law—even in a legal system that is grounded on sound moral and political philosophy—must be respected by judges as the rule of *law*.

Dworkin may be right that judges should read the Constitution as reflecting an underlying philosophy and should make use of that philosophy in interpreting its provisions. Yet it would exceed their interpretive function for judges to make use of that philosophy when it is not conveyed through the Constitution, as it is not, when specific provisions of the Constitution clearly contradict the principles in question. To avoid controversies surrounding the cases most frequently alleged to be inconsistencies, consider a hypothetical. Suppose that the Constitution included a provision authorizing complete government control over citizens' travel (domestic and foreign), and also suppose, for the sake of the immediate argument, that this betrays the principle informing its recognition of freedom of speech and of religious practice and of property (among other freedoms). That contradiction would not license judges to ignore the explicit restriction on travel and to treat travel as equally free. To put the point simply: If a judge is faced with a conflict between the philosophy of the Constitution and a written provision of the Constitution, the latter must be decisive. Philosophy *is* fair game for judges to employ, so long as it is the philosophy clearly expressed in the Constitution. When it is not, it must yield to the written law.<sup>69</sup>

The subjectivism of Dworkin's theory—evidenced in his own statements that judgments of “fit” and of what is “best” are subjective as well as in the implications of his view of how judges are to employ

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69. These claims apply to Constitutional law. Particular legislative statutes and policies of various agencies of government are obviously to be evaluated against the Constitution.

philosophy—is also apparent in his view of why judges should respect precedent, namely, because others thought that a given reading of a law was correct. Now one might think that that is unfair to Dworkin. After all, his call for judges to make reference to philosophy seems a check on slavish deference to either legislative majorities or previous judges. This does not rescue his view from subjectivism, however, for two reasons. First, to the extent that, on Dworkin’s view, philosophy as well as previous laws and rulings must all be taken into account, we cannot be sure that it is philosophy that is “checking” majority or judicial will, rather than the other way around. Indeed, since no instruction for how a judge is to weigh these potentially conflicting considerations is given, it is apparently up to him how to do that—which leaves not only the determination of the proper decision in a given case up to the individual jurist, but also the determination of what *constitutes* proper decision-making.

Second, to the extent that judges are to be guided by the proper philosophy, under Dworkin’s theory (and the exact extent is murky), they are not objectively applying the law. Sympathetic as I am with the desire to correct the law by reference to philosophical truths, when judges attempt to do that, they are no longer applying the law. They are imposing their ideas of what the law should be.<sup>70</sup>

In sum, Dworkin may be right that judges need to be philosophical in interpreting the Constitution in order to apply it in a specific case. It is not a judge’s role to philosophize about what the Constitution itself should be, however, and to implement his conclusions about *that* through his rulings. (I will say more about my own view on this in the penultimate section.)

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70. The wisdom of a particular judge is beside the point.

### C. Minimalism

Yet another theory of judicial interpretation, like Originalism, advocates a type of judicial restraint. Cass Sunstein is the foremost proponent of Minimalism and Supreme Court Justice Anthony Kennedy and the recently retired Justice Sandra Day O'Connor are frequently cited as practitioners.<sup>71</sup> Advocates of “common law judging” are sometimes linked with Minimalism, and Justice Breyer’s view also bears definite affinities.<sup>72</sup>

The title of Sunstein’s book, *One Case at a Time*, indicates the gist of this school of thought. Minimalism is the policy “of saying no more than necessary to justify an outcome, and leaving as much as possible undecided.”<sup>73</sup> A minimalist court, Sunstein explains, is “intensely aware of its own limitations” and thus seeks to decide on “shallow” and “narrow” grounds, avoiding “clear rules,” “abstract theories,” and “final resolutions.”<sup>74</sup> By doing so, Minimalism leaves issues open for democratic participation and deliberation.<sup>75</sup> Breyer similarly stresses this.<sup>76</sup> Minimalists advocate judicial restraint not on

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71. Cass Sunstein, *The Rehnquist Revolution*, THE NEW REPUBLIC, Dec. 27, 2004, at 36; Anonymous, *Divide & Rule*, THE ECONOMIST, Sept. 17, 2005, at 86 (reviewing CASS SUNSTEIN, *RADICALS IN ROBES* (2005)); Emily Bazelon, *The Swing Vote*, NEW YORK TIMES BOOK REVIEW, Feb. 5, 2006, at 21; David J. Garrow, *The Unlikely Center*, THE NEW REPUBLIC, March 6, 2006, at 37; Jeffrey Rosen, *Supreme Court Confirmations Are as Messy as They Should Be*, CHRONICLE OF HIGHER EDUCATION, Nov. 11, 2005, at B8–9; Jeffrey Rosen, *The Age of Mixed Results*, THE NEW REPUBLIC, June 28, 1999, at 46, 50; see generally *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (Kennedy, J., concurring).

72. Others associated with Minimalism include David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 887 (1996); Farber and Sherry, *supra* note 10, at 140–68.

73. CASS SUNSTEIN, *ONE CASE AT A TIME* 3 (1999).

74. *Id.* at ix, 9, 14.

75. *Id.* at 4. (“There is a relationship between judicial minimalism and democratic deliberation. Of course minimalist rulings increase the space for further reflection and debate . . . simply because they do not foreclose subsequent decisions.”).

76. BREYER, *supra* note 41, at 37 (“The principle of active liberty – the need to make room for democratic decision-making – argues for judicial modesty in constitutional decision-making, a

the grounds that resolutions can always be found in law's language, as in Textualism, but on the belief that resolutions are to be supplied through democratic debate. Sunstein commends incremental, case-by-case decision-making for its "flexibility" and refusal to tie the hands of other courts and legislatures.<sup>77</sup> Minimalism "wants to accommodate *new* judgments about facts and values. To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments."<sup>78</sup>

We see Minimalism in practice in the reasoning of Justice William O. Douglas in his majority opinion in the 1954 eminent domain case *Berman v. Parker*.<sup>79</sup> Speaking of the police power, Douglas contends,

[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.<sup>80</sup>

As a more recent example, consider Justice Kennedy's opinion in *Kelo v. City of New London*,<sup>81</sup> another eminent domain case. Kennedy writes that his concurrence with allowing this taking does not "foreclose the possibility that a more stringent standard of review

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form of judicial restraint."); *Id.* at 70 ("[T]wenty-first-century Americans go about finding [legal] solutions . . . [through] a form of participatory democracy.").

77. SUNSTEIN, *supra* note 73, at 44.

78. *Id.* at x (emphasis added). Notice similarities with Ely's advocacy of judges ruling so as to reinforce representation and bolster democratic process. ELY, *supra* note 41. Sunstein also contends that minimalism reduces the burden of judicial decision and is likely to make judicial errors less frequent and less damaging. SUNSTEIN, *supra* note 73, at 4.

79. 348 U.S. 26 (1954).

80. *Id.* at 32.

81. 125 S. Ct. 2655 (2005) (Kennedy, J., concurring).

than announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings.”<sup>82</sup> But, he asserts, “this is not the occasion for conjecture as to what sort of cases might justify a more demanding standard.”<sup>83</sup> And in a recent abortion decision, while reaffirming the need to include an exception for medical emergencies in a law that restricts teenagers’ access to abortion, the Court deliberately sidestepped larger aspects of abortion’s legal status.<sup>84</sup> In her opinion for a unanimous court, Justice O’Connor explained the narrowness of the ruling in minimalist fashion: “we try to limit the solution to the problem.”<sup>85</sup>

While the cautiousness of Minimalism may hold a certain appeal, on analysis, it proves no stronger than the others. For we must wonder: If decisions are not to be based on principles and abstractions, what should they be based on? Under Minimalism, the considerations by which a court properly decides which precedents to respect and which to overturn are not spelled out, let alone validated. Minimalism provides no rationally established standard for judicial rulings. Its pitch for support from “diverse” quarters suggests that broad popularity is the justification for judicial rulings. Yet this is as subjectivist as leaving judicial decisions up to individual judges or the masses (as in Dworkin’s and Popular Will theories).

