

Legal Theory Workshop
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“A THEORY OF LEGAL ADJUDICATION”

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A THEORY OF LEGAL ADJUDICATION

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And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong!

John Godfrey Saxe, *The Blind Men and the Elephant*, 1873

1. Introduction: The Problem of Legal Adjudication

The Hindu parable of the blind men and the elephant has come down to us in various versions, but the basic idea is that several individuals who are either blind or blindfolded are asked to touch different parts of an elephant (trunk, ear, leg, side, tail, tusk) and make a judgment as to the nature of the item they have touched. Because they have touched parts with distinct tactile profiles, they disagree, one taking the item to be a snake, another a fan, another a pillar, another a wall, and so on. Different morals may be extracted from the parable, but one moral is that, due to our cognitive limitations, disagreement can sometimes be explained by everyone's merely partial and limited grasp of the very same truth.

I want to suggest that something like this phenomenon is at work in legal adjudication theory, the prescriptive account of what judges should do when faced with a dispute between parties over the proper interpretation and application of sources of law, in particular, written legal enactments, such as constitutions and statutes. The relevant theoretical landscape is strewn with different proposals that may be classified in accordance with what they take to be the proper

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touchstone: original meaning (e.g., Amar, Barnett, Baude, Easterbrook, Goldsworthy, Gorsuch, Green, Lash, Lawson, Manning, McGinnis and Rappaport, Paulsen, Sachs, Scalia, Solum, Strang, Whittington, Wurman), original (semantic or practical) intent (e.g., Alexander, Bork, Berger, Fish, Katzmann, Kay, Meese, Prakash, Rehnquist, Soames), current meaning (e.g., Bell, Levin, Schauer, Strauss), and political morality (e.g., Barber, Brink, Dworkin, Fleming).² As I will argue, all of these proposals are “partly in the right,” but because of overgeneralization, sometimes but not always theorized, they are ultimately, taken as complete theories, “in the wrong.” Given the legal acumen, intellectual sophistication, and experience of the scholars and judges who have made these proposals, it should not be surprising that they would achieve at least a partial glimpse of the truth. My aim is to explain how, in so doing, they have missed the elephant for its parts.

The need for a methodology of adjudication stems largely from the existence of inevitable deficiencies and desirable features of legislative enactments. The law is (mostly) not a series of clear and easily applied discrete directives or commands addressed to particular persons, proscribing actions, empowering people, or immunizing them in particular ways. In order to serve its proper function (about which, more below), the law speaks in general terms to a large number of people. And because the law is often and for the most part the result of compromise and because its function is to guide behavior in a wide variety of future circumstances, it is also often vague: precise language would be underinclusive (relative to the purpose(s) of enactment) and would also reduce the likelihood of agreement among enactors. In addition, enactors rarely possess a complete grasp of the semantic features of the words and phrases they are using, thereby making room for a

² There are also pragmatic views (e.g., Breyer, Farber and Sherry, Posner), hybrid views that appeal to a variety of different interpretive modalities (e.g., Balkin, Bartrum, Berman, Bobbitt, Fallon, Griffin, Pojanowski and Walsh, Shapiro, Toh), and a variety of other views. I do not aim here to provide an exhaustive typology of existing theories of interpretation or adjudication.

good deal of syntactic and semantic ambiguity or polysemy. Finally, enactors are often unable to come up with answers to all possible questions regarding the future application of their enactments.

Thus, if a city council aims to protect the safety of those who enjoy strolling freely through public parks, it will pass an ordinance banning vehicles in the park, rather than, say, banning all items on the following list: cars, vans, buses, campers, tractors, and motorcycles. Why? Because over time new potentially dangerous vehicles, unthought of by the framers of the ordinance, may become popular, such as Segways, motorized scooters, or golf carts (see Hart; Scalia and Garner). A general ordinance will cover newfangled vehicles, a particularized ordinance will not. Drafters of the Gun Control Act of 1968 used the locution “convicted in any court,” probably not thinking that this might be read to cover persons convicted in foreign courts (Katzmann, 70-81). In *Liparota v. United States* (471 U.S. 419 (1985)), the U.S. Supreme Court considered the following syntactically ambiguous statute: “Whoever knowingly...acquires...coupons [of a value greater than \$100]...in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall...be guilty of a felony” (see Solan, 72) – the question being whether the adverb “knowingly” applies to the prepositional phrase “in any manner...”. And drafters simply can’t think of everything: thus, despite have a good grasp of the principle, *nemo iudex in causa sua*, the framers of the U.S. Constitution used language that, given the semantic values of its constituents, entails that the person who presides over the impeachment trial of the Vice President in the Senate is, well, the Vice President (Article 1, Section 3, Clauses 4-6 – see Amar).

Although greater attention to sentence construction and punctuation can help reduce syntactic ambiguity, enactors will inevitably continue to use semantically ambiguous and vague language, as well as language that is over- or under-inclusive relative to the aims of enactment.

The problems are here to stay, and the question before us is how judges should decide disputes that stem from these features of written enactments.

It might be thought that one source of evidence for what judges should do is what judges actually do. Perhaps we should be guided by their conduct, on the assumption that they have extensive legal knowledge, experience deciding cases, and finely tuned interpretive powers. But this, I think, would be a mistake. Judges, including those who have worked hard to achieve a meta-interpretive conspectus of the juridical enterprise, routinely criticize each other, claiming that their fellow judges are using the wrong methods of interpretation and adjudication. Judges, it turns out, need guidance as much as anyone.

2. Appealing to Law's Nature: Shapiro's Positivist Proposal

There are two ways to identify principles that should guide adjudication. One way involves appealing to the *nature* of law. The other involves appealing to the *function(s)* of law. Examples of the former include both positivist and non-positivist accounts of law's nature or identity. Positivists claim that law is constituted or determined purely by social facts, such as conventions, customs, social practices, or social plans, and not also, even in part, by moral facts. Although some positivists (e.g., Hart) claim that judges have discretion to create new law in the linguistic interstices produced by the open texture of existing written enactments, others (e.g., Shapiro) argue that judges should look to the economy of trust, if any, presupposed by the design of their legal system, interpreting laws broadly when that economy signals a trustful attitude towards legal officials (including judges), but interpreting them more narrowly when that economy signals a correspondingly distrustful attitude. Non-positivists, such as Dworkin, who take law to be constituted in part by principles of political or social morality, argue that under the seeming

indeterminacy of written legal enactments lie determinate answers to many or most legal questions, answers grounded in moral principles that best fit and justify past legal practice.

For various reasons, I am not attracted to accounts of best practices of adjudication that are drawn directly from accounts of law's nature. One reason for this is that I am genuinely unsure of the right answer to the question of what law *is*, but I am, by contrast, more confident of the right answer to the question of how judges should decide cases and controversies. So, if you were to describe and defend your favored answer to the former question, and your answer to that question entails an answer to the latter question that contradicts my favored defensible answer to it, then I would choose *modus tollens* over *modus ponens*. But another reason is that I find existing accounts of the nature of law, and the interpretive recommendations that are supposed to issue from them, problematic or unconvincing.

It is not possible for me here to argue against all current accounts of law's nature and its implications for legal interpretation (or adjudication). But let me give you at least a sense of what worries me about two prominent accounts, one positivist and one not. Consider Shapiro's planning theory of law. According to Shapiro, laws are social plans or planlike norms: more particularly, "what makes laws *laws* is that they are either [?] (1) parts of the master plan of a self-certifying, compulsory planning organization with a moral aim [i.e., the aim of solving a community's moral problems in the circumstances of legality, i.e., when those problems are "numerous and serious" and the solutions are "complex, contentious, or arbitrary" (Shapiro, 213)]; (2) plans that have been created in accordance with, and whose application is required by, such a master plan, or (3) planlike norms whose application is required by such a master plan" (Shapiro, 225). With this account, I see problems.

Shapiro attributes a moral aim (that of compensating for the deficiencies of alternative forms of planning, such as “improvisation, spontaneous ordering, private agreements, communal consensus, or personalized hierarchies” (Shapiro, 170), in the circumstances of legality) to law *by its nature*, in part to vindicate the intuition that organized crime syndicates, such as the Japanese Yakuza or the Sicilian Mafia, are not legal systems (Shapiro, 215). But, as a way of voting the Yakuza and the Mafia off the island of law, Shapiro’s Moral Aim Thesis is too strong. The reason is that many systems that Shapiro would surely recognize as legal do not have the moral aim he attributes to all legal systems by nature. Some legal systems solve serious moral problems merely as a foreseen byproduct of maintaining the existing power structure: arguably, this is the kind of system currently in place in Russia and China.

