

Symposium: Tara Smith's *Judicial Review in an Objective Legal System*

Hercules and Narragansett among the Originalists:
Examining Tara Smith's *Judicial Review in an Objective Legal System*

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1. Is There Really Such a Thing as Law?

Tara Smith's *Judicial Review in an Objective Legal System*¹ has given us an exceptionally powerful argument about the role of the courts in a free society—one which I suspect may be too powerful for its own good. Since the advent of “judicial restraint” or “judicial minimalism,” the legal profession has become so intensely skeptical of the kind of philosophical rigor Smith advocates that it has become a point of pride among some to reject the very possibility of legal theory.

In 2012, J. Harvie Wilkinson, Chief Judge of the Fourth Circuit Court of Appeals, published *Cosmic Constitutional Theory*, the thesis of which is that there is no such thing as valid legal theory; that pretensions to the contrary are hocus-pocus designed to empower a cadre of powerful judges at the expense of democracy, and that the only rescue for the “inalienable right of self-government” is for judges to defer to the decisions of the elected branches at virtually all imaginable cost.² That “inalienable right of self-government” is the

¹ Tara Smith, *Judicial Review in an Objective Legal System* (New York: Cambridge University Press, 2015). Hereafter, all references to this book will be cited parenthetically in the text. Smith's book was the focus of an Author-Meets-Critics session of the Ayn Rand Society, at which I presented an earlier version of this article, in January 2017 at the Eastern Division meeting of the American Philosophical Association.

² J. Harvie Wilkinson, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Government* (New York: Oxford

only right to which Wilkinson devotes substantial attention,³ and on it he builds his theory—yes, *theory*—that courts should subordinate themselves to the will of the people democratically expressed . . . except when they should not. This sounds flippant, but it is in fact what he argues. He acknowledges that constitutional protections for freedoms of speech or religion give courts ground for invalidating legislation that intrudes on these freedoms,⁴ thus recognizing (in theory—yes, *theory*) constraints on democracy. However, as those constraints are themselves democratically imposed—since the people can make and unmake the Constitution—this is really only a manifestation of the will of the majority itself, and thus not really a constraint on the majority at all.

That is also part of the argument Publius makes in *Federalist* 78, but unlike Publius, Wilkinson recognizes no limit whatsoever on the power of the majority, because in his view any such limits would be so much “theory,” and would therefore embody only the subjective personal preferences of whoever enunciates the theory. How, then, is the will of the majority a legitimate principle of rule? Is that not itself a “theory”? Wilkinson provides no answer. He takes it as a given that the majority’s power is legitimate. Nor does he explain why this theory—yes, *theory*—is immune from his universal condemnation of legal theory as such. Taken to its logical limit, Wilkinson’s argument is anti-intellectualism *per se*. It is a revival of the ancient Greek skepticism of Cratylus, who, Aristotle tells us, was so rigorous in rejecting the validity of any assertion of truth that he “finally did not think it right to say anything but only moved his finger, and criticized Heraclitus for saying that it is impossible to step twice into the same river; for he thought one could not do it even once.”⁵

University Press, 2012).

³ This is, of course, not a right at all, but a delegated power. The authors of the Declaration of Independence and the U.S. Constitution rejected the proposition that any person or any majority could have a *right* to govern others; see Timothy Sandefur, *The Conscience of the Constitution* (Washington, DC: Cato Institute, 2014), pp. 1-13.

⁴ Wilkinson, *Cosmic Constitutional Theory*, p. 78.

⁵ Aristotle, *Metaphysics*, in *The Basic Works of Aristotle*, ed. and trans. Richard McKeon (New York: Random House, 1941), pp. 745-46.

I dare say this would be considered tame by the standards of the crude Positivism that dominates the legal academy today. Consider, for instance, Orin Kerr, whose positivism is so absolute that he believes even rules of legal interpretation exist only by fiat. At one point, he even claimed that “If the Supreme Court . . . adopted the canon that statutes must be read to encourage absurdity, then I would change my interpretation of the statute accordingly.”⁶ This statement is at once logically incoherent and revealing of the nature of positivism. It is incoherent because the difference between “absurdity” and its opposite is a *natural* one, not one that is or can be dictated by a court, so that Kerr’s claim that the anti-absurdity rule derives its validity from the court’s command, is question-begging. (It would only make sense if the court also promulgated an entire system of logic to define “absurdity,” explain how lawyers should distinguish it from non-absurdity, and justify the court’s authority to promulgate such a system.) It is revealing because it indicates how the crude positivist thinks law is essentially a command.

To the Positivist—which is to say, most of the legal community today—law is a command from a superior to an inferior. We, the citizens, are the inferiors, and the will of the majority is the superior. Why the majority, rather than a king? Why a constitutional majority, rather than a contemporary legislative majority? Positivists have no answers to these questions, except the question-begging answer that that’s just the way the majority prefers it. But that answer is not only question-begging, it is also, as H. L. A. Hart explains, essentially a rejection of the proposition that there is such a thing as law *at all*.⁷ There is no difference, then, between law and a threat of force.

Positivism cannot provide an account of lawfulness. To say, “The will of the duly constituted authorities is the law” begs the question when one asks, “What makes these authorities ‘duly constituted’?” If the promulgation of a bill according to *procedural*

⁶ Orin Kerr, “‘Kerr’s Inconsistent Positivism’: A Response to Sandefur,” *The Volokh Conspiracy*, December 6, 2010, accessed online at: <http://volokh.com/2010/12/16/kerrs-inconsistent-positivism-a-response-to/>.

⁷ H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), chap. 2. Hart considered himself a Positivist, but in *The Concept of Law*, he not only thoroughly refutes the idea that law is a command, but also provides a rough blueprint for secular natural law theory.

rules is sufficient to make that bill *law*, regardless of its content, then on what basis do we evaluate proposed rules of promulgation? Why should the Positivist obey what the Supreme Court says about statutory interpretation, instead of what a psychic or a madman or a terrorist says?

The answer, according to a *non-Positivist*, is that authority is duly constituted because the procedural rules are *themselves* in accord with pre-political normative standards that are objectively valid.⁸ The Positivist cannot make that argument. For him, rules are simply the will of the governing power, so there can be no difference between “duly” constituted authority and someone who just pretends to be duly constituted. All claims to rule are ultimately arbitrary; there is no fact of the matter, no principle of political legitimacy. His only available answer is: force. The stronger party’s will is law. This, indeed, is what Jeremy Bentham and Oliver Wendell Holmes, Jr., hold.⁹ They do not claim, as they cannot, that the stronger party’s will is more *legitimate* or *true* or *right* than the will of the weaker party. No claim to authority *ever* has such legitimacy in their eyes—it’s just that one side destroys the other or physically compels his surrender, and then proceeds with its arbitrary rule.

The Positivist is thus forced to admit that he would even subscribe to an absurd result—a result that declared that up is down and that Thursdays are actually Wednesdays and that the earth stands unmoved and the sun orbits around it—if the Court were to command that.¹⁰ But where does the Supreme Court get its power to confer such legitimacy? Is it not equally arbitrary to recognize *the Court*, and not a psychic or a madman or a terrorist as the duly constituted authority? To

⁸ That was the Founding Fathers’ justification for majority rule; see James Madison, “Sovereignty,” in *The Writings of James Madison*, vol. 9, ed. Gaillard Hunt (New York: G. P. Putnam’s Sons, 1910), pp. 568-73.