Minimalism is avowedly anti-principle. It instructs judges to avoid abstractions. What is the result of this? By making it a practice

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82. *Id.* at 2670 (Kennedy, J., concurring).

83. *Id.*

84. *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006).

85. *Id.* at 967. Curiously, O’Connor’s dissent in *Kelo* strikes anti-minimalist chords, at odds with her own frequent reliance on minimalism. *See generally Kelo*, 125 S.Ct. at 2671–77. It is interesting to note, however, that from a minimalist perspective, this cannot be seen as truly curious, since the expectation of consistency in method *across* opinions is part of what Minimalism rejects.

to issue “shallow” rulings, other courts will not know what to make of a given ruling. As Jeffrey Rosen has observed, terse opinions given with little elaboration of the governing principles only compound confusion and necessitate clairvoyance.<sup>86</sup> The minimalists’ narrow findings and eschewal of abstractions make the law, and a given citizen’s position vis-a-vis the law, a mystery (unless a specific case involving him is litigated, in which case he can get a ruling—on that—for now). Essentially, a citizen will know whether a course of action is legally permissible only if he has the pleasure of being involved in a legal action.<sup>87</sup>

A court’s refusal to clarify the meaning and proper application of law for any situation beyond that immediately before it is, in fact, an affront to two of the most elementary conditions of the rule of law: the knowability and stability of law. To be sure, certain questions of application of the law to novel circumstances will be inevitable, since men of naturally limited foresight draft laws. It does not follow that questions should be celebrated or encouraged, however. A judicial policy of fostering more questions than answers is unfair to citizens, insofar as it deliberately keeps them guessing about what their legal rights and obligations are. Minimalism’s boast of “flexibility” means that a person’s rights enjoy no firm identity or protection.<sup>88</sup>

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86. Rosen, *supra* note 71, at 46.

87. The message conveyed by Justice Kennedy’s reasoning in *Kelo* could be characterized as follows: “I’ll decide this way about takings today, but if you have questions about what to infer from this for other cases, check back with us later.” See *supra* notes 82–83 and accompanying text.

88. According to Minimalism, the meaning of a Constitutional provision in one case may be quite different from its meaning in another, decided a few months from now. Given that different judges rule in different cases and that even the same judges can change their minds, changes of interpretation are obviously possible under any theory of judicial interpretation. Because Minimalism deliberately circumscribes each ruling to have as little to say about future cases as possible, however—because it seeks to make each decision self-contained—it invites and amplifies uncertainty.

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Obviously, one could present and debate the merits of each of these alternatives to Originalism in much greater depth. What is noteworthy for our purposes is that all deny the objectivity of law. By these doctrines, what the law means is malleable, depending on the views of a particular judge, or of the masses, or of some combination of the two. They replace the objective with the social: What rules is some form of consensus, what certain people approve of.<sup>89</sup> Insofar as law must be interpreted by human beings, it is a given that people will play a major role in this process; that does not constitute subjectivity. The problem rests in making certain people's views the *standard* by which judges are to determine what the law is.

And here, we reach the junction that leads many to embrace Originalism. If the law is a chameleon, depending on the preferences favored in each of these theories, and if such unsettled, unpredictable law is the alternative to Originalism, while Originalism offers stability—a single, constant standard, rooted in the foundation of the laws that *we* agreed to *say*—it seems clearly superior as the only way to uphold the rule of law. Originalism's objectivity, again, is its appeal. Would that that objectivity were genuine.

## V

## ORIGINALISM'S CONFUSED IMAGE OF OBJECTIVITY

The linchpin of objectivity, for Scalia, is fidelity to the text. Judges interpret objectively when they adhere to what the words mean. The problem arises when one examines what Scalia means by this.

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89. This may be initially less apparent with Minimalism, but recall its desire for flexibility so as to leave issues open for democratic deliberation and "to accommodate new judgments." These are desirable, in its view, because they allow the law's meaning and application to vary, based on different people's opinions.

In Scalia's view, words mean what those using those words had in mind—literally, the particular examples they would have associated with a word. The Constitution's framers "were embedding in the Bill of Rights *their* moral values," he emphasizes.<sup>90</sup> While he recognizes that they sought "to guarantee certain rights," he believes that the content of those rights is unchanging over time.<sup>91</sup> The Eighth Amendment, for example, outlaws those punishments that were considered cruel and unusual by those particular authors when they enacted it.<sup>92</sup>

Scalia fails to appreciate that words (other than proper names) designate concepts and that concepts, to use the terminology of Ayn Rand, are *open-ended*.<sup>93</sup> Rand does not mean that meaning is elastic, allowing a given user to control a word's meaning. Rather, the idea is that the referents of a word—the actual, concrete instances of that concept—are not a fixed, immutable set determined by the experience or knowledge of a particular speaker. When I use the concept "men," for instance, that term refers not only to the finite list of particular men that I have encountered or even that I imagine I might encounter in the future.<sup>94</sup> It refers to all men that exist, or have existed, or some day will exist, imagined or unimagined by me.<sup>95</sup> The

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90. Scalia, *supra* note 1, at 146 (emphasis in original).

91. *See id.* at 147–48 ("[T]he passage of time cannot reasonably be thought to alter the content of those rights [in the Bill of Rights.]"). Indeed, Scalia claims that the "whole purpose" of a constitution is "to prevent change." *Id.* at 40.

92. *See id.* at 40, 146. ("The Americans of 1791 surely thought that what was cruel was cruel, regardless of what a more brutal future generation might think about it. They were embedding in the Bill of Rights *their* moral values . . .").

93. AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 66–69 (1990). Rand maintains that "[e]very word we use (with the exception of proper names) is a symbol that denotes a concept, i.e., that stands for an *unlimited number* of concretes of a certain kind." *Id.* at 10 (emphasis added). *Accord id.* at 17–18, 147.

94. *Id.* at 17–18.

95. *Id.*

concept “man” designates existents of a particular type which possess distinctive characteristics, and any existent possessing these characteristics is to be classified as one of that kind.<sup>96</sup> To grasp a concept is to grasp that certain things are *of a kind*; to identify a particular existent as included under that concept—as an instance of “man,” for example—is to recognize it as of that kind, as possessing the distinguishing characteristic within the relevant range of measurement.<sup>97</sup> As Rand observes, “When you form a concept, you implicitly state to yourself that you will subsume under this concept any future object of this kind.”<sup>98</sup>

In the same vein, consider the concept “shopping.” Regardless of whether a person is shopping for groceries or clothes or furniture or a house, whether he is doing so at a mall or a flea market or through a broker, whether he is willing to spend two dollars or 200,000 dollars on the object he seeks, because the essential activity is the same in these and in a wide variety of other circumstances (namely, seeking to acquire goods through economic exchange), we understand him to be shopping in each of them.<sup>99</sup> A man is shopping whenever he is engaged in that activity, even if he is shopping for things (such as cell phones or automobiles) or in ways (by placing phone orders or online) that were not available to earlier generations of shoppers.<sup>100</sup>

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96. *Id.* at 17.

97. *Id.* at 13 (“A concept is a mental integration of two or more units possessing the same distinguishing characteristic(s), with their particular measurements omitted. . . . All concepts are formed by first differentiating two or more existents from other existents. All conceptual differentiations are made in terms of commensurable characteristics (i.e., characteristics possessing a common unit of measurement).”) (emphasis omitted).

98. *Id.* at 257.

99. *See id.* at 64 (“A concept substitutes one symbol (one word) for the enormity of the perceptual aggregate of the concretes it subsumes.”).

100. Another important aspect of concepts’ open-endedness, although slightly less germane to our immediate purposes, is the fact that concepts refer to all of the designated existents’

When Scalia charges that judges who uphold any right that the Constitution's authors would not have upheld are making unlicensed additions to the law—when he claims that “cruel” punishment means only punishments that would be considered cruel by the Constitution's authors, or when, similarly, he claims that the Equal Protection clause does not require female combat troops or recognition of gay marriage because the authors of that Amendment did not envision such applications of it—he is denying the open-ended nature of concepts.<sup>101</sup> He is insisting that we adhere to the particular images that a law's authors had in their heads when they used particular language. Thus in his view, seemingly, a word is a symbol for a finite quantity of concretes. “Cruel” means simply those actions that they regarded as cruel; “equal protection” refers to the set of protections to which they thought it referred.