It doesn’t follow from this criticism that laws are not plans or planlike norms. Perhaps they are. But there is a deeper problem with Shapiro’s planning theory, one that concerns the recipes of adjudication that it purports to offer to judges. Shapiro argues that part of the point of a social plan is to distribute trust, i.e., to assign greater or narrower discretion depending on the level of trustworthiness presupposed of the various officers by the plan (Shapiro, 336). In an authority system, “the reason why the bulk of legal officials accept, or purport to accept, the rules of the system is that the rules were created by those having superior moral authority or judgment.” In an opportunistic system, officials accept the rules of the system “because they recognize, or purport to recognize, that these rules are morally good” (Shapiro, 350). The task of the meta-interpretter is to “extract the planners’ attitudes of trust as they are embodied by the plans of the legal system, and then to use these attitudes to determine how much discretion to accord” officials of the system (Shapiro, 345). Thus, argues Shapiro, textualism or original intent originalism (or some other kind of “restrictive methodology” of interpretation) is appropriate for authority systems

but not for opportunistic systems, whereas living constitutionalism or pragmatism (or some other kind of far less restrictive methodology of interpretation) is appropriate for opportunistic systems but not for authority systems.

The problem with this proposal, as I see it, is that it is viciously circular. The meta-interpreter is supposed to identify the attitudes of trust (and distrust) presupposed by the legal system's master plan, and then use those attitudes to determine the right approach to legal interpretation (broad or narrow). But what the system's master plan actually *amounts to* is, at least in part, the outcome of legal interpretation. To understand what attitudes of trust are presupposed by the master plan, the meta-interpreter needs to understand what the planners *did*, because this is the only way for us to determine what they *thought*. How much trust the founding planners of the U.S. Constitutional system had in the (future) officers of the various branches of government is partly a function of the kinds of powers the founding documents granted, and the kinds of powers they withheld from, those branches. But in order to understand which powers were granted to or withheld from whom, we need to know what the founding documents actually *say* about those powers. But in order to know what these documents say, we need to know how to interpret them. In sum, the planning theory tells that we already need to know how to interpret a master plan's founding documents in order to determine the economy of trust presupposed by the plan; but we need to determine the economy of trust presupposed by the master plan in order to know how to interpret the plan's founding documents.

3. Appealing to Law's Nature: Dworkin's and Greenberg's Non-Positivist Proposals

Can non-positivist accounts of law, and their associated interpretive recommendations, do better? I believe that they are mistaken, but that they have something important to contribute to the answer.

There are two major forms of non-positivist theories of law. On one kind of account, moral considerations determine the content of law *ex ante* (e.g., Dworkin); on a different kind of account, moral considerations determine the content of law *ex post* (e.g., Greenberg). The major problem I see with *ex ante* accounts is that they conflict with law's most important function, which is to embody the rule of law. One of the most important rule-of-law values is publicity or notice: the fact that those subject to law must be in a position to know or discover what law requires or makes possible for them. If law is hidden from its subjects, then it loses its point, which is to enable legal subjects to make and implement rational life plans, without fear of unpredictable government interference. Suppose, then, that the legal content of a legal enactment is, in part, a function of *ex ante* moral principles. In that case, if I am to know what the enactment requires of me or makes possible for me, I need to make an inventory of all potentially relevant *ex ante* moral considerations, balance them with each other, and work out what the balance of moral considerations entails. In a large number of cases, this will be practically impossible for me to do.

Suppose, to take a familiar case, that an agent of the Church of the Holy Trinity wants to know whether U.S. law after the passage of the Alien Contract Labor Act of 1885 permits the importation of foreign rector to work in the United States. The act states that "it shall be unlawful for any...person...to in any way assist or encourage the importation of migration of any...foreigner...into the United States...under contract or agreement...to perform labor or service of any kind in the United States" (23 Stat. 332, c. 164). It is unclear to the agent, however, whether "labor or service of any kind" covers white-collar work (i.e., non-manual labor), and perhaps she has reason to believe that Congress was mostly worried that the importation of foreign manual laborers would place downward pressure on domestic *blue-collar* wages. On the *ex ante* non-positivist approach, in order to determine the legal content of the 1885 Act, the agent needs

to consider whether the balance of moral considerations, whether constrained by past legal practice or not, speaks for or against the importation of foreign white-collar workers. This is a tall order. It requires considerable expertise in economics, sociology, and psychology, as well as ethics and political philosophy. Entire books could be, and have been, written on the subject. If the agent doesn't have the requisite expertise in all these fields or doesn't have the time to work out what those fields taken together would counsel in this case, then she will not be in a position to know what the 1885 Act requires of her.

Can *ex post* accounts of law's nature do better? Possibly, but the best current proposal on offer worries me for much the same reason that Dworkin's *ex ante* proposal does. Greenberg claims that "the content of law is that part of the moral profile [i.e., our moral obligations, powers, privileges, and perhaps permissions – Greenberg, 1308] created [where creation includes alteration and reinforcement – Greenberg, 1320] by the actions of legal institutions in the legally proper way" (Greenberg, 1323). Legal institutions change the content of the law by changing the morally relevant circumstances (e.g., by maintaining security and punishing wrongdoers, by giving notice of which morally wrong acts are punishable, by providing contract remedies, by making particular solutions to coordination problems salient, by issuing decisions democratically, by instituting schemes for the public good, by using the threat of coercion to ensure participation, by adjudicating cases, and more). When it comes to legal interpretation, Greenberg claims that "a statute's contribution to the content of the law is, roughly, the impact of the fact of the statute's enactment on the moral profile" (Greenberg, 1328). And the impact of a statute's enactment on the moral profile is in large part a function of "considerations of democracy and fairness," along with "rule of law, and other moral values" (Greenberg, 1329).

As I see it, problems arise from the fact that, as Greenberg rightly points out, there are competing conceptions of democracy (and, one might add, competing conceptions of fairness). On his view, resolution of cases that stem from competing accounts of a statute's contribution to the content of the law will often require "an account of democracy" (Greenberg, 1331). Providing an account of democracy is a tall order for any judge, but it is an even taller order for ordinary citizens and residents.

A good example of this is the case Greenberg himself uses to illustrate his account of legal interpretation: *Smith v. United States* (508 U.S. 223 (1993)). Smith offered to trade an unloaded firearm for cocaine, and was sentenced under a statute that provided for an augmented penalty for a crime in which the defendant, "during and in relation to any...drug trafficking crime,...uses a firearm" (18 U.S.C. § 924(c)(1)). On the one hand, one democratic consideration suggests that the statute should be read as having its semantic content ("what is specifically encoded in the language"), and hence that the statute proscribes trading a gun for drugs. On the other hand, another democratic consideration suggests that the statute should be read as encoding Congress's "actual communicative intentions" (Greenberg, 1331), and hence that the statute (likely) does not proscribe trading a gun for drugs. The question of the statute's contribution to the content of the law is a matter of "what the relevant moral [here, democratic] values, on balance, support" (Greenberg, 1331). The problem, of course, is not just that it is going to be difficult for judges to answer the balancing question, but also that ordinary citizens and residents are simply not in a position to do so. And, if that is so, then those subject to the statute are not in a position to know what their legal obligations are under the statute, and thus are not in a position to conform their conduct to the law. This is contrary to one of the main functions of law, which is to give individuals

advance knowledge of the constraints within which they can pursue their life plans without government interference.