⁹ See my discussion in Timothy Sandefur, *The Permission Society* (New York: Encounter, 2016), pp. 12-19.

¹⁰ Positivism, writes Hadley Arkes, *The Return of George Sutherland* (Princeton, NJ: Princeton University Press, 1994), p. 223, “might have been fitted out with the pretensions of legal theory, but it reduced to the performance of Woody Allen’s dictator, who simply proclaimed that ‘from now on, all girls under sixteen are over sixteen.’ Promulgation is all. When the law is not tested for its substance, but merely for its enactment, any order may claim the standing of law.”

do so must either be a quiet recognition that there is, *in fact*, some normative principle of legitimacy, or it must be a purely personal, arbitrary decision on one's part—a decision that has no foundation in anything but itself. The Positivist denies the former possibility. Consequently, for him, the law is whatever the duly constituted authority says, and we know it's duly constituted because the Positivist arbitrarily decides to recognize it as such.

Generally speaking, though, courts themselves do not regard their role in this way. In the Positivist's view, a court decision is correct for no other reason than that it is the decision of the court. There is no correct answer to legal problems, only the orders of the duly constituted authority—that is, of the court itself. Thus the U.S. Supreme Court was right—*had to be right*—when it decided *Bowers v. Hardwick* (1986), and the Supreme Court was right—could not be otherwise than right—when it decided *Lawrence v. Texas* (2003).¹¹ And yet, in *Lawrence*, the Court said that *Bowers* was “not correct when it was decided.”¹² But that cannot be, since *Bowers* was a decision of the Court. Yet *Lawrence* *must* be right, because it, too, was a decision of the Court! This Cretan Paradox—or what Christopher Green calls the “WTDIWD [wrong the day it was decided] problem”¹³—plagues any pure Positivist.

To appeal for a moment to non-normative, Positivist criteria: note that courts themselves typically do *not* regard themselves as making law by pronouncement. They view their job as resolving disputes by applying both legal and pre-legal principles of right and wrong, logic and illogic, sense and nonsense, with which the positive law must comply. Reading statutes absurdly is not just wrong because courts say so; courts believe it is wrong to do so because it is irrational, arbitrary, impracticable, and therefore not law. And they are correct about that. Again, if a court's say-so is the law, then the fact that courts say they do not make law by mere say-so must itself be law.

¹¹ *Bowers v. Hardwick* (478 U.S. 186 [1986]); *Lawrence v. Texas* (539 U.S. 558 [2003]).

¹² *Lawrence*, p. 578.

¹³ Christopher Green, “Constitutional Truthmakers,” *Notre Dame Journal of Law, Ethics, and Public Policy* (forthcoming), *Social Science Research Network*, January 17, 2017, abstract accessed online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901157.

There is an even simpler way to refute the claims of the crude Positivist. Imagine a statute that declared, “This is not a statute,” or that was just a jumble of incoherent letters, or that required and prohibited the same act. Would it be valid? To answer “No” is to recognize that there are at least *some* principles—natural principles—that limit the power of the courts, whether they choose to admit it or not. The U.S. Constitution itself reflects this fact because, of course, it contains no definition section, so that we are forced to consult something outside of its four corners—including at a minimum what Publius called “the nature and reason of the thing”¹⁴—if we are to understand and apply its terms.

In fact, there is a still easier way to refute the pretensions of Positivism’s anti-theory theory. I have noted Kerr’s statement that if the Court were to prescribe a rule of interpretation, he would be bound to follow it. Let us assume that that is so. The Constitution of the United States *does* prescribe rules of interpretation, at both the beginning and the end. At the beginning, it explains that the Constitution was written “to secure the blessings of liberty.” At the end, it explains that “the enumeration of certain rights in this Constitution shall not be construed to deny or disparage others retained by the people.” These lines indicate that the Constitution fits neatly within the classical liberal principles of the American founding: that people have certain natural rights which the constituted authorities must respect. Even assuming Positivism’s premise about obeying interpretive instructions, then, the Constitution itself instructs us to apply it as a natural rights document.

2. Originalism and Objectivity about the Promise of the Law

The most popular rival to Positivism—although it shares many of its weaknesses and is arguably a species of Positivism—is Originalism. Originalism is an attempt to avoid the dangers of subjectivity and so-called “judicial activism.” If the specter haunting the courts is the judge who uses “interpretation” as an excuse to impose his personal preferences on the law,¹⁵ Originalism aspires to

¹⁴ Alexander Hamilton, “*Federalist* No. 78,” in *The Federalist*, ed. Jacob Cooke (Middletown, CT: Wesleyan University Press, 1961), p. 526.

¹⁵ Edward G. White, *The American Judicial Tradition*, 3rd ed. (New York: Oxford University Press, 1988), chap. 13.

provide a methodology that will give us objective definitions of legal terms and keep judges out of messy disputes about values.

Much work by Originalists has been fruitful. However, its broader claims are what Daniel Dennett has called “deepities”¹⁶: what is true about them is obvious and uninteresting, and what is interesting and not obvious about them is untrue. To the extent that Originalism counsels us to consult the context and the constitutional structure, that is true but uncontroversial (or should be), whereas what it says about the nature of language is false. Smith effectively demonstrates that Originalism turns out not to be objectivity—a picture of what the law actually *is*—but “*inter-subjectivity*” (p. 160): a picture of what a specified group of people *thought* the law to be. Originalist scholars often do give us good reasons why those people came to the conclusions they did, but then it is *those reasons* that really have weight with us, not the fact that those people found such reasons compelling.¹⁷ And then that isn’t really Originalism, because nothing about it is necessarily rooted in the *origin* of the law.

Lawrence Solum has provided the most thorough argument in defense of Originalism.¹⁸ He distinguishes between *normative* and *semantic* Originalism. The normative Originalist claim is that we are obligated to abide by the meaning that the authors of the document (or their audience) would have given its terms. The semantic Originalist claim is that the nature of language is such that the words in a text *can only have* that meaning that was understood by its authors or their contemporaries. In his words, “the semantic content of constitutional provisions is fixed at the time of framing and ratification.”¹⁹

¹⁶ Daniel Dennett, *Intuition Pumps and Other Tools for Thinking* (New York: Norton, 2013), chap. 12.

¹⁷ This is one reason that even non-Originalists employ what appear to be Originalist arguments at times—disputes over what the founding generation thought about a constitutional text are often covers for disputes over what the text in fact means.

¹⁸ Lawrence Solum, “Semantic Originalism,” *Illinois Public Law Research Paper* No. 07-24 (2208), abstract accessed online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

¹⁹ *Ibid.*, p. 2.

The normative Originalist claim is easily rejected, I think, by the old adage, “The past is a foreign country.”²⁰ We are under no more obligation to follow the meaning intended by past generations than we are to abide by the interpretation of a domestic statute by a foreign government. True, courts do sometimes cite foreign precedent, but they do so only because they find the reasoning in those precedents persuasive, not because they are obligated to follow those precedents. Likewise, we may find a past generation’s interpretations of a law persuasive, but if so, it is because the arguments they mustered are persuasive, not because of the historical fact that the persons mustering those arguments happened to be the founding generation. This is why courts are free to overrule their own wrongly decided precedents. In fact, I would argue that they are *obligated* to do so, because judges take an oath to support the *Constitution*, not the rulings of previous courts. When a past court ruling diverges from the correct interpretation of the Constitution, it is the court’s duty to follow the latter, not the former.