Unfortunately for Scalia, this is untenable. One obvious problem is that, on this model of words' meaning, no communication could take place: When Mary says “man” and Bill says “man,” they will obviously have encountered different men in their experiences. Their lists of referents associated with the term will not match. Thus, in Scalia's view, they are not talking about the same thing.<sup>102</sup>

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characteristics, rather than simply to known characteristics. *Id.* at 66–67; LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 103 (1993).

101. See Scalia, *supra* note 1, at 148–49 (“Is it a denial of equal protection on the basis of sex to have segregated toilets in public buildings, or to exclude women from combat? . . . I answer [these questions] on the basis of the ‘time-dated’ meaning of equal protection in 1868.”). On similar premises, he claims that the legality of abortion, physician-assisted suicide and all-male military schools should be settled by states because the Constitution tells us nothing about individuals' rights in regard to these issues. ANTONIN SCALIA, *Books in Review*, FIRST THINGS, Nov. 2005, at 44 (reviewing STEVEN D. SMITH, LAW'S QUANDARY (2004)).

102. I do not mean to imply that enabling communication is the principal role of language. See RAND, *supra* note 93, at 69 (“Concepts and, therefore, language are *primarily* a tool of cognition—not of communication, as is usually assumed.”).

The implication of Scalia's view is that abstracting is merely pointing. If asked what a particular word means, one could only answer: "Here, this—and this, and this." In effect, only if another person can replicate the items in the speaker's head when he says "man" by pointing to exactly the same concretes would the two people be talking about the same thing. While it is, of course, important to be able to point to the actual referents of any valid concept, Scalia misses the fact that such pointed-to concretes are simply examples. They do not exhaust the meaning of the concept.<sup>103</sup>

At this point, one might come to Scalia's defense by objecting that I have not accurately presented his position. Scalia himself protests the "caricature" of his view as "narrow and hidebound—as ascribing to the Constitution a listing of rights 'in highly particularistic, rule-like terms.'"<sup>104</sup> Scalia does foster confusion about his view by referring to his theory of meaning as "time-dated,"<sup>105</sup> although he also allows that the First Amendment properly protects handwritten letters<sup>106</sup> as well as, he assures us, many things that were not protected in 1791 (expression via movies, radio, TV, computers).<sup>107</sup> Scalia contends that this reading of the First Amendment is permitted by Textualism because it differs from the claim that the very acts which were considered constitutional in 1791 are

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103. David Sosa has observed a related problem: If "cruel" means simply what the word was thought to mean at a certain date, then it would be impossible ever to be wrong about what is cruel. But of course, we can be wrong about that, given that cruelty is one thing and our beliefs about it, another. "Cruel" means *cruel*—disposed to cause undue pain and suffering. See Sosa, *supra* note 29, at 935.

104. Scalia, *supra* note 1, at 140.

105. *Id.* at 149.

106. See *id.* at 37–38 ("In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction.").

107. *Id.* at 140.

unconstitutional today.<sup>108</sup> What we may not do, in other words, is declare something unconstitutional that was considered constitutional then. If lawmakers directly contemplated a given activity and thought that it passed legal muster, then it does; that is the last word on the matter, according to Scalia.<sup>109</sup> We may not tell a law's authors what *their* words mean. We may legitimately expand on what they said by applying their laws to cases that they did not directly consider, such as technologies that did not arise in their day.<sup>110</sup> But we may not "correct" them (by declaring capital punishment unconstitutional, for instance, given that they thought that it was constitutional).<sup>111</sup> In Scalia's view, then, a word represents not a list of specific referents, but the *criteria* for inclusion in the relevant class (for being cruel, for instance, or speech, or an instance of equal protection). We can distinguish, in other words, between two readings of Textualism:

1. The *list view*, according to which the concepts employed in our laws refer to lists of specific things that a law's authors had in mind when enacting the law and only to the items specified on

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108. *Id.* at 38 ("I will consult the writings of some men who happened to be delegates to the Constitutional Convention . . . not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.").

109. This holds true unless and until a democratic majority chooses to change the relevant provision of the Constitution through the established amendment process. U.S. CONST. art. V.

110. Scalia, *supra* note 1, at 140.

111. *See id.* at 46 ("No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional, *even though its use is explicitly contemplated in the Constitution.*") (footnote omitted). The basis for believing that they considered it constitutional lies in the indirect references to capital punishment elsewhere in the Constitution. The Fifth and Fourteenth Amendments both refer to a person's not being deprived of life or liberty without due process of law, which indicates that it is permissible to be deprived of life, under appropriate circumstances. The Fifth Amendment also refers to no person's being answerable for a capital crime without benefit of a grand jury. Since a capital crime is one for which capital punishment would be administered, the implication here again is that such punishment is within the bounds of the Constitution.

those lists (of “cruel” punishments, of what “equal protection” encompasses, of what constitutes “speech,” and so on).

2. The *authors’ criteria view*, according to which the concepts employed in our laws refer to what the law’s authors meant by the concepts in question, that is, to what *they took* to be “cruel,” “equal protection,” etc.—*rightly or wrongly*. Accordingly, any list of examples they had in mind could be expanded to include additional items that meet the criteria that they accepted as determinative of membership in the relevant classes.

Once distinguished, the latter seems much more reasonable than the “list” view. The question is: does it rescue Textualism from my criticisms? I think not, for it retains a constricted notion of concepts that fails to appreciate a concept’s open-endedness, thereby precluding objectivity.

Consider Scalia’s contention that we may “expand” a concept by recognizing that it refers to a greater number of things than previously thought, but we may not correct an error in a previous determination of which particular things possess the salient characteristics that distinguish members of a given class (in determining which punishments are cruel or which activities constitute speech, for instance).<sup>112</sup> In effect, while “opening” a concept to stand for more than a list, he is “opening” it in only one direction: We may add new referents under a concept, but we may not re-assign referents that have already been classified. While Scalia is right to acknowledge that lawmakers may not have foreseen all the specific actions that would be cruel and thereby run afoul of the Eighth Amendment, he fails to see that lawmakers also may not have recognized the cruelty of certain punishments and may therefore have permitted actions that the Amendment actually forbade. We have no reason to expect lawmakers to be any wiser about the one

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112. *Id.* at 140.

type of case than about the other. They can miss cruel actions they are not aware of *and* they can miss cruelty in actions that they are aware of. Roughly, one might say that Scalia is treating lawmakers as if they are not omniscient (because they might not know about radios and email, we can extend the protection of the First Amendment to such unnamed phenomena), but as if they *are* infallible (which is why we cannot correct them on issues of which they are aware).

None of this, I should emphasize, is to argue the merits of capital punishment, of the Eighth Amendment, or to contend that capital punishment *is* cruel.<sup>113</sup> (In fact, I consider it a serious error for the Eighth Amendment to have made cruelty a standard of legality, given that judgments of which treatments are cruel are notoriously open to disagreement. Laws should be written in terms that specify required and forbidden actions by directly and clinically naming the essential character of the actions in question rather than in terms that evaluate an action, such as “cruel” or “obscene.”)<sup>114</sup> I discuss the case of cruelty because it is one of Scalia’s principal, recurring examples and because it allows important points to be made relatively swiftly and clearly. My point about the possibility of lawmakers erring by being either too exclusive or too inclusive in their understanding of pivotal concepts obviously also applies to the understanding of speech, equal protection, the exercise of religion, “public use” of private property, “excessive bail,” and every other concept in the Constitution.

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113. Nor should my earlier reference to Scalia’s position on female combat troops and gay marriage be taken to imply that I hold any particular view of the constitutionality of either of those practices.