Greenberg is alive to this criticism, and offers a reply:

I don't mean to suggest that *whenever* we have to work out what the law is, we have to work out a complete account of all the relevant moral considerations. In the run of cases, all of the plausible accounts of democracy, fairness, and so on favor the same outcome. Therefore, in order to resolve such cases, it is not necessary to turn to the underlying moral considerations. That is why most cases are easy cases. Even in difficult cases, it is only necessary to eliminate candidate accounts to the extent that they favor a different outcome in the case at hand. (Greenberg, 1335)

My main worry about this reply is that a large number of cases turn precisely on the kind of interpretive disagreement that lies at the heart of *Smith*. There is, on the one hand, the semantic content of the words of the statute, and, on the other hand, what the legislature intended to communicate or what it would be reasonable to understand the legislature as having intended to communicate. Are fish tangible objects? Some say yes, others no (*Yates v. United States*, 574 U.S. 528 (2015)). Does "any court" include foreign courts? It's not clear (*Small v. United States*, 544 U.S. 385 (2005)). Are the expenses and fees of expert witnesses included in the "reasonable attorney's fees" that may be awarded to the parents of a disabled child who prevail in a suit under the Individuals with Disabilities Education Act? The Circuits were split until the U.S. Supreme Court stepped in to settle the matter (*Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006)). If James McCoy fires his gun when inside Old Country Buffet, is he

“discharging a firearm from any location into an occupied structure”? Different courts in Pennsylvania disagreed (*Commonwealth v. McCoy*, 962 A.2d 1160 (Pa. 2009)). Is a sixteen-year-old emancipated minor a “child under the age of seventeen” under Louisiana law? This was a question the Supreme Court of Louisiana had to answer (and did so in the negative (!): *State v. Gonzales*, 129 So.2d 796 (La. 1961)). Does solicitation of prostitution count as “sexual conduct” under Colorado’s Rape Shield Statute? The Colorado Supreme Court said yes, but the question seems close (*People v. Williamson*, 249 P.3d 801 (Colo. 2011)). Arguably, all of these cases, which are but the tip of the litigation iceberg, turn at least in part on whether semantic content or communicative content (or some other factor) should govern the proper interpretation of the relevant statute. So, if I want to know what my legal obligations and permissions are, then it looks like I will need to become an expert in democratic theory, in addition to philosophical accounts of fairness. Indeed, I will need to understand the whole of morality.

Greenberg claims that his account of the nature of law does not automatically entail that judges deciding cases should turn to democratic theory and moral philosophy to “work out explicitly the impact on the moral profile of all of the relevant actions”: given “shortages of time, memory, and so on,” it might be better for judges to “follow relatively simple heuristics” instead (Greenberg, 1335-1336). But, in the face of continual disagreement over whether semantic content or communicative content (or something else) should be the touchstone of statutory interpretation, what relatively simple heuristic should judges follow? To simply stipulate, for example, that semantic content should carry the day would be to privilege one democratic consideration over another without reason; similarly for a stipulation in favor of communicative content. And arbitrary decisionmaking of this sort seems contrary to the very function of a judge, which is to decide cases in a reasoned, non-arbitrary way. That one particular heuristic would lead to better

results on the whole than another should not determine what a judge should do in *such-and-such* particular case before her.

I do, however, think that there is something deeply right and insightful about Greenberg's general approach to the questions of interpretation and adjudication. But the insight, I think, should be transposed from a theory of the *nature* of law to a theory of law's *function*, and the moral considerations that turn out to be relevant to interpretation and adjudication are narrower, and hence tractable, in a way that is consistent with, and indeed furthers, law's aim. In addition, I think that Dworkin is basically right about the proper way of interpreting and deciding cases under a constitution, and in particular the U.S. Constitution. Let me explain.

4. Appealing to the Function of Law: The Rule of Law

In *The Morality of Law*, Lon Fuller rightly points to eight factors or values that together constitute the rule of law: generality, publicity (or promulgation), prospectivity (or non-retroactivity), clarity, consistency, possibility of compliance, constancy (or stability), and congruence. According to Fuller, these features are moral and definitive of law: they constitute "the morality that makes law possible." I am not sure that I would go so far as to say that in their absence a legal system would be impossible: law is sometimes obscure (what is an "unreasonable" search or seizure?) or insufficiently well promulgated, and occasionally inconsistent. Instead, I think we should accept that law would lose its *purpose or function* if it suffered from the vices that correspond to the rule-of-law virtues: it would be (seriously) deficient as judged by its aim. And this aim, as I have said, is to make it possible for citizens and residents to plan their lives within accessible constraints, so as to pursue their goals and remain free of state interference. In this sense, the rule of law is to be contrasted with the rule of human beings. To be ruled by human beings, as opposed to be ruled

by law, is to be at the mercy of the will of the sovereign and his minions. A sovereign might wish to target a particular person or group with punishment, and, in the absence of the rule of law, could do so directly or by issuing retroactive, secret, obscure, or inconsistent rules, or rules with which no one could possibly comply. A system of governance in which the sovereign has these degrees of freedom is a functional tyranny, and this is precisely what the rule of law is meant to avoid.

In practice, contemporary enactments (such as constitutions and statutes) generally abide by the rule of law. But there is one value in particular that perpetually clashes with the features of legislative language I identified above as either inevitable or desirable (vagueness, ambiguity or polysemy, and the inability to anticipate how enactments will apply in all circumstances): this is the value of (fair) notice (publicity/promulgation). When an enactment is vague or ambiguous, or appears to have unintended consequences, persons who are subject to law do not know what their legal obligations or permissions are, and hence cannot conform their conduct to law in a way that enables them to confidently predict that their actions will not be legally void (as in the case of, say, unconscionable contracts or invalid wills or marriages) or punishable. This is unfair, but perhaps more importantly, it is contrary to the very point or purpose of law. Here is where the rubber meets the road, here is the source of virtually all cases and controversies under statutes, and it is in this space that judges need guidance the most.

Now some (e.g., Barnett) think that the fact that statutes and constitutions are written and promulgated at a particular time entails that they should be interpreted in accordance with their original semantic meaning. But this does not follow. As intentionalists have rightly noted, private letters should not be interpreted this way. For example, if, in an email to you, I type a malapropism (“the flood damage was so bad they had to evaporate the city”), you should not understand me to have communicated that the city was evaporated, but rather that the city was evacuated. Others

(e.g., Alexander and Prakash; Fish) think that the fact that statutes and constitutions are forms of intentional communication entails that they should be interpreted in accordance with the original semantic, pragmatic, or application intentions of the framers or ratifiers. But this does not follow either. After all, original intentions, of whatever sort, even if mutually consistent and pegged at the right level of generality, are generally hidden from those who are subject to law. Thus intentionalism, no less than *ex ante* or *ex post* moral accounts of legal interpretation, runs afoul of the value of notice (see Scalia, e.g.). Similar problems arise for pragmatist theories of adjudication: it places far too great a burden on the ordinary citizen to insist that their legal obligations and permissions are determined by cost-benefit analysis or a similar form of consequentialist reasoning: the facts that would need to serve as input into the analysis are not accessible to most people, and neither are the economic or sociological theories that it would be proper to use as functions to deliver the proper output. As for using current meaning as the interpretive touchstone, the main problem here concerns the rule-of-law vice of instability: law simply cannot perform its function of guiding behavior in the right way if its function is hostage to semantic drift or change. It would not serve the rule of law to interpret the term “militia” in Article 1, Section 8 as applying to the Oath Keepers or Three Percenters.

At the same time, rule-of-law values, and in particular the value of notice, play an important part in what I take to be the right solution to the problem of adjudication. The solution, which is reminiscent in some ways of Dworkin’s and Greenberg’s accounts of the content of law, makes sense of why judges and legal scholars have been attracted to the various theories just outlined, helps explain what is wrong with those theories, and promises practical guidance, to those who promulgate and execute enactments, to judges who decide cases, and to the disputants who come before them. In what follows, I will describe this solution, explain how it resembles and differs

from its main competitors, how it accounts for what those competitors get right and what they get wrong, and how it can be used both to reduce the number of cases that come before judges and to help judges decide the cases that remain. Because part of the solution is in some ways similar to Justice Scalia's "fair reading" method of adjudication and based on similar normative considerations, I will close by explaining how and why that part of my solution differs from his.³

5. Constitutional Adjudication

Let me start with what Dworkin gets right. Every constitution lays out a scheme of government, i.e., a scheme of legislative activity, executive action, and judicial decisionmaking. These powers are stipulated to belong to this or that person or body of persons, either in concentrated form or dispersed among them, and a plan laying out who shall be eligible for various offices and how the occupants of those offices will be chosen. Very particular powers might be enumerated, and various constraints on the exercise of those powers stipulated. Sometimes, as in the case of the U.S. Constitution, the point or purpose of the constitution is set out in a preamble. If it is, then, when the constitution is accepted as the basic framework for politics in a society, judicial decisionmaking should be guided by the values set out in the preamble. And if there is no preamble, the job of a judge is to make the governing structure the best that it can be from the point of view of political morality. This is because, whatever the preamble says, the point of any constitution is to create what the founders take to be the best political structure.

