

☆ *Preface* ☆

THE RULE OF LAW is essential to constitutional democracy. But its implications for how judges should interpret the law are complex and contested, as evidenced by Justice Antonin Scalia's elegant essay and the respectful but challenging responses to it by Professors Ronald Dworkin, Mary Ann Glendon, Laurence Tribe, and Gordon Wood. Together these eminent legal minds address one of the most important legal questions of our time: How should judges interpret statutory and constitutional law so that its rule is a reality that is consistent with a constitutional democratic ideal?

Should the aim of judges be to determine the intent of the legislators who made the law? On its face, this appears to be a democratic aim: to capture the intention of the law's makers, legislators who are accountable to the majority. Justice Scalia offers a powerful critique of this popular idea that judicial interpretation should be guided by legislative intent. A government of laws, not of men, means that the *unexpressed* intent of legislators must not bind citizens. Laws mean what they actually say, not what legislators intended them to say but did not write into the law's text for anyone (and everyone so moved) to read. This is the essence of the philosophy of law that Justice Scalia develops here in more detail. The philosophy is called textualism, or originalism, since it is the *original* meaning of the text—applied to present circumstances—that should govern judicial interpretation of statutes and the Constitution.

The idea that the law is what the words that constitute it mean is of course too simple. Most words are open to multiple interpretations. To say that laws are what their words mean would be to leave the meaning of most laws unacceptably ambiguous. The complexity of figuring out what laws mean should not prevent us—as it does not prevent Justice Scalia—from eliminating indefensible responses to the challenge of interpreting

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apparently ambiguous laws. Justice Scalia criticizes two alternatives to textualism—judicial decision making according to subjective intent and judicial creation of a “living” or “evolving” Constitution—as indefensible ways of interpreting (or failing to interpret) the law. But he also goes well beyond criticism; he develops and defends the merits of his philosophy of textualism.

Justice Scalia shows that textualism is not wooden, unimaginative, or pedestrian; least of all is it boring. Textualism is not strict constructivism, although (he says) strict constructivism would be better than nontextualism. “Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.” Scalia’s respondents take up his challenge: to show what could possibly be wrong with the commonsensical view that judicial interpretation should be guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time.

The questions raised by Justice Scalia’s commentators are of two kinds: What do judges committed to textualism do when the text is ambiguous? More critically: Why should judges desist from invoking moral principles and other nontextual aids to help interpret the law when the text itself is an inadequate guide?

Justice Scalia anticipates both challenges in his essay, and he also replies to them in his “Response.” Judges must do their best to figure out, first, the original meaning of laws and, second, the practical implications given new contexts for those original meanings. In most cases, judges will be successful in so doing. “Originalism” helps specify “textualism” and helps judges arrive at definite interpretations of the text even when the words are ambiguous. “There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court,” Justice Scalia writes. “But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare

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say usually—that is easy to discern and simple to apply. Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena.”

But the disagreement of views about interpreting the law represented in this volume ranges much further than resolving ambiguity about original meaning or uncertainty about how to apply original meaning to new and unforeseen phenomena. Professors Wood, Tribe, Glendon, and Dworkin also take issue with other claims that Justice Scalia makes on behalf of textualism. They question whether textualism, as Justice Scalia understands it, is the legal philosophy that is most defensible or most consistent with democratic values. All the commentators concur with Justice Scalia’s critique of interpreting the law according to either subjective legislative intent or a judge’s favorite moral philosophy. But they suggest other alternatives—including some significantly different versions of textualism—that are apparently defensible and democratic, even if not definitive, options. They argue that these alternatives do not suffer from the same devastating flaws as the interpretative strategies that Justice Scalia criticizes.

Professor Wood joins Justice Scalia in worrying about the tension between judicial lawmaking and democracy. Judges, he agrees, should be interpreters, not makers of the law. But Professor Wood, whose area of expertise is American history, also worries that Justice Scalia underestimates the degree to which judicial lawmaking is part of the very constitution of American democracy, albeit an extremely controversial part. Thomas Jefferson struggled, unsuccessfully, to end “the eccentric impulses of whimsical, capricious designing man” and to make the judge “a mere machine.” But not all, or even most, of the founding fathers shared Jefferson’s aims. Nor did the design of the judiciary follow Jefferson’s plan. According to Professor Wood: “The courts became independent entities whose relationship with the

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sovereign people made them appear to have nearly equal authority with the legislatures in the creation of law. The transformation was monumental." If Professor Wood's interpretation of American history is correct, then the blurring of legislative and judicial matters may be the rule rather than the exception for postcolonial America.