114. In the Oxford English Dictionary, “cruel” is defined as, “of persons: disposed to inflict suffering; indifferent to or taking pleasure in another’s pain or distress; destitute of kindness or compassion; merciless, pitiless, hard-hearted.” OXFORD ENGLISH DICTIONARY 78 (2d ed. 1989). For discussion of the impropriety of laws banning obscenity, see AYN RAND, *Censorship: Local and Express*, THE AYN RAND LETTER, Aug. 13, 1973, at 229.

Despite its initially seeming stronger than the list view, the critical problem with the second version of Textualism is that, because it is the lawmakers' criteria that govern, it is subjective. It fails to provide what is needed:

3. The *objective criteria view*, according to which the concepts employed in our laws refer to anything that meets the actual, objective criteria of what it is to be a thing of the relevant type (to be "cruel," "speech," "equal protection," etc.).

In this third view, we should interpret the language of law by the correct criteria, rather than by the law's authors' criteria. And by this standard, we could add to *and* subtract from whatever lists of referents those authors may have had in mind. We could re-classify particular concretes that lawmakers had considered on the basis of subsequent gains in human knowledge. Scalia's authors' criteria view handcuffs us to certain individuals' *beliefs* about actions. Under the objective criteria view, by contrast, once laws are enacted, whether citizens' actions are legally permissible depends on the nature of those actions.<sup>115</sup>

In Scalia's view, if people come to believe that previous understandings of concepts were deficient and that a law's authors used incorrect criteria, we do have a remedy. It is not to have judges interpret the relevant law according to present-day criteria, however. Rather, we should revise or repeal that law democratically, through

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115. Dworkin also recognizes this distinction. On one reading, he writes, "the framers intended to say, by using the words 'cruel and unusual,' that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase 'punishments widely regarded as cruel and unusual at the date of this enactment' in place of the misleading language they actually used." Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 120 (Amy Gutmann ed. 1997). On an alternative reading, Dworkin says, we would suppose "that [the Framers] intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual." *Id.*

the legislative process.<sup>116</sup> Imagine how this would work in practice, however. Suppose, for instance, that we wished to retain a ban on cruel punishments but believed that the use of capital punishment is cruel and thus sought to pass a law to this effect. How would we express this understanding and state our new law? Wouldn't it be natural to use the very same words that we think were previously misused? Wouldn't we still say, "no cruel punishments," expecting that that would now be understood on *our* understanding of the meaning of "cruel," rather than on the understanding of an earlier era? The only alternative seems to be to attempt to list various activities that do and do not qualify as cruel. Yet that would be an endless task and would return us to the untenable "list" view that even Scalia seems to reject.<sup>117</sup>

This scenario reinforces the fact that the only proper way for the law to be interpreted is objectively. Law must be interpreted according to the correct criteria of concepts' meaning rather than by time-bound criteria. Any alternative procedure would freeze a term's meaning to a particular date and preclude communication across time. Correspondingly, it would prevent the law from governing those whose understanding of salient concepts deviated from that of the lawmakers. In this situation, the only safeguard against the law's scope of authority being continually trimmed by the evolution of human knowledge would be to alter the law each time our knowledge of any of its concepts' referents changed.

Consider the issue from a simpler angle. If confronting a choice between the authors' criteria view and the objective criteria view, it is natural to wonder: why should we respect *their* criteria rather than

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116. Scalia, *supra* note 1, at 47.

117. Thanks to Joshua Knobe and Geoff Sayre-McCord for developing this thought, in conversation.

the correct criteria? Why should we treat lawmakers' beliefs about words' meaning—whatever those beliefs happened to be, true or false, rational or irrational—as opposed to their words' objective meaning, as sovereign?

Well, why *might* it make sense to respect a law's authors' criteria? The most plausible answer is, because that is what was intended; that is what the lawmakers meant, what they had in mind when writing the laws. To defer to their beliefs on those grounds, however, would be to revert to being governed by intent, rather than by text—a view that Scalia adamantly rejects. The view of concepts that he employs, in other words (as reflected in his embrace of the authors' criteria view), relies for its appeal on the very position from which he wishes to distance his type of Originalism.<sup>118</sup>

The problem here is not simply an internal inconsistency in Scalia's position. The deeper problem—and the one that exposes the absence of genuine objectivity in his view—is the treatment of certain individuals' understanding of words' meanings as decisive, which elevates the content of certain consciousnesses over the relevant facts.<sup>119</sup> It mislocates the standard of law in certain individuals' beliefs about the law rather than in facts about the nature of freedom, the

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118. A different reason to think that we must abide by lawmakers' criteria might be the denial that anything constitutes correct criteria. Accordingly, if all we have are the competing criteria embraced by different groups of men, we should follow the criteria favored by those who have legislative authority. Notice that this view reduces to "might makes right": Some people's understanding of a law should be followed because they hold political power. More fundamentally, it also relies on the self-contradictory view that we can reason in the absence of objectivity. That is, if we have no objective criteria by which to determine the meaning of any claims that are made, then we also have no objective criteria by which to evaluate the logic or validity of any claim that is made. To present the denial of objective criteria as an objective truth—as a claim that anyone has reason to take seriously (let alone accept)—is thus to adopt an incoherent, self-refuting position.

119. It reflects what Rand calls the Primacy of Consciousness. For explanation of this concept, see AYN RAND, *The Metaphysical Versus the Man-Made*, in PHILOSOPHY: WHO NEEDS IT 28–41 (1982); PEIKOFF, *supra* note 100, at 17–23.

nature of force, and the kinds of actions that the law governs. In Scalia's view, beliefs become sovereign. Accordingly, a citizen who is trying to ascertain whether an action that he is contemplating is legal needs to look not at the character of the action vis-a-vis legal restrictions (asking, for instance, "is this an exercise of free speech?" or "would this infringe on another's rightful freedom?"), but into the heads of the lawmakers. Whatever limitations or errors he finds infecting their beliefs are immaterial. The legality of the action is determined not by the nature of that action and whether it would encroach on others' freedom, but by their beliefs.<sup>120</sup>

Essentially, Scalia erroneously treats the question of proper legal interpretation as a question of *whose* understanding should govern: ours or theirs (the law's authors). It is important to realize, however, that the third, objective criteria view is not merely a disguised insistence that "our" criteria be employed, whatever those happen to be. (The dominant present-day criteria are not necessarily objective criteria.) Rather, it posits that the criteria that should govern the interpretation of law are provided by reality, by the nature of the referents in question. Thus the question to be answered by any interpretation of law is not *whose* understanding should rule, but which understanding conforms to reality—which understanding accurately reflects the nature of the things to which the relevant law refers.<sup>121</sup> For instance, *is* this action, in fact, an exercise of free

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120. My reference to freedom and force obviously presupposes that law's object should be to protect individuals' freedom by banning force, a presupposition I will not defend here. My point does not depend on that presupposition, however. That point is that Scalia treats certain persons' beliefs about law as decisive, rather than the nature of the actions to which the law in question refers.

121. David Brink embraces a similarly realist view. See David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, PHIL. & PUB. AFF. 117–21 (Spring 1988) ("The reference of our words is determined by the way the world is and not by our beliefs about the world . . . . Meaning is not to be identified with, and reference is not determined by, the descriptions that people associate with, or their beliefs about the extension of, their words.").

speech? The fact that it will always be human beings who supply answers to this question does not entail that their answers are inescapably about themselves or their mental contents rather than about the relevant objects. While one might feel occasionally tugged by the Originalists' pitch, "But shouldn't we go by what the lawmakers meant by their words?," what is crucial to keep in mind is that words refer to existents, not to some people's beliefs about those existents. As Leonard Peikoff observes, "A concept is an integration of units, which are what they are regardless of anyone's knowledge; it stands for *existents*, not for the changing content of consciousness."<sup>122</sup>

The implication of this primacy of beliefs in Scalia's view is still more damning. For the contention that lawmakers' words *as they understand them*—by *their* criteria of what the words mean—carry final, unchallengeable authority surrenders the rule of law to the rule of men. No limits on these men's power can be found in the written law, since they are treated as the authorities on the meaning of any laws they wrote. Their words are not respected as having objective meaning to which everyone is bound. (Laws written by their predecessors merely represent the rule of another set of men.) My claim is not that the few dozen or few hundred men who ratified a particular law will not be held accountable to that law—that they will not be punished, should they violate it, or that we should worry about insincere reports of what they had in mind at the time that they drafted a particular law. The point is more fundamental: By adopting the lawmakers' criteria as sovereign and thereby enshrining certain men's beliefs as the ultimate arbiter of an action's legal permissibility, Scalia abandons the basis for recognizing the

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122. PEIKOFF, *supra* note 100, at 103. This is the reason that Rand observes that "concepts are independent of the time of your awareness." See RAND, *supra* note 93, at 257.

difference between the rule of law and the rule of men as a difference in kind. If the law holds no meaning other than what a certain set of individuals *consider* its meaning, then a country's citizens are ultimately beholden to those men.