As befits its purpose, a constitution is, for the most part, not addressed to the citizens: it does not lay out, in any great detail, their legal obligations or their legal powers. That is largely

³ Justice Scalia faced two problems in addition to the one I will outline below: one is that he did not practice what he preached, and another is that, even when he did, he manipulated it to get results to which he was antecedently attracted, thereby depriving the method of its main justification (in his eyes), which is to insulate judges from their own ideological prejudices (for details, see, e.g., Segall, Hasen).

the business of the common law and ordinary legislation. I do not form my life plan by looking at Article 1, Section 8 of the U.S. Constitution, but I absolutely need to be aware of state and federal criminal and civil codes, the basic rules for the formation of contracts and wills, and my legal responsibilities under tort law. I do not even guide my conduct by looking at the constraints that the U.S. Constitution places on the various branches of government, such as the (extended) Bill of Rights. This is because these constraints, if they are to function correctly, must be left relatively vague and made more precise over time in response to increased moral understanding and rapidly changing circumstances. Otherwise, they will function as a straightjacket that will likely contribute to society's untimely demise. Thus, when I want to understand my own degrees of freedom, I will look at the more definite, action-guiding principles that the courts (particularly the U.S. Supreme Court) have laid out as a way of filling out the vague constraints on government conduct. Thus, for example, if I am going to a (peaceful) public demonstration in Washington D.C., I will not look directly to the Fourth Amendment, but rather to (summaries of) particular U.S. Supreme Court decisions governing the detention, search, and seizure of persons.

Under these conditions, rule-of-law values should constrain, without guiding, judicial decisionmaking. Judges should, of course, promulgate their opinions, explain the reasons for them and their connection with existing law, make them as clear as can be, avoid inconsistency, and, more importantly, maintain the stability of law through some form of (clearly enunciated) *stare decisis*. They should also make sure that those subject to law are capable of conforming to it. Within these constraints, their job is to perfect the system of government that makes society possible. In order to do this properly, they need to be well educated in moral and political philosophy. The alternative is inevitable oppression, injustice, and potential or actual societal dissolution. We have seen examples of this in the past (e.g., *Dred Scott*, *Plessy*, and *Lochner*), and

we are beginning to see major signs of it in the present (e.g., the privileging of in-person religious worship in the middle of a pandemic, the assault on the reproductive rights of women, the almost unchecked and corrupting influence of large donors on the electoral process, the refusal to stop excessive political gerrymandering, and so on). Especially when the explicit and stated purpose of a constitution is to “establish justice” and “promote the general welfare,” it is unthinkable that judges should avoid perfecting the constitutional framework.

Notice here that the semantic values of the constitution’s words, and, in a very limited way, the communicative intentions of the ratifiers, play a very important role in this process. As originalists rightly point out, the point of a constitution is to fix a structure of government to guide the actions of future government officials. That we should look to original meaning and intent is not something that simply follows from the fact that the constitution is written. But it is something that follows from that fact together with the constitution’s purpose or function. For the framework itself is encoded in the words and intentions of the ratifiers. This, then, is where any judge deciding some dispute about what a written constitution requires must begin. The fact that the constitution was intentionally written in ordinary (and sometimes narrowly legal) English of the late eighteenth century matters. Few would dispute this. But questions arise when it comes to filling the holes left by linguistic vagueness and ambiguity. To resolve ambiguity (e.g., over “domestic violence” or “militia”), it seems appropriate to turn to the communicative intentions of the framers or ratifiers, which are not difficult to discern and are even accessible to the ordinary person with a minimal degree of effort. The difficulty arises with respect to resolving vagueness. Some here would continue to counsel appealing to original meaning or original intent. But in the case of vagueness, semantic meaning gives out, unless it is supplemented by pragmatic meaning or assertive meaning, and this is just another way of appealing to communicative intention (see, e.g.,

Grice). But (collective) communicative intentions, even when identifiable (which is rare or impossible), should give way to what is morally best, again because it is the very point or purpose of a constitution to set out a scheme of government in pursuit of important moral values. Thus, for example, if a constitution bans cruel punishments, what matters, as Dworkin rightly points out in his criticisms of Scalia, is not what the framers or ratifiers *took to be* cruel, but rather what, according to our best current moral understanding, *is* cruel. And if Congress is directed not to abridge the freedom of speech, what matters is not what the framers or ratifiers *took to constitute* abridgment, but rather what, according to our best moral understanding, *actually constitutes* abridgment.

At the same time, it will not do for judges to play fast and loose with the words of the constitution, by, say, giving them some sort of metaphorical or other non-literal meaning. Constitutions are not poems. Their function is not to elicit some sort of emotional response in the reader. And constitutions are not there to be read as meaning whatever judges want them to mean. Their function is to use semantic meaning to encode a framework for government. It completely defeats the purpose of a written constitution to treat it non-literally, even for good moral reasons. We are told, for example, that in the U.S. Constitution “writings” is used non-literally (Balkin, 13) as a synecdoche (Balkin, 47), so that “it refers to more than written marks on a page but also includes printing and (probably) sculpture, motion pictures, and other media of artistic and scientific communication” (Balkin, 13). Similar claims are made for “speech” and “press” (Balkin, 13; Scalia, 37-38), and even “Congress” (!) in the First Amendment (Balkin, 204). This strikes me as defeating the purpose of semantic encoding: it is one thing to ask whether “domestic violence” or “militia” in 1787-88 meant something different from what it means in 2021, but it is

quite another thing to ask whether “Congress” means “any branch of the Federal government” or whether “writings” means “any form of communication.”

There are two main interrelated problems here. One is that there is no principled way to stop the inevitable slide down the slippery slope of nonliteralness. If “Congress” is held not to mean “Congress” in the First Amendment, then why hold it to mean “Congress” in other parts of the U.S. Constitution? Why not just say that the enumeration of Congress’s powers in Article 1, Section 8 is really just an enumeration of the powers of the Federal government, and be done with the entire scheme of separation of powers? Indeed, why not just treat every word in the document that refers to something that counts as part of a whole as a synecdoche? A “search,” for example, is a kind of activity. So why not treat “search” as referring to any kind of government activity? A “person” is a living being of some sort. So why not treat all constitutional provisions that acknowledge the rights of persons as acknowledging the rights of all living beings?⁴

Related to this problem is that the function of a constitution is to set out a framework of governance and a set of constraints on the exercise of government power. It is not possible to do this if the language of the constitution is susceptible of non-literal interpretation. For non-literal interpretation *knows no bounds*. Understood non-literally, any piece of language can be read to mean anything at all. But a document that can be read to mean virtually anything cannot do the job it was designed to do.⁵

⁴ Balkin (153) argues that “commerce” does not *need* to be read as a metonym or synecdoche in Article 1, Section 8. But neither does “Congress” *need* to be read as a synecdoche in the First Amendment. Indeed, reading “Congress” as a synecdoche in the First Amendment *makes no sense*, on the assumption that Congress, and no other branch of government, is tasked with the job of “making law.”

⁵ Balkin (151) writes: “Now if the word ‘commerce’ was used nonliterally in the Constitution’s text..., one would think that opponents of the Constitution (or the framers at the Philadelphia convention itself) would have pointed this out. This didn’t happen.” Applying the principle of charity, I am sorely tempted to read these words nonliterally. For surely it will not have escaped Balkin’s notice that the same is true of “writings,” “speech,” “press,” and, perhaps above all, “Congress” in other constitutional provisions.