The semantic Originalist claim seems stronger: that because of the nature of language, what a statute says is *and can only be* what its authors and their contemporaries believed it to say. Smith rejects this argument, in favor of the Objectivist theory of concepts. In her view, language expresses concepts which themselves reflect real meanings in nature. Those meanings do not change, although our understandings of them can. When our understanding of nature broadens, we should follow reality, not our previously enunciated understandings of it.

One attractive feature of this argument is that it recognizes the possibility that the authors of a text might be mistaken about what it means. It is possible, according to her argument, that everyone in 1792 or 1868 thought the word “liberty” would not include, say, the freedom to engage in consensual sexual intercourse with a member of the same sex—and that, *in fact*, it does include that freedom, and therefore *Lawrence* was rightly decided and *Bowers* wrongly decided all along. Certainly, any argument that purports to be objective should recognize the possibility that the authors of a document can be wrong about its meaning. There is a *fact of the matter* about what the statute says, independent of what we or anyone else might think about it. It seems impossible for Originalism to account for the possibility that a statute’s authors or ratifiers could have been wrong about its meaning, because

²⁰ This saying originated in L. P. Hartley’s novel *The Go-Between* (Bloomsbury, UK: Hamish Hamilton, 1953).

it has just that meaning that the authoritative source chooses to give it, no more or less.²¹

One avenue for criticism here is that there is a difference between law and other kinds of texts. In fact, law is not a text at all. Law is a promise—a mutual relationship between the rulers and the people, pursuant to which the parties agree that certain things will be done under certain circumstances.²² Often, people write down these promises, and much of what we call interpretation consists of determining what exactly the promise is, given either some dispute over the language in which it is memorialized or some unforeseen state of facts. But it is not *necessary* to a promise or a law that they be written down, and even when they are, the promise, not the words on the paper, is the law. The written words, whether in a constitution, a statute, a precedent, a contract, or other written matter of legal significance, are only *evidence* of the law.²³ The law itself is an abstraction—a promise or proposition—which can be determined even in the absence of written materials. That suggests that whatever the correct epistemological answer to the question of what or how a

²¹ Solum suspects that Originalism can survive this criticism (“Semantic Originalism,” p. 95). He holds that the “core insight of Originalism” is “that semantic content is fixed at the time of utterance” (p. 56). But this raises the paradox that either meaning is “fixed” at that time because of the action of some authoritative meaning-conveyer—in which case, anything that he or she chooses to “fix” is *ipso facto* the law—or it is “fixed” at that time because the nature of law is such that fixation just is a part of law, in which case this is actually a claim about the objective nature of law, rather than a claim about public understandings or intentions or “the notion of original public meaning” (p. 59). In the latter case, Solum’s claim might be true or false but, again, does not seem distinctively *Originalist*.

²² Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven, CT: Yale University Press, 1969), pp. 19-27.

²³ As Lord Justice Mansfield observed in *Jones v. Randall* (98 Eng. Rep. 954, 955 [1774]), “it is admitted that the contract is against no positive law; it is admitted that there is no case to be found which says it is illegal; but it is argued, and rightly, that, notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles.”

statutory text means, there are other considerations involved when a court must determine what the law is.²⁴

If law is a promise, then we face different constraints when we try to discern the meaning of a statute than there are when we try to interpret a literary text or a scientific journal article. If we are interpreting a scientific journal article, our effort is to understand with precision the nature of the phenomenon being described. Ambiguity and rhetorical effects are accordingly minimized. If we are reading a literary text, we try to find the most thorough, evocative, and integrated meaning in the text. Our approach to ambiguity and rhetoric might therefore be wholly different. If we are trying to determine the contours of a promise, then considerations of fairness and notice apply, which might influence our reading in different ways. That is why there are traditional rules of interpretation and construction in the law, which do not exist, or not in the same form, in science or literature. Scientists have no counterpart to “construe against the drafter” or “*ejusdem generis*,” or the parol evidence rule, just as the law has no counterpart to the noble scientific tradition of publicly admitting one’s mistakes.²⁵ Some interpretations of a text that might be plausible as a matter of scientific or literary interpretation would be *unfair* if adopted as a matter of law.

This quality of fair play in interpretation is what led Ronald Dworkin to argue for the “chain novel” theory of legal interpretation: that the role of the judge is “to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of

²⁴ This brings to mind Jed Rubenfeld’s distinction between intentions and commitments; see Jed Rubenfeld, “The Paradigm-Case Method,” *Yale Law Journal* vol. 115 (2006), pp. 1990-92. A commitment obliges, while an intention does not. Intentions are subject to change when circumstances change, while a commitment binds us even in changed circumstances, unless we have specified otherwise: “The point of a commitment is to impose a future obligation on the self to take (or not take) some action even if doing so runs contrary to later preferences” (ibid., p. 1991). We can form commitments even without realizing it, based on repeated behavior giving rise to settled expectations. See, e.g., *Burns v. North Chicago Rolling Mill Co.* (65 Wis. 312 [1886]). This is even truer when speaking of intergenerational laws like the 200-year-old Constitution.

²⁵ For an attorney to admit publicly his past errors would often violate the rules of legal ethics. In fact, lawyers are ethically obligated *not* to be objective much of the time. It is the job of the court, not the lawyer, to be objective.

the political structure and legal doctrine of [the] community.”²⁶ An even better image is given by Lon Fuller, who likens the judge’s task to a person trying to tell a funny story he has heard from another:

The “point” of the story, which furnishes its essential unity, may in the course of retelling be changed. As it is brought out more clearly through the skill of successive tellers, it becomes a new point; at some indefinable juncture the story has been so improved that it has become a new story. In a sense, then, the thing we call “the story” is not something that is, but something that becomes; it is not a hard chunk of reality, but a fluid process, which is as much directed by men’s creative impulses, by their conception of the story as it ought to be, as it is by the original event which unlocked those impulses. . . . The statute or decision is not a segment of being, but, like the anecdote, a process of becoming.²⁷

Let us put some meat on these bones with a hypothetical example: Suppose that a statute written in ancient days makes it illegal to catch “fish” in a certain place. Suppose further that at the time it was written, it was widely believed that dolphins are fish. We now know that dolphins are not fish but are mammals, but nobody has bothered to update the statute. A fisherman is arrested one day because he caught a dolphin. He now pleads before the court that he should be found not guilty for this reason.

The Originalist would say that the fisherman should be convicted, because at the time the statute was written, it was believed that dolphins would be covered. On the other hand, I believe that Smith would answer that the fisherman should be acquitted, because *in fact*, dolphins are not fish, and what matters is what the statute says, not what its authors believed it to say. Yet this conclusion would be overhasty, because the law is not the *text*, but the *understanding* that the text is meant to represent or to memorialize. The understanding was that it covered dolphins, and only accident or inattention—or the fact that people thought the statute adequate—has left the text of the

²⁶ Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), p. 255.

²⁷ Lon L. Fuller, *The Law in Quest of Itself* (Boston, MA: Beacon Press, 1966), p. 9.

statute unchanged despite scientific discoveries about fish and dolphins. If we assume the fisherman were somehow alone in knowing that dolphins are not fish and also knew that the public generally believed the statute would cover dolphins, it would be unjust to let him escape punishment merely on account of a technicality that has nothing to do with the reasons for which the promise was formed. On the other hand, if he caught the dolphin in the innocent belief that the statute did not apply—because he knew that it referred to fish and dolphins are not fish—then it seems even more unfair to convict him.