Obviously, since all law is written by men, even steadfast adherence to the rule of law cannot expunge men from the scene. Under the rule of law, human beings enact the law, interpret the law, and enforce the law. Human beings are not treated as the *standard* of law's authority, however. The ideal of the rule of law is the thesis that, once enacted, all are subject to what that law says and that the written law has a meaning that is not reducible to anyone's beliefs about its meaning (its authors included). Under the rule of law, once properly enacted, law commands an authority of its own. This unyielding authority is impossible under Scalia's account, however. Under his theory, the rule of law becomes the rule of what certain men *say* the law is. The result is that, while Scalia invokes the rule of law in touting his theory of judicial interpretation over the alternatives, reliance on his theory of concepts actually marks the abandonment of that ideal.<sup>123</sup>

## VI OBJECTIVITY

By this stage, we have identified a number of grave failings in Scalia's Originalism. To understand the fundamental source of Scalia's various errors, let's zero in on his notion of objectivity.

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123. While any law is subject to interpretation by men and while the power of Supreme Court justices is, in the effects of their rulings, vast, we criticize certain exercises of that power as misguided or as actual abuses precisely on the premise that the justices, like everyone else in our system, are subject to follow the *law*.

As we have seen, Scalia holds that any contemporary judge's deviation, in interpreting a law, from the specific inventory of concretes that a law's authors would recognize (based on their criteria of words' meaning) is a case of legislating from the bench. This amounts to the advocacy of rule by ignorance: We must arrest the growth of our knowledge to the state of men thirty years ago, two hundred years ago, or whenever a given law was written. Dworkin has made a somewhat similar criticism, contending that Scalia conflates a concept of something with a particular conception of that thing. (Roughly, a "concept," in Dworkin's terminology, corresponds with a concept as I have described it, open-ended and objective. A "conception," in contrast, is the specific list of referents that a particular speaker takes as the extension of that concept.)<sup>124</sup> What has not been sufficiently appreciated in any of the critical discussion, however, is that Scalia's view relies on a confused image of objectivity—of what it is and what it requires.

Contrary to Scalia's implication, objectivity in interpretation does not preclude the need for judgment. A judge's work could never be reduced to a mechanical process. Scalia would no doubt concede that judges must exercise *some* judgment. Their role, after all, is to determine the proper application of our laws to specific cases. Yet his view of how judges are to reach such determinations shrinks the proper domain of judicial activity and distorts the type of judgment that a judge must exercise. His theory reduces judicial judgment to a rote performance of matching—and crucially, the Scalian judge is to ask not whether the case before him is an instance of the *concepts* named in the relevant laws. Rather, he is to ask whether the particulars of the immediate case match the lawmakers' necessarily

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124. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 49, at 134–36.

limited conception or understanding of words' meaning. The kind of judgment preserved under Scalia's theory, in other words, attends to the wrong issue. Scalia reduces judicial interpretation to something akin to transcription. While Scalia ridicules the Humpty Dumpty view of meaning ("[w]hen I use a word it means just what I choose it to mean—neither more nor less"),<sup>125</sup> his theory would have judges treat lawmakers as a collective Humpty: Words mean strictly what *they* say they mean. Their beliefs about words' meaning are sovereign.

In fact, words designate concepts. As such, words are shorthand for countless particular things of the relevant kind ("man" for all men; "shopping" for all shopping, and so on). The written law is also shorthand, drafted in deliberately broad terms in order to govern an array of cases that are similar in principle but different in particulars.<sup>126</sup> The Constitution is written in particularly broad terms (certain narrower, more rule-like provisions notwithstanding). Lawmakers do not pretend to be omniscient, able to foresee and directly address all possible circumstances. To objectively interpret the concepts used in law is to understand *kinds*. The Textualist attempt to automatize judicial interpretation dismisses the need for conceptual thought, the need for the intelligent application of law to specific cases. It denies a judge's capacity to recognize new instances of a concept that are the same, in essential kind. It directs the judge

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125. Antonin Scalia, *Law & Language*, 157 *FIRST THINGS* 37, 43 (2005) (reviewing STEVEN D. SMITH, *LAW'S QUANDARY* (2004)).

126. For further discussion of this in regard to Scalia, see Timothy Sandefur, *Scalia's Basic Contradiction, or, Words Mean (A Potentially Infinite Number of) Things*, Positive Liberty, Nov. 3, 2005, <http://positiveliberty.com/2005/11/scalia%e2%80%99s-basic-contradiction-or-words-mean-a-potentially-infinite-number-of-things.html#more-879>. Also, my reference to "broad" terms should not be mistaken for "vague" terms.

to not engage in abstract reasoning, despite the fact that the law necessarily directs us through abstractions.

The Originalists' desire for stable, predictable law is entirely appropriate. Scalia fails to recognize, however, that the terms in which the law is written provide that. The open-ended character of the concrete *referents* of the concepts named in our law in no way threatens legal stability, since the essence of the concepts remains the same. The criteria for class inclusion are firm, even while the catalog of a concept's referents may grow (or contract).

This is not contradicted by the fact that as human knowledge grows, we sometimes discover that we need to refine our *definitions* of concepts because we have mis-identified the precise characteristics that distinguish a certain kind of object from others. What is important is that when we do so, we are still referring to the same kind of object. The advance from an early childhood definition of a human being as "a thing that moves and makes sounds," for instance, to the definition "a rational animal" reflects a greater awareness of what it is that distinguishes the things in question; it does not reflect a change of referents, a shift from talking about one kind of thing to talking about another.<sup>127</sup> The fact that concepts' definitions can change does not entail that no objective meaning is possible, however, as Scalia seems to fear. To believe that it does entail that would be roughly comparable to believing that because we can later know more about a subject than we know today, we can know nothing. The fact that a later stage of knowledge may be fuller and more precise does not cancel or eradicate all that we do objectively

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127. RAND, *supra* note 93, at 43–44. For a full explanation of the contextual nature of definitions, see *id.* at 40–54.

know today. Changes in a concept's definition that result from the expansion of knowledge do not threaten objective knowledge.

Properly, a definition is not a gatekeeper that determines which referents are and are not identified by a given concept. A concept designates actually existing things rather than a given person's or group's beliefs or current knowledge of those things.<sup>128</sup> A definition, by contrast, at any given time, reflects knowledge *at* that time of the distinguishing characteristics of the referents identified.<sup>129</sup>

While judgment *is* needed to identify which referents properly fall under the terms of a given law, then, that judgment is bounded by the words of the law. Stable law is not stagnant law. It requires not an immutable list of specific concretes, nor that we blindly obey the flawed or incomplete understanding of concepts and their distinguishing criteria held by particular men of an earlier era, but constancy in the *kinds* of concretes that the law refers to.

At this stage, I can comment again on the Public Understanding strain of Originalism. Insofar as the Public Understanding view shares the essential features of the authors' criteria version of Textualism, it is subject to the same fatal objections. To treat the public understanding of any particular time as sovereign is, as with the authors' criteria view, to refuse to respect the open-ended nature

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128. This is not to rule out concepts that stand for ideas of non-existent things (understood as such), such as ghosts or gremlins, or of hypothesized existents, such as in scientific theories, but only to highlight the contrast between phenomena and beliefs about those phenomena. Note that the *idea* of a ghost is itself an existent. For a clarifying discussion of the relationship between meaning and referents, see *id.* at 236–37.