But isn't it sometimes absurd to read a constitution literally? Well, it depends what you mean by "absurd." Balkin, e.g., writes:

If the First Amendment applied only to "Congress," territorial legislatures and federal sheriffs could punish people for speaking out against the government or practicing their religion. Federal judges could issue prior restraints against books distributed in the nation's capitol [?], federal post offices could refuse to deliver mail the president did not like, and the president, acting in his capacity as commander in chief, could order all U.S. soldiers to pray to the same god for victory. (Balkin, 204)

Balkin wants to avoid this parade of horrors, and so do I. But his way of avoiding the parade is to "interpret constitutional language to fulfill the purpose of the text as best we can determine it" (Balkin, 204). The problem is that we cannot understand the text's purpose without understanding *what it says*. And what it says is that *Congress* is not permitted to make laws of certain kinds. It is overwhelmingly likely, then, that its *sole* purpose was to prevent Congress from making laws of certain kinds. To try to work around this by appealing to non-literal usage is to open a Pandora's Box of horrors far worse than the horrors that would be produced by literal interpretation. The best option for avoiding Balkin's parade of horrors, then, is to look to the semantic meaning of other constitutional provisions, such as the Fifth Amendment, which protects persons against deprivation of freedom (by the Federal government) without due process of law.

Appeal to semantic meaning (and to semantic intentions in the case of ambiguity or polysemy) will not decide the majority of constitutional cases. But it can rule out a number of interpretations that the U.S. Supreme Court has imposed on the U.S. Constitution. A good example

of this is the Court's decision in *The Slaughterhouse Cases* to read the Privileges or Immunities Clause as saying that no state shall make or enforce any law which shall abridge *the privileges or immunities that follow from U.S. citizenship*. It is simply not true to say that the italicized phrase means the same as "the privileges or immunities of citizens of the United States." The word "of" does not mean "follow from": it means "belong to." The question for the Court should have been, "What privileges and immunities do citizens of the United States possess?", not "What privileges and immunities do citizens of the United States possess *as a result of their status as U.S. citizens?*"

One of the more difficult problems in constitutional interpretation, apart from perfecting the constitutional structure within the document's semantic constraints, is deciding whether a word or phrase should be read in its ordinary sense or in some technical, legal sense. It is not difficult, of course, to see that "letters of marque and reprisal," "writ of habeas corpus," "impeachment," and "bill of attainder" are technical legal terms. What is more difficult to determine is whether phrases such as "freedom of speech" and "freedom of the press," or "due process of law" and "equal protection of the laws," should be treated as ambiguous, as between an ordinary sense and a technical legal sense. Here I am willing to turn to the historical evidence, but it is particularly tricky to distinguish between past usage as evidence of original expected application and past usage as evidence of implicit disambiguation. If, say, it was generally believed that freedom of the press amounted to freedom from prior restraint, was this because "freedom of the press" was taken to have a narrow legal meaning identical with the meaning of "freedom from prior restraint," or was this because the extension of "freedom of the press," in its ordinary non-legal sense, was taken to be exhausted by freedom from prior restraint? This makes a huge difference to how the First Amendment should be understood and applied, and yet the historical evidence, such as it is, might not enable us to decide between the two options. In that case, it seems to me that we should

be guided, again, by ordinary semantic meaning, which should be the default in all cases in which there is no clear evidence of technical ambiguity.

Presented with a written constitution with a particular aim or function, the job of a judge is to interpret it as instituting a morally optimal structure of government within the bounds set by the semantic values of its constituent terms, and as appropriately disambiguated by appeal to original semantic intentions when the basis for disambiguation is clear, accessible, and uncontroversial. For original meaning theorists to abjure appeal to morality or original intent, for original intent theorists to neglect morality or original meaning, and for moral theorists (whether *ex ante* or *ex post*) to leave out original meaning or original intent, would be a mistake born of overgeneralization. Each of these three factors (meaning, intent, morality) has an important role to play in constitutional interpretation and adjudication. As I see it, inasmuch as this method of reading a constitution gives pride of place to moral theory *ex ante*, this is a largely Dworkinian conception of constitutional interpretation.

6. Statutory Adjudication: The Principle of Adjudicative Justice

I now want to argue that matters should be quite different when it comes to *statutory* interpretation. Statutes are exercises of legislative power, codified in words, within the framework defined by the constitution, and it is by means of statutes that citizens and residents come to know their particular legal powers, immunities, and obligations. If statutes are to perform this function within the rule of law, then the value of notice requires that judges interpret them in a very particular way. What should matter to the interpreter of a statute is, *primarily and in the first instance*, not the original semantic meaning of the statute, not its original intended meaning, not its original intended application, and not considerations of policy or public welfare, but rather *what it would be just or*

fair to hold a linguistically competent speaker to, on the basis of the statute's enactment. Call this “the Principle of Adjudicative Justice.” Even taking moral considerations into account, the relevant question is not, “How did this particular enactment change the moral profile?”, but rather, “What is the morally optimal way for the legal system to treat a linguistically competent speaker who has done their best to identify their legal powers, immunities, and obligations by reading the enactment?” It is the latter question that judges should be asking themselves when faced with controversy over the proper application of a statute. Why? Because the Principle of Adjudicative Justice is the method of interpretation that follows directly from the function of law, which is to implement the rule of law, which, assuming all other promulgation requirements have been followed, reduces to the value of notice.

One might reasonably ask where democratic values fit into the picture. After all, in most current legal systems, statutes are passed by democratically elected legislatures. Democracy is instrumentally valuable, inasmuch as free and fair elections result in legislative bodies that (more or less) represent and channel the will of the people, or, at least, the will of the majority. Shouldn't judges, therefore, look (at least in part) to what the legislature intended to say or accomplish, precisely in order to give effect to the people's will? How, after all, would it be consistent with democracy for a judge to read a statute to mean something other than what the legislators who passed it intended it to mean?

The answer is that democracy, as a value, has no relevance to statutory interpretation. Within the overall context of the rule of law, democracy is merely a procedure for coming up with legally valid enactments. In a direct democracy, the enactments are voted on by the people directly. In an indirect democracy, the people choose representatives who then vote on the enactments directly. In terms of procedure, it matters not a whit what those who vote on the

enactments (i.e., the enactors) think they are saying or doing. What they are voting on, what they enact, is a statute, which is a set of words. Law is encapsulated in language, not in minds. In a legal system governed by the rule of law, what rules us is a set of texts, not a set of people. Of course, representatives try very hard to channel their own intentions into the words of the bills they pass. If they draft those bills well (which often happens), there will be substantial overlap between the semantic meaning of those bills and the intentions that guided the drafting process. But, once a bill has been passed, all the intentions that led to its enactment drop out and what we legal subjects are left with are the words of the enactment. The question for a judge is what to hold people to, given those words.

The answer to *that* question will depend on the circumstances, and it is here, in particular, that we see legal theorists identifying different aspects of the same elephant, but then overgeneralizing. In many circumstances, the language of a statute is clear, in the sense that its semantic meaning is definite and straightforward. Valid marriage in the state of California requires the fulfillment of specific age, consent, and capacity requirements. In the same state, every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life. Even if the statute is complicated (e.g., further conditions apply in the case of valid marriages where at least one of the parties to the marriage contract is under the age of 18, longer sentences for second degree murder apply under a complicated set of conditions that apply when the victim is a peace officer), it is sufficiently clear that it would be possible for a competent speaker of English to work out whether this or that particular (type of) act would count as satisfying the requirements for a valid marriage, or would trigger a sentence of 25 years to life. When the semantic meaning of the relevant words is clear, it is fair and just for a judge to hold people to that very semantic meaning. This is because it is overwhelmingly reasonable to expect

competent speakers to grasp that meaning and apply it to a variety of concrete circumstances. It is no surprise, then, that some legal theorists are drawn to semantic meaning as the touchstone of statutory interpretation. But what most semantic meaning originalists do not realize is that the appeal to semantic meaning is neither self-justifying nor justified by appeal to a statute's writtenness: semantic meaning is relevant to interpretation exactly to the extent that the Principle of Adjudicative Justice makes it so.