This may seem like a fanciful example, but something like this in fact happened to me. Some years ago, I litigated a case in California challenging the constitutionality of a licensing law for pest control workers. One strange aspect of the law was that it only applied if the pest control worker was dealing with pigeon infestations. Someone suggested, in all seriousness, that I make the following argument: The birds colloquially called “pigeons” in California are actually not pigeons (which are of the genus *Patagioenas*) but are technically rock doves (of the genus *Columba*). Could I not argue that the statute did not apply to my client, because it referenced “pigeons” and he was only dealing with “rock doves”? Needless to say, that argument would have risked sanctions, precisely because everyone knows that the statute, in referring to pigeons, meant this specific type of animal, and it would be unfair to the body politic for a court to rule that the statute had all along been referring to the wrong bird.

In cases that involve terms like “liberty” or “property,” the potential for unfairness is proportionately increased. Witness the “judicial takings” cases, in which courts have told property owners that—surprise!—as a matter of law, they never owned their property to begin with, and therefore are owed no compensation when the government takes it.²⁸ It seems unfair for a court to tell a property owner that, notwithstanding the general consensus at the time of a law’s passage that it would not include X, in fact it *does* include X, because we have come to realize that this is what the text of the statute means.

In the ordinary world of contracts, property, and criminal law, there are many rules, including the rule of lenity, statutes of limitation,

²⁸ See, e.g., Justice Antonin Scalia’s dissent from denial of *certiorari* in *Stevens v. City of Cannon Beach* (510 U.S. 1207 [1994]), and the opinion of the Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (560 U.S. 702 [2010]).

and adverse possession, designed to avoid the unfairness of interpreting laws in ways that alter the layout of rights and responsibilities that the parties either contemplated beforehand or have come to embrace. And Smith acknowledges that “[e]ager as an objective court might be to correct unwarranted legal practices, given the deviant precedents and associated expectations that have taken root, it would be unjust to do so by shock treatment, abruptly eradicating policies that people have organized their affairs around and have reasonably come to rely upon” (p. 267).

Yet at the same time, she is resolute that “[w]e must not allow legitimate concern for [settled expectations] to distort our reasoning about what *is* constitutional,” and that however familiar and long-standing an unconstitutional practice, it cannot change the meaning of the law (p. 267). And in distinguishing between the law and “[p]eople’s *understanding* of the law,” she criticizes Dworkin’s chain-novel theory (and, presumably, Fuller’s anecdote theory) on the grounds that they view the law as “ever in-progress; it has no fixed identity.” Under Dworkin’s approach, she argues, “the ultimate root of legal authority” would be “not the Constitution or written law, nor even the principles reflected in that law,” but “judges’ ideals *coupled with* those received legal materials” (p. 193).

I think this critique fails for two reasons. First, it is not true that according to the Dworkin or Fuller models, the law has no identity. A thing that is in the nature of becoming rather than being—a process—does have identity: fire, for instance, or life, or a performance of *Hamlet*.²⁹ Second, Smith seems on occasion to conflate the written text, which is only evidence of the law, with the law itself. She appears to be arguing that the “sovereign” should be “the Constitution or written law.” But according to our Constitution, it is the *people* who are sovereign, not the Constitution; the people, after all, promulgate the Constitution, and choose judges to interpret and apply it. The law is not the written Constitution—of which there is no single, definitive text—but the meaning that the words specify.

A variation on Fuller’s anecdote example may make the point clearer: nobody would deny that *Hamlet* exists and has identity. There is such a thing as *Hamlet*; it is not *The Three Little Pigs*—even though *Hamlet* is *not* the written text (in fact, there is no authoritative text of *Hamlet*) or any single performance of it. *Hamlet* is a play—an enacted

²⁹ Aristotle, *Metaphysics*, in *The Complete Works of Aristotle*, ed. and trans. McKeon, p. 732.

story—a process of which any single performance is only evidence.³⁰ If asked, who is the “sovereign” in this analogy? I answer, the audience and the actors, working together, who present and accept (or reject) any particular performance of *Hamlet* as being true to the genuine article.³¹ Unlike Smith, I see nothing shocking in a model that sees judges as “play[ing] the analogous role” and thereby “making the law” (p. 193). A better way of viewing it is that when judges (or presidents or members of Congress) act out the parts assigned to them by the Constitutional “play”—and when citizens act in compliance with contracts, or tort or property law—they are *performing* law.

Perhaps this confusion is resolved by Smith’s distinction, in her passages addressing Dworkin, between “the overt, readily accessible . . . meaning [of the statute] that has a definite identity,” on the one hand, and “the practical effect that will result from the judiciary’s ruling about a law’s semantic meaning,” on the other hand (p. 194). Her point is that the behavior of courts is not the law—the law is the instructions by which courts (and all of us) are supposed to behave. That is correct. But the *text* is not the *instructions*, either. The text *describes* the instructions. The *law*, not the text, is the instructions. That is why courts can recognize scribes’ errors, and apply rules such as “interpret the statute to give effect to all its provisions” or “avoid absurd results.” The law is the stage directions, which even in *Hamlet* are sometimes missing from the text or are only present by

³⁰ In the initial draft of this article, I said that *Hamlet* is *not* any particular performance of *Hamlet*, but is “that ideal thing which the perfect performance, were it possible, would enact.” Smith rightly pointed out that this seemed to reflect a Platonic conception of the nature of law. That is not, however, what I had intended to say. Instead, *Hamlet* is not any particular performance of *Hamlet*, but is that experience produced when and while the instructions of the playbook are followed, just as baseball is that thing that occurs when the rules of baseball are followed by the requisite number of players. I am not analogizing law to *Hamlet*, but to the stage directions and lines which, if followed, result in a performance of *Hamlet*.

³¹ This analogy is important, I think, because the law has a historical and philosophical kinship with dramatic performance. Trials are, in a sense, dramatic recreations of real events for the benefit of a jury, which renders a verdict just as an audience renders its decision after the recreation of the events in a play. Ayn Rand’s *Night of January 16th* takes dramatic advantage of this kinship.

implication.³² Smith is right that if we think law is the behavior of courts, then that deprives the law of meaning and makes the courts sovereign. The *statute* is not the law, however; the *meaning* of the statute is the law. That meaning is described and prescribed by the text, as well as by implicit factors that control how the text is to be interpreted (just as it is implied that the characters in *Hamlet* who are given lines are capable of speaking them³³). But the understanding of the text can change, and it is then *that understanding*, not the text, that is the law. To take another Shakespearean example, few would deny that the balcony scene in *Romeo and Juliet* is a part of the play and that any performance of *Romeo and Juliet* would be lacking without it. Nevertheless, the text contains no stage directions, does not specify the presence of a balcony, and is not separated from the previous scene.³⁴

I am not as squeamish as Smith is about describing legal reasoning as a *creative* enterprise. In her view, for a judge to act as a creator of law amounts to “overrid[ing]” the law (p. 198). I’m not so sure. Law, of course, need not be written down. Rules not expressed in statutes, or only afterward memorialized in statutes, are still law, as for instance common law tort rules or the principle of equitable tolling. A statute, let us say, specifies a limitations period for bringing suit, but also prescribes an administrative exhaustion requirement—a person must ask the government to review its procedures before he can file his case. Suppose he submits that request and the limitations period

³² This is common with Shakespeare. For example, in the climactic sword fight, the First Folio provides virtually no stage directions. We are left to infer from the following lines that Hamlet has struck Laertes with his sword:

Ham. One.