129. *Id.* at 47, 232, 233, 259. For discussion of implications of the growth of knowledge for our understanding of concepts, see Allan Gotthelf, *Ayn Rand on Concepts, Definitions, and Essences* (unpublished manuscript, on file with author); James G. Lennox, *Ayn Rand on Concepts, Context, and the Advance of Science* (unpublished manuscript, on file with author); Paul Griffiths, *Commentary on "Ayn Rand on Concepts, Definitions, and Essences"* by Allan Gotthelf and "Ayn Rand on Concepts, Context, and the Advancement of Science" by James G. Lennox (unpublished manuscript, on file with author). These papers were presented at the Ayn Rand Society meeting at American Philosophical Association, Washington, D.C., December 2003.

of concepts and the conceptual character of language and law. By equating the meaning of words with particular individuals' beliefs about their meaning (in this case, with the beliefs attributed to the general public), the Public Understanding view insulates meaning from objective verification and thereby renders meaning—and law—irredeemably subjective. To put the point slightly differently, whether “their criteria” represents the criteria of a set of lawmakers or of the public at large, people's beliefs are afforded an unwarranted sanctity that precludes the possibility of genuine objectivity. The subjectivity of elevating consciousness over existence is not mitigated by piling up more consciousnesses—by finding more people who share a certain understanding of a term. Objectivity is a matter of accordance with the objects, not with certain people's beliefs about the objects, however great their number. In short, the Public Understanding version of Originalism is, in its essence, every bit as subjective as the authors' criteria version of Textualism.

The reason that Scalia attempts to exclude judgment from judicial interpretation, I submit, is that he labors under a misguided, *intrinsicist* image of objectivity. He regards judgment as necessarily intrusive and manipulative because he expects the objective meaning of words to be self-evident. The meaning of any concept inheres *in* the words, in his view, and an objective interpreter is a passive spectator who can simply await its revelation. Scalia views judges employing the competing theories of Dworkin, Ely, et al. as subjectively inventing the law. He proposes that judges, instead, find the law. But this is a false dichotomy—neither end of which delivers an account of objective interpretation.<sup>130</sup> Properly, as Timothy

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130. Ayn Rand, *What is Capitalism?*, in *CAPITALISM: THE UNKNOWN IDEAL* 11, 21–22 (Ayn Rand ed., 1967) (introducing the trichotomy of the intrinsic, the subjective, and the objective when discussing theories of the good). She explains that the essence of a concept is not a

Sandefur points out, “[w]hen a judge ‘finds’ law, what he is doing is bringing to the test of the concepts established in the law, the particular instance before him.” He is applying “the concepts expressed in the law to the potentially infinite number of concrete instantiations which are subsumed by that concept.”<sup>131</sup>

Scalia’s debate with Dworkin offers a vivid illustration of this dichotomy. In resisting the charge that his view unduly restricts judges, Scalia agrees that the law embodies “abstract principles” and that “the Eighth Amendment is no mere ‘concrete and dated rule’ but rather an abstract principle.”<sup>132</sup> Yet his crimped notion of “abstraction” is revealed by his subsequent explanation. According to Scalia, what the Eighth Amendment abstracts

is not a moral principle of “cruelty” that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. It means not (as Professor Dworkin would have it) “whatever may be considered cruel from one generation to the next,” but “what we consider cruel today” . . . . It is, in other words, rooted in the moral perceptions *of the time*.<sup>133</sup>

Notice that Scalia portrays the alternative to his view as utter license: “*whatever* may be *considered* cruel,” a principle “that philosophers can *play* with.”<sup>134</sup> Scalia sees the activity of drawing inferences from an abstract concept as arbitrary. Against that option, the only alternative is his: Words’ meaning is what it was thought to

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metaphysical universal that resides *within* something akin to Platonic Forms or within specific concretes (tables, chairs, individual men, and so on). Essence and meaning are not “intrinsic” in anything. For a full discussion of her view of the nature of objectivity and on the contrast with the intrinsic and the subjective, see PEIKOFF, *supra* note 100, at 142–51; RAND, *supra* note 93, at 46–47, 52–54, 79, 81–82; Ayn Rand, *Who is the Final Authority in Ethics?*, in *THE VOICE OF REASON* 17, 17–22 (1988); Tara Smith, “*Social*” *Objectivity and the Objectivity of Value*, in *SCIENCE, VALUES, AND OBJECTIVITY* 143–70 (Peter Machamer & Gereon Wolters eds., 2004).

131. Sandefur, *supra* note 126.

132. Scalia, *supra* note 1, at 145.

133. *Id.*

134. *Id.* (emphasis added).

be—nothing more—when those words were enacted into law. Any subsequent growth in human beings’ understanding of various phenomena is not to distract judges from allegiance to the past.

Scalia is correct, in my view, that Originalism’s leading competitors substitute various forms of subjectivity for objectivity, as I have already indicated.<sup>135</sup> Despite rhetoric to the contrary, however, his Textualism offers no better. While the subjectivists give too free-roaming a role to people’s judgment, the Textualists’ campaign to eliminate conceptual judgment is equally non-objective. Scalia implies that if a judge simply fastens his eyes on the language of law, objective truth will be revealed to him. It will not be. The meaning of law (and its proper application to specific cases) cannot be found ready-made—self-contained in the ink on the page. The objective is not intrinsic.

Words, by themselves, cannot tell us how to apply a law. Words alone do not tell us the context that a given law is a part of, the relevant principles that a given law is meant to implement, or the purpose that a law is meant to further. In part for this reason, some have observed that Scalia’s Textualism, in practice, cashes out as the

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135. Popular Will’s deference to what the people today want, Dworkin’s advocacy of judges’ “balancing” the considerations of legislation, judicial precedent, and their own sense of relevant political principles that would make the “best” law, and Minimalists’ failure to provide standards for the “narrow” and “shallow” rulings that they urge, which are defended on the grounds that they preserve flexibility, promote democratic deliberation, and are most likely to win support from a diverse range of citizens, all render subjective opinion paramount. The absence of firm checks on the will of the relevant people means that that will is sovereign. An “objective” interpretation of law, on these views, amounts to whatever interpretation is *considered* objective by the designated people. These theories do not all explicitly describe their theories as “objective.” To the extent that they would maintain that their theories do offer objective interpretation, however, as when attacked by Originalists for the failure to provide that, it is fair to infer that these are their images of what objectivity requires. Further, note that it is not the fact of people using judgment that disqualifies these theories from being objective. It is the absence of standards external to people’s will that renders these theories subjectivist.

Original Intent view that he so vilifies.<sup>136</sup> By insisting that the meaning of a concept is nothing but what its users have in mind when using it, Scalia is saying that law's meaning is determined by what its authors meant—what they *took* their words to mean, rather than what the words actually mean. Authors' intent is back in the driver's seat.<sup>137</sup>

While this is a serious problem for Scalia, what is even more instructive for us is that Textualism also collapses into subjectivism.<sup>138</sup> We glimpsed this already, in his view that written laws do not refer to actions of designated types that occur “out there” in the world, but to particular individuals' mental contents, to their beliefs about which things are referred to by a given word. In Scalia's view, the “objective” amounts merely to the subjective opinion of a particular group at a particular time, which might or might not be objectively valid.<sup>139</sup>

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136. See, e.g., SUNSTEIN, *supra* note 73, at 224 (“Recall that meaning is, for Scalia, to be determined by reference to ‘meaning’ as it was commonly understood at the time of enactment. But common understandings are inevitably uncovered by figuring out *what people thought*. Thus the movement from ‘intentions’ to ‘meaning’ is not a movement from something (entirely) subjective to something (entirely) objective.”); Sosa, *supra* note 29, at 933 (“In the area of constitutional interpretation, then, Scalia's textualism becomes specifically *originalism*.”).