What should a judge do in the face of semantic drift or change? Here different rule-of-law values might come into conflict. On the one hand, it is important for the law to be stable. On the other hand, it might be difficult for a person to identify a word's original meaning. If the original meaning is really lost (e.g., all evidence of past usage is wiped out by some sort of catastrophe), then judges should hold persons to *current* semantic meaning, and not to *original* semantic meaning. Again, this is because it would be unfair or unjust to hold people to requirements encoded in a meaning that is inaccessible to them. So, again, we can see why some theorists might be drawn to current meaning as the interpretive touchstone. But in the vast majority of cases of semantic drift, evidence of original meaning is accessible and relatively easy to find. If I find a statute that contains the word "nauseous" and I know that the statute was promulgated in 1790, it will not take me long to discover that the word should be read as a synonym for "nauseating," rather than as a synonym for "nauseated." Similarly for phrases such as "militia" and "domestic violence." As I see it, then, it is at least in part because the Principle of Adjudicative Justice endorses appeal to *original* semantic meaning in most cases that original meaning originalism seems intuitive to so many legal theorists.

What should a judge do in the face of ambiguity or polysemy? Well, it depends. In many cases, the (semantic meaning of the) context in which a word or phrase appears is sufficient to

disambiguate. As Scalia points out, it makes no sense to take “bay” to mean “sea inlet where the land curves inward” if the context is one in which someone is described as putting a saddle on the bay (Scalia, 26). You will know which meaning of “arm” applies when I speak of the referent as being “brandished,” and similarly when I speak of the referent as being “flexed.” In that case, the fixed semantic values of the surrounding words fix the semantic value of the potentially ambiguous term. This is reflected in the canon of (constitutional and statutory) construction, *noscitur a sociis*, as well as other semantic canons, such as *ejusdem generis*. But again, the reason for interpreting a word as contextually disambiguated is that it would be unfair or unjust to the competent reader to do otherwise. Matters are quite different in cases in which the semantic features of the context cannot help decide between or among contending meanings. If a standalone statute prohibits keeping bats in one’s home, it is completely unclear whether “bat” here means a particular kind of nocturnal animal capable of sustained flight or an implement with a handle and solid surface used for hitting balls. In this sort of situation, it would be unfair to hold persons to either of the two possible meanings. This is because, in the absence of explicit disambiguation by the legislature, persons subject to this law can reasonably assume that it prohibits keeping one or the other of two sorts of things in one’s home, without knowing which. Those who make the wrong assumption relative to original legislative intent should not be held to account for doing so. For it is incumbent on the legislature to resolve ambiguities, so as to respect the rule-of-law value of clarity. This, to my mind, is what best explains both the longstanding practice of granting lenity to criminal defendants in cases of ambiguity, as well as the *contra proferentem* rule in contract law.⁶

⁶ As explanations for widespread acceptance of these interpretive practices, Scalia and Garner mention “policy adopted by the courts,” as well as the fact that such “deeply ingrained” rules are “known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text” (Scalia and Garner, 30-31). But “policy” suggests a consequentialist or pragmatic justification, which differs from the Principle of Adjudicative Justice. And most readers of statutes or contracts have no grasp of the rule of lenity or the rule of *contra proferentem*. Moreover, it makes no sense to say that lenity, which supposedly applies in the case of ambiguity that remains “after all the

What should a judge do in the face of vagueness? Answer: give the benefit of the doubt to those who are relying on their understanding of the relevant statute to plan their lives. A term is vague when there are instances to which it clearly applies, instances to which it clearly does not apply, and instances to which it neither clearly applies nor clearly does not apply. A good example of this is the term “heap.” There are clear instances of heaps, clear instances of non-heaps, and instances that cannot be clearly classified as heaps or non-heaps. Suppose, then, that a competent reader faces a statute with a vague term, such as 47 U.S.C. § 223(a)(1)(D), which penalizes anyone who “makes or causes the telephone of another repeatedly or continuously to ring, with the intent to harass any person at the called number.” How many repetitions of the call count as “repeatedly”? How long does the phone have to ring in order for the ringing to count as “continuous”? Well, it’s not clear. On the one hand, it seems clear that if I call Bob every few minutes for several hours, allowing the phone to ring continuously during each call, I am causing Bob’s phone to ring repeatedly and continuously. On the other hand, it seems clear that if I call Bob twice over the course of two hours and hang up after a few rings each time, I am not causing Bob’s phone to ring repeatedly and continuously. But what if I call him six times per hour for two hours, letting the phone ring continuously four times out of six? In that case, it is unclear whether my conduct falls under this statutory provision. In the grey area of vagueness I should not be held to account, reason being that it would be unjust or unfair of the state to do so, given the unclarity of its proscription. Even as it is reasonable for a legislature to seek to cover a large number of different types of conduct by using vague general terms, it is the legislature’s responsibility to provide citizens and residents with sufficiently clear guidance to enable them to accurately predict

legitimate tools of interpretation have been applied” (Scalia and Garner, 299), fixes one of two admissible semantic meanings as *the* semantic meaning of the relevant text.

whether the conduct they are planning will run afoul of the law. If the legislature fails to do this, that is on the legislature, not on the person who is subject to the legislation.

7. Canons of Construction

Having noted above that the Principle of Adjudicative Justice makes sense of some canons of construction (*noscitur a sociis* and *ejusdem generis* in particular), I should add that there is a fair amount of confusion as to how and when these canons apply. In a nuanced discussion, Scalia and Garner try to hem in *ejusdem generis* with some rules, while acknowledging that courts have significant discretion when applying the canon. As they describe it, *ejusdem generis* says that, “where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned” (Scalia and Garner, 199). But they list several caveats. First, the canon “generally requires at least two words to establish a genus”: thus, “theaters and other places of public entertainment” does not invoke the canon (Scalia and Garner, 206), but “gravel, sand, earth, and other material” does (Scalia and Garner, 201). Second, there is indeterminacy in the canon’s application, because “the court has broad latitude in determining how much or how little is embraced by the general term” (Scalia and Garner, 207). Third, the canon does not apply when “the enumeration of the specific items is so heterogeneous as to disclose no common genus” (Scalia and Garner, 209). And fourth, “when the specifics exhaust the class..., the follow-on general term must be read literally” (Scalia and Garner, 209).

Scalia and Garner chastise judges and legal commentators for failing to heed these caveats, and for placing additional unnecessary caveats (such as the assumption that the follow-on general term should not apply to persons or things of higher worth than those specifically listed—Scalia and Garner, 210), on the application of *ejusdem generis*. But judges might reasonably be excused

for thinking that they should not be blamed for inconsistent application of an indeterminate, somewhat but not precisely constrained, canon (e.g., how non-heterogeneous does an enumeration have to be to count as triggering the canon?). Can we give them better guidance than the somewhat heterogeneous comments Scalia and Garner have cobbled together? Buried in their discussion of indeterminacy, Scalia and Garner offer the following advice: “Consider the listed elements, as well as the broad term at the end, and ask what category would come into the reasonable person’s mind” (Scalia and Garner, 208). As a rule of thumb, there is much to recommend it. But why? The answer, I suggest, stems from the Principle of Adjudicative Justice, for it is reasonable to suppose that it is fair and just to hold the competent reader to the narrowing of the general category that would most readily come to their mind after having mentally processed the items specifically listed.⁷

Similar confusion applies when it comes to the *mens rea* canon, which, according to Scalia and Garner, reads: “A statute creating a criminal offense whose elements are similar to those of a common-law crime will be presumed to require a culpable state of mind (*mens rea*) in its commission. All statutory offenses imposing substantial punishment will be presumed to require at least awareness of committing the act” (Scalia and Garner, 303). The problem is that some crimes defined by statute do not always contain a *mens rea* requirement. Under what

⁷ However, it is tempting for a judge to apply the “reasonable reader” standard by thinking of what she would think when reading the relevant list. This should be avoided. The best way to do this is for the judge to ask herself, not how a reasonable reader *would* narrow the general term at the end of the list, but how a reasonable reader *could* narrow such a term. Scalia and Garner cite the following example without expressing any reservations about it: “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”—held to include only transportation workers in foreign or interstate commerce” (Scalia and Garner, 200). But if one follows the Principle of Adjudicative Justice, one *should* have reservations. It would be perfectly reasonable for a reader to understand the phrase as applying to workers engaged in foreign or interstate commerce who are not also transportation workers. Another way to think of this example is in terms of ambiguity or polysemy: “any other class of workers engaged in foreign or interstate commerce” could reasonably be read any number of ways. Under the circumstances, it would be unfair for a court to hold the reader to any one particular member of the set of admissible readings. If a legislative majority then decides that its aims are better furthered by limiting the relevant class to transportation workers, it can do so by amending “any other class of workers” to “any other class of transportation workers.”

circumstances, if any, should some sort of *mens rea* requirement be read into a criminal statute that omits it? According to Scalia and Garner, it is “perhaps beyond human endeavor...to identify all situations in which a requirement of *mens rea* ought to be read into a statutory text” (Scalia and Garner, 312). Ouch. That is not much in the way of guidance. But Scalia and Garner offer at least the following sufficient condition: when the elements of the statutorily defined offense are similar to those of a common-law crime. Why? As they see it, this sort of condition “reflects consistent judicial practice” and is therefore something “that legislators...have reason to assume” (Scalia and Garner, 308). As they go on to say: “When legislators know that, apart from a statutory enactment of common-law crimes, the failure to specify an intent requirement means liability without fault, they will be more likely to specify (as they should) that element of the offense” (Scalia and Garner, 308).