Laer. No.

Ham. Judgement.

Osr. A hit, a very palpable hit.

This is an obvious inference, perhaps, but an inference nonetheless.

³³ Again, this may seem a silly example, but Synetic Theater in Washington, D.C., regularly performs “silent Shakespeare” in which the actors dance, pantomime, and grunt versions of the plays; see James Bovard, “A Silenced Shakespeare in Washington,” *Wall Street Journal*, July 13, 2015. In my view, this is simply not Shakespeare.

³⁴ Sylvia Morris, “Romeo and Juliet’s Balcony Scene,” *The Shakespeare Blog*, March 24, 2014, accessed online at: <http://theshakespeareblog.com/2014/03/romeo-and-juliets-balcony-scene/>.

expires before the government completes its review. May he still file suit? Equitable tolling is the principle that the limitations period should be paused or “tolled” so that the person does not suffer because the government takes too much time in the pre-lawsuit review process. Courts regularly apply equitable tolling where statutes are silent on the matter. Are they “creating” the law by doing so? Yes, and they do so in part by consulting broader principles of public policy and the judges’ own views about the fairness of a particular situation.

This does not mean that the law lacks identity, so long as the judges make their decisions within the objective boundaries of the concepts involved. The same is true of tort rules: Is it negligence for a property owner to fail to warn of a known danger on his land? Should the answer depend on whether the law wants to discourage trespassing? Finding that trespassers are owed a lesser duty than invitees are, falls within the boundaries of the objective definition of the concept of negligence—even though the judges in answering the question are *creating* the law of negligence.

Smith argues that this is not the same thing as creating the law, but only “the explicit articulation of that which is implicit in a rule or of that which can be logically derived from a rule” (p. 196). But a judge who fashions a new rule of equitable tolling or synthesizes a tort law doctrine from prior precedents is engaged in a creative act as much as the scientist who formulates a theory or a poet who writes a sonnet. A truly brilliant solution to a legal problem, such as Chief Justice John Marshall’s decisions in *Fletcher v. Peck* (1810) or *Dartmouth College v. Woodward* (1819),³⁵ does just this. Marshall cited virtually no authorities in these cases, and the outcomes were not logically entailed by the relevant text, which was that no state shall make a law that impairs the obligation of contract. There would have been nothing non-objective about him ruling that the term “contract” only refers to agreements between private parties and not to charters or patents. Marshall’s rulings, though, fashioned ingenious solutions to those problems that certainly fell within the objective meaning of the term “contract.”

Judges are even more creative in cases where there is no relevant text, as in the equitable tolling or tort law examples. True, common law lawyers have usually preferred to speak of judges *discovering* or *finding* law than creating it, but a scientist who fashions

³⁵ *Fletcher v. Peck* (19 U.S. 87 [1810]); *Dartmouth College v. Woodward* (17 U.S. 518 [1819]).

an intellectual model by a process of deduction and induction is certainly *creating* it. Perhaps what he does is best described in a passage from *Areopagitica*, where John Milton writes of scholars who strive to “unite those dissevered pieces which are yet wanting to the body of Truth. To be still searching what we know not, by what we know, still closing up truth to truth as we find it (for all her body is homogeneal, and proportioned) this is the golden rule.”³⁶

3. Can the Law Change without the Words Changing?

The point is that law is always a combination of reason and fiat,³⁷ of explication and creativity, and when a judge goes wrong in fashioning a new legal rule or applying an old rule to new circumstances, the wrongness is in the lack of fit or inconsistency of that rule with the law, not in the creativity itself. This might seem a semantic difference, but Smith places a great deal of weight on the purported distinction between application and creativity when it comes to judges, and criticizes judges who “override” the law and act as creators. In my view, the judicial function rightly understood does encompass the creation of law, and *any* decision that is wrong as a matter of legal reasoning “overrides” the law, even if it is not creative. A judge who honestly misreads a statute’s terms and misapplies it—say, fines the defendant \$100 when the statute only authorizes a \$50 fine—“overrides” the law. The fault is in the error, not in the “creativity.”

While a statute certainly does not change based on settled expectations, the *commitments* that the language is meant to memorialize *can*, even without a change in the text. We know from everyday life—as well as from such contract law principles as “course of performance”³⁸—that promises can be changed by circumstances, even if there is no writing to memorialize those changes. What counts is the *promise*, not the memorialization; the letter of the statute is not the law. The law is the abstract proposition that the letter is meant to

³⁶ John Milton, *Areopagitica*, in *Areopagitica and Other Prose Works of John Milton*, ed. C. E. Vaughan (Minneapolis, MN: Dover Thrift Editions, 2016), p. 30.

³⁷ Lon L. Fuller, “Reason and Fiat in Case Law,” *Harvard Law Review* vol. 59 (1946), pp. 376-95.

³⁸ *Hobbs v. Massasoit Whip Co.* (158 Mass. 194 [1893]).

convey. If that abstraction changes, then the law has changed, even if the meaning of the writing has not. To return to my “performance” analogy: It seems to me that the balcony scene is a part of *Romeo and Juliet*, just as standing during Handel’s “Hallelujah” chorus has become a part of the *Messiah*, and the famous thirty-two *fouettés* in the *pas de deux* of *Swan Lake* have become a part of *Swan Lake*, even though these agglomerations have no textual mandate. Audiences have come to regard them as so much a part of the originals that it would seem strange—*inauthentic*, even—to say they are not a part of these performance works. That is, although the texts of these works have not changed, the commitments they represent to audiences and performers have.

James Madison believed that the Constitution can change likewise, at least to some degree. In explaining why he signed the bill to recharter the Bank of the United States, despite having earlier opposed the Bank on constitutional grounds, he explained that, in his view, legislative precedent deserves respect just as judicial precedent does, in expounding the Constitution. Legal precedents are respected if and when they are reasonable, and because they keep society stable and predictable:

[I]f a particular Legislature, differing in the construction of the Constitution from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the Constitution, but in the laws themselves; inasmuch as all laws preceding the new construction and inconsistent with it are not only annulled for the future, but virtually pronounced nullities from the beginning.³⁹

It is generally better, he argued, to rely upon an interpretation of the Constitution “which has the uniform sanction of successive legislative bodies, through a period of years under the successive varied ascendancy of parties,” than to embrace an interpretive method that allows “the opinions of every new Legislature, heated as it may be by the spirit of party, eager in the pursuit of some favourite object, or led astray by the eloquence and address of popular statesmen,

³⁹ James Madison, “Letter to Charles Jared Ingersoll (June 25, 1831),” in *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed., ed. Marvin Meyers (Hanover, NH: Brandeis University Press, 1981), p. 391.

themselves, perhaps, under the influence of the same misleading causes,” to alter the understanding of the nation’s fundamental law.⁴⁰ Because the National Bank had existed for twenty years, had been sanctioned by Supreme Court rulings, and had obtained “the acquiescence of all the local authorities, as well as the nation at large,” it would have disrupted the nation’s settled expectations for Madison to have vetoed its recharter.⁴¹

Is this to endorse Bruce Ackerman’s theory of “constitutional moments”?⁴² I honestly don’t know. The risk, of course, is that, as Michael McConnell says, “the criteria for constitutional moments become so malleable that almost any significant popular movement addressed to a constitutional issue will suffice.”⁴³ It is difficult to deny that in some cases, settled expectations about the content of a law or legal system can diverge from the actual meaning of the written text, and become so entrenched that the difference between the objective *content* of the text and the *settled expectations* regarding that law becomes irreparably blurred. If it would be unjust to disrupt these settled expectations, what is that other than to say that the law itself has changed? Law is, after all, nothing but settled expectations plus justice. Smith herself acknowledges that “whether a legal system exists in a given area” is a “non-normative matter of fact”; she rejects the proposition that an unjust law is no law (p. 89 n. 2).