137. While we have already encountered a version of this problem, note the difference between this point and the one I made earlier. Previously, I observed that the rationale for Textualism rests largely in the thought that we should follow what lawmakers intended. Here, the point is that, whatever the rationale for Textualism, when it comes to implementing Textualism in practice, we must proceed by lawmakers' intent, since words carry no meaning that can be divorced from intent.

138. BREYER, *supra* note 41, at 124. (“The literalist's tools—language and structure, history and tradition—often fail to provide objective guidance in those truly difficult cases . . .”). On how such a collapse is typical of intrinsicism, see PEIKOFF, *supra* note 100, at 146, 160–61. Note that while Stanley Fish argues that no meaning resides simply in the text, his conclusion is that we must therefore treat authorial intent as sovereign. Thus his position perfectly illustrates the swing from the intrinsic to the subjective, bypassing the objective. Stanley Fish, *Intentional Neglect*, N.Y. TIMES, July 19, 2005, at A21.

139. Sandefur notes this, as well. Sandefur, *supra* note 126. The subjectivity in Scalia's view is also the target of Sosa's criticism that I cited earlier. The reason that we cannot be wrong about a term's meaning, on Scalia's “dated” view of language, is that when we speak of an action as cruel

To see the subjectivism more fully, consider the following: Since words alone cannot furnish all the answers we need, what is a judge who is attempting to be faithful to the text to do? What *can* he do? He can project and supplement. The prospect of individual judges' projections unnerves Scalia, for that sounds a far cry from the rule of law. Yet he seeks refuge, essentially, in the projections of the many. Recall that the law's words are sacred because they represent the will of the people, which is the ultimate reason for fidelity to the text. The central importance of the group's will is also clearly reflected in Scalia's view of rights: "Do you want a right to abortion? Create it in the way that most rights are created in a democratic society: persuade your fellow citizens and enact a law."<sup>140</sup> "You think there's a right to suicide? Do it the way the people of Oregon did it and pass a law! Don't come to the Supreme Court!"<sup>141</sup>

Rights—moral entitlements which one might have thought the Constitution was designed to protect, rather than invent—are not objective, in Scalia's view. They are the creatures of majority preference. What we find in practice, in other words, is that Scalia's theory exchanges the will of individual judges for the will of the masses. Its purported objectivity turns out to be intersubjectivity, what the collective agrees on. Textualism's respect for language is but camouflage for another brand of subjectivism. (I do not claim that

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or as violating free speech, we are really talking about ourselves, rather than about external phenomena. See Sosa, *supra* note 29.

140. Quoted in Steven Kreytak, *At A&M, Scalia Rails Against Judicial Reinterpretation*, THE AUSTIN AM. STATESMAN, May 6, 2005, at B1. He has made similar claims on other occasions. See, e.g., *Captial Commentary: Lawmaking and the Supreme Court*, THE CENTER FOR PUBLIC JUSTICE, March 16, 1998, [http://www.cpublicjustice.org/stories/storyReader\\$222](http://www.cpublicjustice.org/stories/storyReader$222) ("You want a right to abortion, create it the way most rights are created in a democracy: pass a law. If you don't want it, pass a law the other way."). For more on Scalia's views on the right to abortion, see ANTONIN SCALIA, SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE 103–41 (Kevin A. Ring ed., 2004).

141. Quoted in Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, March 28, 2005, at 42.

the camouflage is conscious or deliberate.) For in the Textualist view, what a word means is what a given group of speakers at a certain time *thinks* it means. The law, however, holds no meaning that can be objectively determined. (Recall our earlier discussion of how his view surrenders the rule of law to the rule of men.)

Some might object that Scalia would be unmoved by this, given that he openly embraces legal positivism. Regardless of whether he realizes its problematic implications, however, my point is that positivism entails subjectivism—which is untenable in its own right and at odds with the aura of objectivity which props up his theory. While the debate over positivism is obviously a much larger one than we can undertake here, it is important to appreciate a more specific respect in which Scalia’s dismissal of natural rights presents a conflict with the rest of his theory.

While Scalia is a positivist, the Constitution’s framers were not. They believed that human beings possess natural rights. That was clear from many of their writings, including the Declaration of Independence.<sup>142</sup> The Founders held that the reason to have a government is to protect rights that individuals antecedently possess in virtue of being human or of being given those rights by God. The Ninth Amendment reflects this belief. That Amendment would make no sense had they been positivists; there would be no rights that could be “retained by the people” if the only rights that existed were those “created” through manmade law. The problem for Scalia

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142. See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 3 (1995) (“[T]he Framers of the Constitution remained committed to the natural-rights principles of the Declaration . . . .”); JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* 2 (1995) (describing a shared commitment to natural rights as a common denominator of America’s movement for independence); Michael P. Zuckert, *Thomas Jefferson on Nature and Natural Rights*, in *THE FRAMERS AND FUNDAMENTAL RIGHTS* 152–63 (Robert A. Licht ed., 1991) (interpreting Jefferson’s presentation of natural rights).

is the fact that the Constitution's authors did not embrace positivism means that he cannot be both a positivist about legal rights and a Textualist. His positivism requires him to ignore the Ninth Amendment, but to do that is to refuse to honor the text—the very thing that he maintains judges should respect, above all.

## VII

### A NOTE ON OBJECTIVE INTERPRETATION

My purpose in this Article is constructive criticism—criticism of dominant theories of judicial interpretation, focusing on Originalism in particular—intended to clear the ground and offer preliminary guidance for building an account of proper judicial decision making. A full elaboration of the proper, objective method of judicial interpretation easily requires an article in itself. Nonetheless, before concluding, I can broadly indicate a few of its most important features. Doing so should sharpen our appreciation of the difference between the objective procedure and the pseudo-objectivity offered by Originalism.

In order to be objective, a judge must be philosophical and conceptual.

No particular provision of law can be interpreted apart from philosophy—the philosophy of the legal system of which it is a part. For a law is not a free-standing, self-sufficient decree; it comes into being in order to do a job, and it gains its authority as a means of serving the larger purpose for which a government exists. Correlatively, no law can be wrenched from that context and understood apart from it.<sup>143</sup>

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143. For a clear affirmation of the role of philosophical principles in judicial interpretation, see *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). See also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1393, at 268 (1833).

Scalia errs in seeking to dismiss philosophy from judicial interpretation, maintaining that there is no “philosophizing in our Constitution.”<sup>144</sup> By the same token, Dworkin allows too much philosophy into judicial interpretation—or more precisely, philosophy of an inappropriate sort: the judge’s own philosophy. I am as keen to prevent judges from assuming the authority of philosopher kings as the Originalists profess to be. (Recall my criticisms of Dworkin.) What Originalists fail to appreciate, however, is that for a judge to be philosophical *in a specific, limited manner* does not render the judge a “king” who usurps the legislators’ authority.

Originalists are right to insist that judges abide by what the law *is*. And, indeed, that means that they must abide by what law’s words say. The spirit of their thesis that the meaning of the Constitution should be settled by reference to the original understanding of those who enacted it is sound insofar as a certain continuity between enacted law and judicial interpretation of law is absolutely essential to the rule of law. It is crucial to correctly identify what the requisite continuity consists in, however. Given that the law is itself conceptual, fidelity to law demands treating it as such. Accordingly, the objective judge will respect the open-ended nature of concepts. Indeed, it is because of this open-endedness—it is because concepts identify existents rather than any person’s beliefs about existents—that words have objective meaning and that we can ascertain the objective meaning of our laws.<sup>145</sup>

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144. Scalia, *supra* note 1, at 134. Rather, he views the Constitution as a “practical and pragmatic charter of government,” thereby posing a false dichotomy. *Id.*

145. It bears noting that we could never ensure objectivity. No theory of proper adjudication could provide a failsafe guarantee of all and only objectively impeccable judicial rulings. Complete, ready-made answers that eliminate the ongoing need for conceptual judgment cannot be furnished by any method of judicial interpretation.