From the perspective of the Principle of Adjudicative Justice, this is all rather baffling. Why distinguish between statutory crimes that resemble common-law crimes and statutory crimes that do not resemble common-law crimes? Although this distinction is something that might reflect judicial practice and that legislators have reason to assume, it is *not* something that a competent reader of the statute can reasonably take for granted. So how can it be just or fair to hold the reader to the distinction? It makes more sense to suppose that this practice came into existence because it struck judges as *substantively*, as opposed to *procedurally*, unjust, and probably also contrary to original legislative intent, for a legislature to criminalize certain types of conduct committed without intention, knowledge, recklessness, or negligence. But of course, as Scalia and Garner point out, there are some crimes that a legislature may actually want to designate as strict liability (Scalia and Garner, 306). For a judge, then, to read *mens rea* into this statute but

not that statute is for the judge to set herself up as a super-legislator, rewriting some statutes and not rewriting others. This is kritocratic rule, not the rule of law.

Is there a better way? The general function of the criminal law is to deter (and punish undeterred) culpable conduct that violates certain kinds of rights or fails to protect certain sorts of interests. As a *default* matter, criminal conduct is culpable conduct. What this means is that it is incumbent on the legislature to stipulate *exactly when* it wishes to override the default assumption. As a matter of fairness to criminal defendants, it should *always* be presumed that a statutory crime requires *mens rea* unless otherwise *explicitly* noted by the legislature. This is a clear, hard and fast rule that stems directly from the function of law and treats all citizens and residents with the respect that is due to them under the criminal law. It is also far easier to apply than any rule that tells judges to read *mens rea* into statutes that criminalize conduct similar to conduct criminalized at common law. (*How similar is “similar”, Justice Bright-Line-Rule Scalia?*)

Scalia and Garner also defend a version of the Presumption Against Implied Repeal, which disfavors repeals by implication, except when a provision “flatly contradicts” an earlier-enacted provision (Scalia and Garner, 327-333). But this exception is unjustified under the Principle of Adjudicative Justice. Although it is difficult for citizens and residents to gain access to legal provisions, it is definitely feasible for them to find provisions that speak directly to what they plan to do. But without the assistance of well-trained lawyers or a significant amount of logical acumen, it will be extremely difficult, perhaps even unfeasible, for them to determine whether a recent statute “flatly contradicts” a previous statute.

Consider an example discussed by Scalia and Garner, *Washington v. State* (30 P.3d 1134 (Nev. 2001)). Scalia and Garner say that “a 1977 Nevada statute made it a felony to sell or offer to sell...imitations” of certain controlled substances, but that “a 1983 statute made the same acts a

misdemeanor” (Scalia and Garner, 328). However, as might be expected, the *language* used in both statutes did not overlap (otherwise, the inconsistency would likely have been caught by legislative staff or the legislators themselves). Simplifying greatly, and leaving out a number of surrounding words, the 1977 statute said that it would be a felony to offer to sell a controlled substance and then sell any other substance “in place of” the controlled substance. After similar simplification, the 1983 statute said that it would be a misdemeanor to sell an “imitation controlled substance,” and then, in a separate section, defined “imitation controlled substance” disjunctively, as “a substance, not a controlled substance, which *either* in the form distributed is shaped, marked or colored so as to lead a reasonable person to believe it is a controlled substance *or* is represented to be a controlled substance.” The Nevada Supreme Court held that “although the words may differ, the ultimate conduct that is punished by each statute is the same” and “in essence, the only true difference between [the two statutes] is the penalty.” But, under the Principle of Adjudicative Justice, what should matter here is not whether the *extensions* or *referents* of the relevant phrases are the same, but whether a competent reader *could reasonably be expected to work this out* from the *senses* of the relevant phrases. For me, it was a bit of a logical challenge to work this out. Imagine what it would be like for someone who, unlike me, does not teach logic for a living.⁸

The source of Scalia and Garner’s mistake here lies, in part, in a misperception of the judicial role. Our co-authors cite a decision, in which, writing for the U.S. Supreme Court, Justice Scalia says that “it is our role to make sense rather than nonsense out of the *corpus juris*” (*West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991)). Not true, I say. The role of the U.S. Supreme Court is to decide disputes under the law. Faced with an inconsistency, it is not the job

⁸ Moreover, even after staring at the two statutes for a while, I am still unsure whether it is possible to sell a substance S “in place of” a controlled substance without S being an “imitation controlled substance” under the 1983 definition. So, even after careful scrutiny, I am unconvinced that the only true difference between the statutes is the penalty.

of the Court to clean up the *corpus juris* and render it internally consistent: that is the responsibility of the relevant legislature. What the Court needs to decide is whether someone should be held to account when there is an unflagged inconsistency between statutes promulgated at different times. As I see it, the answer is that someone who would suffer a loss by relying on an earlier statute contradicted, but not explicitly repealed, by a later statute should win. What counts as a “flat” contradiction turns out to be trickier than Scalia and Garner lead us to believe, for it can sometimes require significant effort to determine when two sets of propositions are mutually inconsistent. The fairest division of labor within the rule of law is for the legislature to have the burden of maintaining overall consistency, and thus to have the burden of telling the governed exactly when past statutes have been repealed. When it fails to do so, anyone who might suffer a loss under some part of the inconsistent legislation should prevail against the government.⁹

I have discussed canons of statutory construction at some length because it seems to me that, in their standard acceptance, they are muddled both in their nature and in their justification. The proper rules of construction are those that follow from the Principle of Adjudicative Justice, not from a somewhat garbled mish-mash of different considerations (ordinary meaning, intended meaning, stability, consistency, and so on) that are brought under the slippery rubric of textualism. What matters to the interpretation and application of statutes is what it would be fair and just to require of competent readers given the semantic meaning of the statutory language. Notice that this Principle takes a page from Greenberg’s Moral Impact Theory, but instead of treating moral

⁹ Scalia and Garner defend the Desuetude Canon, according to which “a statute is not repealed by nonuse or desuetude,” on the grounds that the judiciary does not have “the power to invalidate lawful enactments” (Scalia and Garner, 337). However, the best argument for this canon does not rely on the separation of powers, but rather on the Principle of Adjudicative Justice. Were it possible for a statute to be repealed by nonuse, it would become unclear which statutes have, and which have not, been rendered legally invalid (for how long must a statute remain unused in order to count as repealed?), and hence it would become unclear to citizens and residents what their legal obligations, powers, and immunities are. This would defeat the point of legislation, which is to enable the governed to pursue permissible goals in life without fear of government interference.

impact as directly relevant to the nature of law and thence (perhaps) indirectly relevant to the theory of prescriptive adjudication, it treats something like moral impact as directly relevant to prescriptive (statutory) adjudication on the basis of the function or purpose of law, which is to establish the rule of law. The enactment of a statute changes the moral profile, but it does so by changing what it would be fair to hold people to under the statute (and the scheme of which it is a part). In this sense, the Principle of Adjudicative Justice embodies a kind of *ex post* moral theory of legal adjudication that is both reminiscent of and importantly different from Greenberg's *ex post* moral theory of legal content.

8. Textualism and Adjudicative Justice Contrasted

Now some of you might think, “this is all well and good, but the Principle of Adjudicative Justice is just a fancy word for the “fair reading method” touted by textualists” (notably, Scalia and Garner). I have already explained how Scalia and Garner's fair reading method differs from the Principle of Adjudicative Justice when it comes to the content and justification of particular canons of statutory construction. What I would now like to explain is how the two methods of adjudication differ when considered in themselves.