Rather than endorsing the “constitutional moments” theory, what I think Madison recognized is that notwithstanding the fact that a constitution is written down precisely to resist alteration, it is nevertheless true that public acquiescence in unconstitutional behavior can legitimize that behavior to such a degree that disputing its constitutionality afterward becomes too much for the law to bear. (This is a point that Smith recognizes; see pp. 261-62.) At that point, it seems senseless to insist that it is nevertheless not law. This is a familiar notion to us; we find it throughout the law in principles of repose or

⁴⁰ Ibid., pp. 392-93.

⁴¹ Ibid., p. 393.

⁴² Bruce Ackerman, *We the People: Foundations*, vol. 1 (Cambridge, MA: Belknap Press, 1991).

⁴³ Michael McConnell, “The Forgotten Constitutional Moment,” *Constitutional Commentary* vol. 11 (1994), p. 142.

adverse possession. So while one might be tempted to say that, in the event of a conflict between the legal text and the public's understanding of that text, the text ought to prevail, the law already rejects this in at least some instances.⁴⁴

However, if the law is an abstract promise that can change even in the absence of written evidence, then the commitments that constitute the law might evolve to the point where they are not only different from, but perhaps contrary to, the text's objective meaning.⁴⁵ This is why the question "Is a dolphin in fact a fish?" is different from the question "Given that the statute committed us to a prohibition on fishing, and has always been enforced with regard to dolphins in the past, and we now know that technically it wouldn't apply to a dolphin, nevertheless does the law still apply when a fisherman catches a dolphin?" Smith treats the first question as an epistemological one and the second as one of practical statesmanship: given settled expectations and the nature of the commitments involved, what is the best way to restore a misunderstanding that has arisen over what is and is not legal? Courts already do this.⁴⁶ I am arguing that these two questions cannot always be *qualitatively* distinguished, just because law is a commitment, and commitments, unlike other objects, can change depending on our expectation about their content. Perhaps this is a

⁴⁴ This is not to endorse the Burkean concept of "prescription" in full, but to recognize that the American constitutional order is based on the British common law, but only as far as is consistent with the natural rights of man. Our Constitution's "sole authority" is *not* "that it has existed time out of mind" (Edmund Burke, in *The Works of Edmund Burke* [London: George Bell and Sons, 1890-1906], vol. 6, p. 146), but our law does presume that "it is with infinite caution that any man ought to venture pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes" (*ibid.*, vol. 2, p. 334).

⁴⁵ For instance, in the Eleventh Amendment cases.

⁴⁶ Courts have at times announced a constitutional rule, but applied it only prospectively, where the immediate application of the rule would disrupt settled expectations. See, e.g., *Turken v. Gordon* (223 Ariz. 342, 351-52 [2010]); *Kearney v. Salomon Smith Barney, Inc.* (39 Cal. 4th 95, 130 [2006]); *Ex Parte Archy* (9 Cal. 147, 171 [1858]).

manifestation of the fact that law always straddles the boundary between “is” and “ought.”⁴⁷

The best response to these objections may be that while the law is a promise, it is a unique type of promise, developed behind a unique kind of veil of ignorance: a promise which is going to be made binding on future generations we do not know. Justice therefore requires that we take special care to minimize subjectivity and protect the rights of the innocent as much as possible.⁴⁸ In order to achieve that goal, we adopt rules of thumb that straddle the boundary between epistemology and political philosophy, between linguistic interpretation and the normative considerations of individual rights. The rule of contractual interpretation that we construe contracts of adhesion strictly against the drafter, for example, is meant to protect parties against surprises. The U.S. Constitution is the ultimate contract of adhesion, and we accordingly use interpretive rules to protect the innocent, such as the rule of lenity in criminal law. Smith’s argument for objective interpretation—that the fisherman who catches the dolphin should be acquitted—gives effect to this commitment to impose the risk of surprise on the government rather than on the citizen.

The perfect illustration of this comes from a case that does, in fact, involve fish.⁴⁹ In *Yates v. United States*,⁵⁰ the Supreme Court ruled that a law forbidding the destruction of a “record . . . or tangible object,” did not apply to a fisherman who destroyed a fish he had caught illegally, which he did to conceal his crime. The question before the Court was whether a “fish” is a “tangible object” for purposes of the statute. Fish are obviously tangible objects, but the Court ruled that given the context, including the history of enforcement as well as

⁴⁷ Fuller, *The Law in Quest of Itself*, pp. 8-9.

⁴⁸ Randy Barnett, *Restoring the Lost Constitution* (Princeton, NJ: Princeton University Press, 2004).

⁴⁹ While this article was in press, the Ninth Circuit Court of Appeals decided in *Makah Indian Tribe v. United States* (873 F.3d 1157 [9th Cir. 2017]), that where a treaty with two Indian tribes referred to “fish,” that term encompassed sea mammals also, because “the [tribes] (and possibly even the [federal] commissioners) understood the Treaty to protect [the traditional practices of] whaling and sealing.” *Ibid.*, p. 1166.

⁵⁰ *Yates v. United States* (135 S.Ct. 1074 [2015]).

traditional interpretive rules designed to protect individual rights—particularly, the rule of lenity—the statute did not apply. That conclusion, said the Court, would ensure “that criminal statutes will provide fair warning concerning conduct rendered illegal.”

4. What Would Judge Narragansett Do?

Smith addresses the question of what a judge committed to her vision—Hercules, if you will, or Judge Narragansett⁵¹—would do in today’s legal system, which is in so many ways contrary to any reasonable reading of the constitutional text. She argues that a “contextual application of objectivity . . . would counsel a gradual transition back to a fully objective application of the relevant law” (p. 267). While there is “no pain-free path back to objective law” from today’s situation (p. 268), judges should gradually restore objectivity, guided by the legal system’s overall purpose of protecting individual rights. This means putting an end to the rational basis test, among other things. But I think there are a few devils in the details that are overlooked by focusing on relatively easy questions like the rational basis test.

First, it remains to be explored how, in these hard cases, the judge’s interpretive task relates to broader values such as the protection of individual liberty. This is complicated by the relationship in Smith’s view between a text’s linguistic meaning and the *legally acceptable* meanings of that text *qua* a component in a politically legitimate legal system. She argues that “[t]he proper understanding of *any discrete element* of the legal system rests on an understanding of the system’s overarching substantive mission” (p. 226, emphasis added). Thus, a judge should, when interpreting any particular segment of the law, also view it holistically and interpret it in order “to advance its principal, overarching purpose,” which is the protection of individual rights (p. 226). In other words, *linguistic* interpretation is cabined by moral and political values so that there are some interpretations of texts that “might be . . . valid . . . were those words used in different contexts,” but can “not be . . . valid understanding[s] of the provision *as law*, that is, as genuinely carrying the authority of law,” because they offend the underlying values of the legal system.⁵²

⁵¹ The latter is Ayn Rand’s ideal judge, depicted in her novel *Atlas Shrugged* (New York: Random House, 1957). Hercules was the name Dworkin gave his ideal judge; see Dworkin, *Law’s Empire*, p. 239.