It should go without saying that recognition of the open-endedness of concepts does not entail endorsing every interpretation of a legal provision that a court ever issues. Various laws have been, at times, misinterpreted. The fact that a concept might be sometimes erroneously applied (that the equal protection clause is read to protect activities that it objectively does not, for instance) does not entail that the very practice of interpreting language in a way that respects concepts' open-endedness is invalid (any more than the incorrect treatment of a particular person's medical ailment demonstrates that we should not treat medical ailments).

It may be helpful to observe that Textualism gains credibility from conflating two significantly different scenarios. If a court were to interpret a word in the law to designate one concept when it clearly was written to mean another, that would be an obviously unwarranted deviation from the law. Suppose a legal provision regulating "banks," for instance, was part of an environmental protection law and concerned coastal land, such as the Outer Banks of North Carolina. It would be inappropriate for a court, decades later, to read that provision as applying to the other sense of "banks," financial institutions (just as it would be inappropriate for a court to read financial industry regulations as governing coastal banks). Similarly, it would be inappropriate for a contemporary court to read a law referring to "gay" behavior as referring to homosexual conduct if, at the time the law was enacted, that sense of the word "gay" did not exist.

Textualism erroneously contends, however, that the same bait and switch occurs when a court recognizes that over time people frequently acquire a fuller and finer understanding of the specific referents of a concept. For a court to respect that growth in knowledge by failing to uphold or strike down the exact same set of

particular actions that the law's framers would have, due to the framers' comparative ignorance about all the referents of that concept, does not constitute altering the concept or changing the rules. There is a night and day difference between justices inserting different *concepts* in their interpretations of law and justices applying the concepts that *were* expressed in the law according to objective criteria.

The Originalists' right-minded demand for fidelity misidentifies the proper object of fidelity. Original-ness is not the fundamental issue. Fidelity to the written law *is*. And since the written law is conceptual, that fidelity is owed to the concepts expressed in the written law rather than to a set of lawmakers' or a society's time-frozen beliefs about those concepts' referents. At best, the sense in which the *original* understanding is important is that the objective judge must ask of a given law, roughly, "What language were the lawmakers speaking?" and "How were these words used at that time?" (Had "gay," for instance, come to be used to refer to homosexuals?) If a particular word did have more than one meaning at the time in question, the judge must examine the context of the relevant provision to determine which sense of the term was at issue. Basically, the judge's responsibility is to discover which concept was referred to by the words in the law and then use the objective meaning of that concept in reasoning to reach his decisions.

Having claimed that the objective judge needs to be philosophical as well as conceptual, I should stress that the domain for exercise of philosophical judgment is limited. Judges are not *simply* philosophers, nor are they primarily philosophers. They are interpreters—of laws that others have made. Judges are not unilaterally generate philosophical questions and apply their answers through their rulings. Rather, when cases are brought before them,

they are to read those cases according to the philosophical framework that our Constitution provides. Their role is not to “perfect” the Constitution.

To illustrate, suppose that a judge reflectively and sincerely believes that the eminent domain clause of the Fifth Amendment contradicts the basic philosophy that underlies our system.<sup>146</sup> Any seizure of an individual’s private property, in his view, for any purpose, be it a legitimate government function or not, is a violation of the rights that our government and laws are designed to protect.<sup>147</sup> The judge’s philosophical conviction, even if correct, would not license him to ignore the eminent domain clause and find in favor of anyone who challenges it. Arguably, this judge should recuse himself from the case on the grounds that the Constitution, by the best of his reading, gives him conflicting instructions on the issue at hand, instructing him, through certain provisions and through its guiding philosophy and purpose, to respect private property while simultaneously instructing him, through the eminent domain clause, to infringe on private property. He is thereby placed in an untenable position: To apply one part of the Constitution would require his violating a conflicting part of the Constitution. I have not yet formed a firm conviction of what a judge in such a situation should do. What I will affirm is something he should *not* do. Because eminent domain is a written part of the Constitution itself, a judge in this position is obligated not to ignore it or strike it down as unconstitutional on the grounds that it is at odds with the underlying philosophy that informs the Constitution as a whole. To do that would be to

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146. U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

147. I leave aside cases in which this is enforcement of a legal punishment.

philosophize about what the Constitution should be rather than about what it is.<sup>148</sup>

In sum, a judge should be philosophical in interpreting a Constitutional provision, but not by ruling on the basis of the opinion that lawmakers should not have written a particular Constitutional provision. An objective judge is to be philosophical strictly within the confines of his role, *qua* interpreter. He is not in the position of an academic philosopher. An academic is free to formulate the ideal theory of what our laws should be and to reject inconsistencies in existing law, in the process. A judge is not. His professional philosophizing is circumscribed by the written Constitution. This is essential to maintenance of the rule of law. The objective judge is not to pass judgment on the merits of law by any standard other than the standard of whether something is indeed law, that is, whether it is constitutional. This is what the rule of law *means*.<sup>149</sup>

## VIII

### CONCLUSION

Scalia has often been criticized for inconsistency in his adherence to Textualism on the bench.<sup>150</sup> Critics point to opinions he has

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148. Note the similarity with my earlier discussion of an explicit constitutional denial of the right to travel.

149. At this point, we can observe the defect in the Originalists' umpire analogy. Unlike umpires, the judge's role *is* to evaluate the validity of laws in a particular, crucial respect: whether they are constitutional. Umpires have no such authority to assess the validity of rules of their sport (let alone to refuse to enforce those they consider invalid).

150. See, e.g., Adam Cohen, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. TIMES, April 19, 2005, at A20 ("Justice Scalia has been more than willing to ignore the Constitution's plain language, and he has a knack for coming out on the conservative side in cases with an ideological bent."); Jeffrey Rosen, *Originalist Sin*, THE NEW REPUBLIC, May 5, 1997, at 26 ("Scalia reveals himself in his new book to be not a partisan of textualism or originalism, but a partisan of traditionalism, which is a very different methodology, and looks a lot like the judge-made law that he claims to abhor."); Cass R. Sunstein, *The Rehnquist Revolution*, THE NEW

written that depart from strict Textualist doctrine. The problem does not rest with a single, hypocritical practitioner, however. What we should now appreciate is that anyone attempting to apply Textualism has to be inconsistent, because words by themselves cannot deliver all the guidance that is needed. Scalia is inconsistent because he must be, given his theory. He is compelled by its inadequacy to rely on something beyond the text alone.

The appeal of Originalism rests primarily in its presenting itself as the champion of objectivity. It retains this appeal, despite incisive criticisms, because the alternatives seem wobbly in comparison, distinctly lacking in objectivity. And here, appearances are not deceiving: Each of them offers merely a different form of subjectivism. Originalism seems to provide the only refuge. Its professed objectivity is illusory, however. For Originalism mistakes the intrinsic for the objective. And because objective meaning does not, in fact, simply inhere within words, Originalism collapses into subjectivism, the very thing it means to overcome.

Obviously, the full and exact nature of objectivity is a huge subject in itself. I hope that my proposal that the reigning theories of judicial interpretation offer two ends of a false dichotomy will stimulate further examination of objectivity in this context. Each side of the debate has the story partially right, detecting something that is defective in the other. Textualism's opponents mistakenly assume that the only alternative is some brand of subjectivism, however,

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REPUBLIC, December 27, 2004, at 32 ("Scalia and Thomas do not follow the logic of originalism wherever it leads. Most disturbing of all, they seem least interested in the original understanding when it runs counter to their moral and political convictions."); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism* (B. U. Sch. of L. Working Paper Series, Pub. Law & Legal Theory, Working Paper No. 06-01, 2006), available at <http://ssrn.com/abstract=880112> ("Justice Scalia himself commits the comparable sin of ignoring the original meaning of those portions of the Constitution that conflict with his conception of 'the rule of law as a law of rules.'").

while Textualists mistakenly assume that the only alternative to subjectivism is intrinsicism. Originalism has not died, in other words, because both sides labor under erroneous conceptions of objectivity. As long as we lack an accurate understanding of what the objective application of laws *is*, we cannot expect to have it—which means that the rule of law and the protections it affords are precarious. Even well-intended interpreters trying to uphold the rule of law will not be in a position to do so.<sup>151</sup>

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