According to Scalia and Garner, the touchstone of interpretation/adjudication is “how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued” (Scalia and Garner, 33). What a reasonable, fully competent reader understands at the time of enactment is what the text means: “In their full context, words mean what they conveyed to reasonable people at the time they were written” (Scalia and Garner, 16). And what a text means is determined in part by its context, which itself contains or is (partly) constituted by its “evident” (or “textually manifest”—Scalia and Garner, 40) purpose: “The evident purpose of what a text

seeks to achieve is an essential element of context that gives meaning to words” (Scalia and Garner, 20). For Scalia, “evident” or “textually manifest” purpose is objective, rather than a matter of the subjective intentions of the framers (or ratifiers) (Scalia, 20): it is something that can be gathered “immediately” from the text, rather than by looking at enactive history or what enactors may have said about the text. It is largely for this reason that textualism differs from purposivism, which finds textual purpose by going “around or behind the words of the controlling text” (Scalia and Garner, 18), a purpose that is “often a highly abstract one” (Scalia and Garner, 20). The purposivist does not look merely at “the one purpose unquestionably demonstrated from reading the text in context,” but rather “ask[s] *why*” the text was adopted, thereby looking for a broader purpose (Scalia and Garner, 38).

It is not clear to me that all of this is coherent. In particular, a text is not the sort of thing that can have a purpose, at least if “purpose” is understood in accordance with its ordinary, colloquial meaning: only entities capable of mentation are capable of having a purpose, and texts are incapable of mentation. But perhaps Scalia and Garner are using “purpose” in a technical sense, meaning something akin to “function” or “point,” where this is a feature of a text that can be gathered just by looking at (the semantic meaning of) its words in their syntactic context.

But if *this* is what Scalia and Garner mean by “purpose,” then the fair reading method, by its very nature, diverges from the Principle of Adjudicative Justice. Although one might initially have thought that “reasonable” (as applied to the hypothetical reader) is a moral or ethical feature of persons, Scalia and Garner’s appeal to reasonableness (and competence) is really just a non-moral heuristic by which to identify what really matters to interpretation (and adjudication), namely, objective, evident, textually manifest purpose. The aim of adjudication is to identify this purpose and apply it to the facts of the relevant case or controversy.

How does this work in practice? Scalia and Garner tell us that it is usually easy for a judge to discern a text's objective purpose, and provide several examples:

Normally, finding a purpose in text is a straightforward matter requiring no feats of subtle deduction. Generally the purpose is unmistakable. A statute imposes a tax: The purpose is to contribute to the fisc. A statute provides that anyone with three or more convictions for DUI must have his driver's license permanently revoked: The purpose is to keep those so convicted permanently off the road...A statute limits the time for appeal to 60 days after judgment has been entered: The purpose is to close off appeal, and terminate the litigation, after 60 days...A statute creates a private claim for harassing phone calls: Its purpose is to deter, and provide compensation for, telephone harassment. (Scalia and Garner, 34-35)

I find these examples baffling. It is not *at all* evident that the purpose of a tax-imposing statute is to contribute to the fisc. Oftentimes, the purpose of a tax is to discourage certain forms of activity. A tax on cigarettes, for example, might have as its primary or only purpose to discourage the purchase of cigarettes, in order to promote public health. A tax on carbon might have as its primary or only purpose to internalize a negative externality. The basic point here is that texts do not have purposes tattooed on their foreheads. The purpose of a text, as Scalia and Garner must be thinking of it, is really a subjective legislative purpose that has been inferred from the content of a text. But, if that is so, then Scalia and Garner are just replacing one brand of purposivism (a "broad" form) with another ("narrower" form). Something similar might be said about their claim that the evident purpose of a statute that creates a private claim for harassing telephone calls is to deter, and provide compensation for, phone harassment. For it may well be that the legislators who

passed the statute were thinking only of compensation, or only of deterrence, and not both. Or perhaps their real purpose was to chill speech directed at politicians. Again, there is no such thing as textual purpose divorced from the purposive intentions of lawmakers.

The remaining examples create further confusion. I would have thought that the evident purpose of permanently revoking a habitual drunkard's driver's license is to protect the lives he would likely endanger and the property he would likely damage or destroy if he were given leave to drive on public streets. It is not that I think that permanent driver's license revocation does not have, as its immediate purpose, to keep habitual drunkards off the road. It's that it is not at all clear to me why the immediate purpose should be treated as the only purpose, or even the main purpose, of the statute. Finally, I just don't understand the claim that the purpose of a statute that limits time for appeal to 60 days is to close off appeal after 60 days. What Scalia and Garner here identify as the purpose of the statute is simply the *meaning* of the statute: that appeal is closed off after 60 days is what the statute *says*.

Stepping back, it should be clear, first, that the cornerstone of legal adjudication according to textualism, as Scalia and Garner define it, is not the Principle of Adjudicative Justice. Second, textualism, as Scalia and Garner apply it, is really just a (narrow) version of purposivism, dressed in the garb of an appeal to ordinary, original meaning. Inasmuch as Scalia and Garner are, for good reason, hostile to purposivism (and intentionalism more generally), their views are self-contradictory. Third, Scalia and Garner's application of their own theory to particular cases reveals confusion and arbitrariness. In particular, it appears that virtually any potential reason for an enactment, as well as the semantic content of the enactment itself, could count as its objective purpose, and thereby determine how the enactment should apply to a set of facts.

In the place of this blooming, buzzing mess, I offer a simple, moral principle of adjudication, the Principle of Adjudicative Justice, that gives judges a straightforward way of deciding cases under statutes, as long as they have a modicum of familiarity with and training in moral reasoning. The method of adjudication that derives from this Principle resembles textualism in some ways but should not be confused with it. The main similarities are that (1) both textualism and the Principle of Adjudicative Justice are justified (at least in part) by appeal to the rule-of-law value of fair notice, and (2) some of the canons of statutory construction that textualists take to be indicators of meaning or objective purpose resemble some of the rules of thumb that follow from the Principle of Adjudicative Justice. But, as I have argued, these similarities hide more profound differences, both differences in nature and differences in application.

9. Conclusion

This, then, is the theory of adjudication I support: a combination of a (Dworkinian) *ex ante* moral approach to constitutional adjudication with a (Greenberg-ish) *ex post* moral approach to statutory adjudication. The job of a judge is to make the Constitution, given the semantic meaning of its words, the best it can be, given the values that (implicitly or explicitly) animate it. In this context, the judge should try to solve problems of semantic ambiguity or polysemy by appealing to original semantic intentions, when these are clear and accessible. But when it comes to interpreting and applying statutes, a judge should decide cases by appealing to the Principle of Adjudicative Justice, that is, should hold people to what it would be fair or just to hold them to, given the semantic meaning of the statutory text. This principle will often require holding people to the original semantic meaning of a statute, but it may, in rare and exceptional cases, require holding people to current semantic meaning instead. The Principle will entail some form of lenity in criminal cases

(and perhaps in other cases too) in the face of ambiguity. It will occasionally counsel appeal to how a reader might reasonably narrow or broaden a general term when reading it in its particular context, and it will counsel bright-line approaches to, say, the mens rea canon and the presumption against implied repeal. Although the Principle, like textualism, is justified by appeal to the function of law and, in particular, the rule-of-law value of (fair) notice, it should not be confused with textualism, whether in principle or in practice.

Importantly, I think, the entire adjudicative scheme that I am recommending makes the best sense of much of what many judges are already disposed to do, and thus is supported by common judicial practice. At the same time, the scheme differs in important ways from the canons of construction that have acquired customary status among judges, and, importantly, more severely restricts appeal to legislative intentions and legislative history than many judges would wish. The scheme I am offering is therefore conservative in some ways and revisionary in others. Given that many judges learn their craft *in medias res* and by studying what their predecessors did *in medias res*, and that a large number of them believe, along with Justice Holmes, that the life of the law is experience, it should not surprise us that there is no consensus among them about the right principle of adjudication. And yet they have converged somewhat on some right answers, without quite grasping *why* those answers are right. Like the blind men of the parable, they have seen part of the truth and taken it for the whole.