⁵² Tara Smith, “Originalism, Vintage or Nouveau: *He Said, She Said Law*,”

This is problematic because most of a judge's interpretive tasks are at too fine a level for a broad framework of values to be much help. On the other hand, when it *is* helpful, *it*, and not the linguistic interpretation, does the real work. When a judge is asked to decide what is chicken⁵³ or what is a boat,⁵⁴ moral and political values will at best play a minor role. When asked to decide what qualifies as "property" or "liberty" under the Fourteenth Amendment, moral or political considerations will overwhelm linguistic ones. This suggests that Smith's recommendations give judges little guidance in important cases, considering the broad generality of many of the applicable moral and political principles,⁵⁵ and the fact that "a proper understanding of a legal system's mission does not dictate a single, uniquely acceptable set of rules by which a legal system can serve that mission," but "permits a certain range of acceptable alternatives" within which "officials enjoy discretion in adopting the exact rules by which the system will operate" (p. 54).

How, then, would Judge Narragansett interpret the commerce clause? That clause grants Congress power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. Putting aside relatively easy cases such as *NFIB v. Sebelius* (2012) (easy because it simply asked whether to expand federal authority beyond what existing precedent permits),⁵⁶ this is not an area where Smith's prescriptions help. The objective meaning of "commerce among the several states" is commercial intercourse across state lines, but that is no help in a case like *Baldwin v. G.A.F. Seelig, Inc.* (1935), which asked whether a state law imposing a minimum price for milk could be applied to an in-state dealer who acquired the milk wholesale in another state, had it shipped into the state, and then sold it retail in

Fordham Law Review vol. 82 (2013), p. 625 and n. 18.

⁵³ *Frigalment Importing Co. v. B.N.S. International Sales Corp.* (190 F. Supp. 116 [1960]).

⁵⁴ *Lozman v. City of Riviera Beach* (133 S. Ct. 735 [2013]).

⁵⁵ Cf. Ayn Rand *Philosophy: Who Needs It* (New York: New American Library, 1982), p. 4: "political philosophy will not tell you how much rationed gas you should be given and on which day of the week—it will tell you whether the government has the right to impose any rationing on anything."

⁵⁶ *NFIB v. Sebelius* (132 S.Ct. 2566 [2012]).

the original packages in which it was shipped.⁵⁷ The breadth of federal authority over interstate commerce certainly has *implications* for individual liberty, but only indirectly so, and there may be cases where broader federal authority would actually protect individual liberty better.⁵⁸

Indeed, it is not even clear how Judge Narragansett would decide a case like *National Labor Relations Board v. Jones & Laughlin Steel* (1937), which upheld the constitutionality of federal regulations of wholly intra-state commercial transactions, on the theory that doing so was necessary and proper to preventing disruption of the inter-state economy.⁵⁹ If Congress has the enumerated power to regulate commercial transactions that cross state lines, and also to pass laws necessary and proper to effectuate its enumerated powers, it is difficult to see why Judge Narragansett would not uphold the constitutionality of the Act on this theory. True, that is an expansive interpretation, but that is not *necessarily* a bad thing in terms of individual liberty, and it appears to fall within the “broad range” of answers that objective moral values permit. Certainly *Jones & Laughlin Steel* contradicts the original understanding of the Clause’s meaning, but it is not clear that it violates either Smith’s linguistic or political principles.

On the other hand, what about cases in which the Constitution itself is contrary to individual liberty? Smith writes: “The legitimate authority of the law (of a particular legal system as a whole) naturally

⁵⁷ *Baldwin v. G.A.F. Seelig, Inc.* (294 U.S. 511 [1935]). It will not do to say that the judge should simply strike down the New York law for violating freedom of contract or other individual liberties. That was not the question presented in *Baldwin*, and would have been the sort of “sudden imposition of radical changes in the application of law” that Smith views as unjustified (p. 269).

⁵⁸ For instance, in cases involving the Federal Arbitration Act, which requires states to respect the decision of contracting parties who agree to submit disputes to arbitration, notwithstanding state law to the contrary. See, e.g., *AT&T Mobility v. Concepcion* (563 U.S. 333 [2011]); *Preston v. Ferrer* (552 U.S. 346 [2008]). While this certainly preserves the freedom of contract, it is debatable whether the Act is within Congress’s authority when applied to intra-state agreements, as Justice Clarence Thomas argues in his dissent in *Allied-Bruce Terminix Companies, Inc. v. Dobson* (513 U.S. 265 [1995]).

⁵⁹ *National Labor Relations Board v. Jones & Laughlin Steel* (301 U.S. 1 [1937]).

constrains . . . what any particular provision of its written expression could genuinely mean” (p. 89). Elsewhere, she says, “Every aspect of a legal system is to be . . . operated in ways that advance that system’s reason for being”—that is, the protection of individual rights—and “[t]he authority of the law can extend no further than that. This entails that the identity of the law can extend no further than that. And this entails that the exercise of judicial review . . . can extend no further than that. Objectivity demands that a court treat nothing other than that as carrying legal authority” (pp. 248-49). Yet, as noted above, she rejects the proposition that an unjust law is no law, and argues that the job of judges is both to make “the most sense of the law that they find” and to “draw on the philosophy that is *in* the law, but not inject their own” (p. 238). This seems contradictory. If the law’s legitimacy constrains its possible linguistic meanings, what should a judge make of a constitutional provision that violates individual liberty, or does so by implication, and thus has no claim to legitimacy?

The intricate perversity of slavery law provides many fascinating examples: If a slave is charged with a crime, can her master be compelled to testify that she confessed to him that she committed the crime?⁶⁰ Or is that confession privileged? Or is it hearsay? Can an insolvent master free his slaves to the damage of his creditors?⁶¹ If he tries to, and the deed of manumission is later found invalid, are the slave’s children born during that interval of freedom born enslaved or

⁶⁰ *Sam v. State* (33 Miss. 347 [1857]) (finding communications by slave to master are not privileged). Thomas Cobb takes the position that a slave’s confession should be privileged; see his *An Inquiry into the Law of Negro Slavery* (Philadelphia, PA: T. & J. W. Johnson & Co., 1858)—the only pro-slavery legal treatise published, and which was intended as volume one of a two-volume set, but which Cobb never completed before dying in Confederate service at the Battle of Fredericksburg. Cobb there argues: “The [slave] is bound, and habituated to obey every command and wish of the [master]. He has no will to refuse obedience, even when it involves his life. The master is his protector, his counsel, his confidant. He cannot, if he will, seek the advice and direction of legal counsel”; thus, “[e]very consideration which induces the law to protect from disclosures confidential communications made to legal advisers, applies with increased force to communications made by a slave to his master” (p. 272).

⁶¹ *Allen v. Negro Sharp* (8 G. & J. 96 [1835]).

free?⁶² I cannot imagine how Judge Narragansett would answer these questions.