Professor Tribe defends a version of textualism that helps explain why this blurring may be necessary. He doubts that judges, historians, or anyone else can discover enough about the law to render decisions in many cases by interpreting the text only in the way that Justice Scalia recommends. Yet Professor Tribe also wants to prevent judges from legislating their personal preferences or values under the guise of constitutional interpretation. To prevent judges from usurping democratic authority, he suggests a strategy quite different from Justice Scalia's. "[O]ne must concede," Professor Tribe says, "how difficult the task [of constitutional interpretation] is; avoid all pretense that it can be reduced to a passive process of *discovering* rather than *constructing* an interpretation; and replace such pretense with a forthright account, incomplete and inconclusive though it might be, of why one deems his or her proposed construction of the text to be worthy of acceptance, in light of the Constitution as a whole and the history of its interpretation."

Professor Tribe therefore takes up Justice Scalia's challenge by doubting "that any defensible set of ultimate 'rules' [of interpretation] exists. Insights and perspectives, yes; rules no." Judges can still know how *not* to interpret laws, but they "must of necessity look outside the Constitution itself" for guidance, as must all who are authorized by the Constitution to interpret it and duty-bound to adhere to its provisions. The "Constitution's written text has primacy and must be deemed the ultimate point of departure," and "nothing irreconcilable with the text can properly be considered part of the Constitution." Nonetheless, "[t]here is . . . nothing in the text itself that proclaims the Constitution's text to be the sole or ultimate point of reference—and,

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even if there were, such a self-referential proclamation would raise the problem of infinite regress and would, in addition, leave unanswered the very question with which we began: how is the text's *meaning* to be ascertained?"

Professor Glendon focuses on a neglected topic, raised by Justice Scalia's critique of extending common-law habits to statutory and constitutional law: the merits of common-law habits, applied to the realm of the common law. "Many of our interpretive ills are due to the survival of common-law habits in the world of enacted law," Professor Glendon writes, "But it ought to be said that those habits were good ones, even if ill-adapted to statutory and constitutional interpretation. It is cause for concern, therefore, that they seem to be deteriorating." *Stare decisis*, by protecting the power of precedent, lends stability to the expectations of citizens. There could be far worse, Professor Glendon suggests, than a Supreme Court that followed common-law methods "in the sense of attending in each case to providing a fair resolution of the case at hand, mooring that decision in text and tradition, fairly exposing its reasoning processes, and providing guidance to parties in future cases." By contrast, Professor Glendon asks us to consider a Court whose "rulings look less like the reasoned elaboration of principle than like the products of majority vote. At times the Court appears just to be lurching along in irrational and unpredictable fashion, like the monster in the old version of *Frankenstein*." This kind of Court would give us far more to fear, Glendon vividly argues, than one that followed common-law patterns of principled building upon precedent.

Professor Dworkin defends a different version of originalism from Justice Scalia's. The idea that distinguishes Professor Dworkin's version from that of Justice Scalia is that "key constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules. If so, then the application of these abstract principles to particular cases, which takes fresh judgment, must be continually reviewed, not

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in an attempt to find substitutes for what the Constitution says, but out of respect for what it says." Professor Dworkin argues that this interpretative strategy is both true to the text and principled. "[W]hy," he asks, "shouldn't the 'framers' have thought that a combination of concrete and abstract rights would best secure the (evidently abstract) goals they set out in the preamble?" Why shouldn't we think that wise statesmen would realize that their views were not the last word on the subject? Moreover, Professor Dworkin argues, "There *was* no generally accepted understanding of the right of free speech on which the framers could have based a dated clause even if they had wanted to write one." When the debate raged over the Sedition Act of 1798, "[n]o one supposed that the First Amendment codified some current and settled understanding, and the deep division among them showed that there was no settled understanding to codify."

The division among the contributors to this book may not be as deep as that between the authors of the Sedition Act and their critics, but there is certainly no settled answer among them to the question of how judges should interpret statutory and constitutional law. Although it is up to each reader to adjudicate this disagreement, Justice Scalia's respectful yet spirited response to his commentators will undoubtedly increase our understanding of the merits of alternative answers and heighten our awareness of the stakes for all American citizens.

This book originated in an invitation by the University Center for Human Values at Princeton University to Justice Scalia to deliver the Tanner Lectures, and to Professors Dworkin, Glendon, Tribe, and Wood to offer commentaries on them. We are all thankful to the Tanner Trust for their generous support of the Tanner Lectures and to the University Center for Human Values for hosting the lectures each year. We are especially grateful to Mrs. Grace Adams Tanner and the late Mr. Obert Clark Tanner for endowing the Tanner Lectures and to Mr. Laurance S. Rockefeller for endowing the University Center for Human Values. As part of the University Center for Human Values pub-

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lication series, this book conveys our mutual dedication to giving voice to perspectives that challenge conventional ways of thinking and thereby contribute to our reflecting more deeply and broadly about issues of great human significance.

AMY GUTMANN

*Laurance S. Rockefeller University Professor
University Center for Human Values
Princeton University*