Let us consider a simpler example: the fugitive slave clause. Smith seems to say that if the Constitution contradicts the underlying principles of justice, then even Judge Narragansett is required to enforce it—as Justice Joseph Story did in *Prigg v. Pennsylvania* (1842),⁶³ despite his opposition to slavery—because “[w]hile it is true that proper law must itself be philosophically justified, this does not erase the difference between philosophical justification and legal justification” (p. 199). But is Judge Narragansett also supposed to say that while this provision, as a non-normative matter of fact, means that slaves shall be returned to their masters, it nevertheless imposes no *normative duties* because it violates individual rights? Smith writes that “a legal system’s moral authority” is what “provides the context necessary for understanding *individual laws’ legitimate meaning*. A ‘meaning’ that exceeds the scope of a legal system’s authority could not be valid.”⁶⁴ Being more specific, she writes that an interpretation of a specific legal provision that violates underlying moral values “could not be a valid understanding of the provision *as law*, that is, as genuinely carrying the authority of law,” even if “[i]t might be a valid understanding of the very same sequence of words, were those words used in different contexts.”⁶⁵

Presumably, therefore, Judge Narragansett must enforce the fugitive slave clause, but simultaneously announce that it is philosophically unjustified, and therefore that it is not “a legal system that *should* be respected” (p. 89). Perhaps he would reason that even while the obligation to deliver up fugitive slaves might be the correct understanding of the sequence of words appearing in that clause, it cannot be a valid understanding of that clause *as law* because it exceeds the scope of a valid legal system’s objective authority. Thus he is simultaneously required to acknowledge that the clause means what it obviously says—that fugitive slaves are to be delivered up—because

⁶² In *Union Bank of Tenn. v. Benham* (23 Ala. 143, 154-55 [1853]), the court found that the children were free.

⁶³ *Prigg v. Pennsylvania* (41 U.S. 539 [1842]).

⁶⁴ Smith, “Originalism, Vintage or Nouveau,” p. 625.

⁶⁵ *Ibid.*, p. 625 n. 18.

it is part of a larger constitutional compromise that was intended to placate the slave states, but at the same time that he *cannot* ascribe that meaning to the clause *as law*—that he cannot read it to justify the return of fugitive slaves—because the “legal system [can] not be interpreted as sanctioning activities that the government lacks the basic authority to engage in” (p. 89).

Even if there is no contradiction here, this would surely be a radical ruling, one that would disrupt settled expectations. Smith tells us, though, that “[s]ometimes, big change needs to happen . . . according to the fundamental principles of the legal system’s authority,” and that “we need radically to reverse our course, at times” (p. 268). If the Rule of Law is not an end in itself, but “valuable for a practical reason, namely, to help protect individual rights” (p. 266), then why would Judge Narragansett *not* be justified in simply refusing to enforce slavery laws at all, damn the Rule-of-Law consequences, because such laws lack moral authority? That was the position taken by some anti-slavery constitutionalists, and there is much to be said for it.⁶⁶ But the strongest criticism of it—the one adopted by, among others, the *Dred Scott* Court—is that this interpretation ignores the context that gives the constitutional provisions regarding slavery their meaning.⁶⁷

Or is he constrained to resign? That may seem logical, until we reflect on how many morally outrageous and non-objective laws there are on the books today, and how pervasive their consequences are in our legal system. Smith argues that “the only end that courts should ‘aspire’ to is accurate, objective interpretation of the Constitution and the specific moral judgments it finds therein; nothing more, nothing less” (p. 237). However, the Constitution of 1787 was infamously ambiguous regarding its moral judgment of slavery, in that it seemed simultaneously to endorse and to repudiate it. It called slaves “persons,” for example, refusing to use the word “slave,” but at the same time mandated the return of these “persons” who are elsewhere

⁶⁶ Randy Barnett, “Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner’s Theory of Interpretation,” *Pacific Law Journal* vol. 28 (1997), pp. 977-1014.

⁶⁷ As Harry V. Jaffa observes: “Never has the doctrine of original intent been stated with greater perspicuity” than by Chief Justice Roger Taney in the *Dred Scott* case; Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery, 1994), p. 14.

entitled to due process of law. If Smith's argument only works in an ideal, objective legal system, then it would seem useless to us today, swamped as we are in so much that falls short.⁶⁸

5. Conclusion

I think Smith is right that the act of legal interpretation relates to practical statesmanship in that the judge must consult fundamental normative principles, as a compass is necessary for navigation.⁶⁹ In controversial cases, the court must decide not only what the constitutional commitment is, but whether that commitment is justified. The answer will depend on both rules of interpretation and principles of political legitimacy.

On the other hand, Smith argues that in ordinary cases where courts are asked to interpret terms like "commerce among the several states," they are not bound by historical understandings, because their task is to determine what the text *says*, not what people thought it said. On this point, I am not entirely persuaded because in my view, the court's task is not to determine what the text says, but *what the law is*—a question to which the text is relevant, but not always dispositive. The *law* is an abstraction that must be proved—and not just proved, but placed within a comprehensible story about what our society is and means. White puts the point well: "At some point," he writes, "any appellate judge . . . confronts the paradox that judging is ideological, and because it is ideological it requires in its practitioners' efforts to show that the ideological position being advanced in a given case is a position based on sources external to its author, a position that others with different preconceptions can share."⁷⁰

But those "different preconceptions" cannot be so extreme that the resultant "sharing" is impossible. The fact is, it is not possible to have a constitution for "people of fundamentally differing views," as Justice Holmes claims in *Lochner v. New York* (1905).⁷¹ The search for

⁶⁸ Smith seems to suggest this when she writes: "Bear in mind that I am describing the proper method of review in an objective legal system" (p. 235). What, then, about a system with manifold non-objective, or even objectively evil, elements?

⁶⁹ Sandefur, *The Conscience of the Constitution*, pp. 16-22.

⁷⁰ White, *The American Judicial Tradition*, p. 367.

⁷¹ *Lochner v. New York* (198 U.S. 45, 76 [1905]).

such a thing—including the recent hope that some interpretive method can be found which will circumvent contentious arguments about fairness and justice—is ultimately a snipe-hunt.

Smith is exposing the fact that the debate over Originalism versus the Living Constitution is a proxy war for a clash over the moral and political values undergirding our constitutional system—or, to be more precise, that Originalism consists of both a misguided quest for value-free constitutional solutions and a noble search for objectivity, which Originalism ultimately cannot satisfy. The benefit of Smith’s book is that she clarifies that objectivity cannot be separated from values, that the effort to attain objectivity by ejecting references to “ought” is misguided.

Alas, for the legal community to admit that would require it to be open about the role of broader normative principles in the law—just what it is loath to do. As Carlton Larson puts it: “Invoking ‘natural rights’ in a modern law school is about as persuasive as citing Cotton Mather’s treatise on witchcraft.”⁷² We are fortunate that Smith is unashamed to say that liberty is in fact a good; that rights in fact exist, and that governments act justly only when they respect those rights and, ultimately, serve human flourishing. But today’s legal culture, in seeking to pretend that it is “value free” and above it all, sees such claims as this as proof that the author should simply be ignored.

⁷² Carlton Larson, “The Declaration of Independence: A 225th Anniversary Re-Interpretation,” *Washington Law Review* vol. 76 (2011), p. 711.

