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Book Review

Justice Scalia's Democratic Formalism

A Matter of Interpretation: Federal Courts and the Law. By Antonin Scalia* et al. Princeton, N.J.: Princeton University Press, 1997. Pp. xiii, 159. \$19.95.

Cass R. Sunstein†

INTRODUCTION: RULE-BOUND JUSTICE AND THE STATUTORY STATE

In 1982, Guido Calabresi published a provocative book, *A Common Law for the Age of Statutes*,¹ based on his Holmes Lectures at Harvard Law School. Judge Calabresi's basic argument was that the common law has certain virtues—above all, flexibility across time and space—that are at serious risk in a statutory era.² Judge Calabresi's central concern was to find a way to import the values of common law judgment into a legal fabric governed by statutory law. His most dramatic proposal was that courts should be given the authority to declare statutes that were out of step with the prevailing legal landscape void for “obsolescence.”³ Judge Calabresi's particular proposal has been very controversial, but it is of a piece with more standard views about statutory construction having common law origins: judge-made exceptions to plain language for absurd results; judicially developed “clear statement” principles; judicial invocation of statutory purpose in a way reminiscent of a precedent's “rationale”; judicial treatment of many statutes as the foundation for judge-made common law; and “dynamic” statutory interpretation.⁴ And

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1. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)

2. *See id.* at 3-7.

3. *Id.* at 2.

4. *See* WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)

Judge Calabresi's views are reflected in the common law characteristics of much constitutional law, characteristics which have given rise to a general claim, usually meant as both description and praise, that constitutional law is merely a species of Anglo-American common law.⁵

The central essay in Justice Antonin Scalia's new book,⁶ based on his Tanner Lectures at Princeton, offers an argument that is in many ways the converse of Judge Calabresi's. Where Judge Calabresi sought to celebrate the common law and to authorize courts to introduce far more of common law thinking into a statutory era, Justice Scalia seeks to demote, even to exorcise, the common law, to complain of its ascendancy in an age committed to the principles of democratic government and the rule of law. Hence the essay's title: *Common-Law Courts in a Civil-Law System*.⁷ In Justice Scalia's view, the use of common law methods is simultaneously anachronistic and hubristic. It is anachronistic because it is out of touch with the values and operations of modern government.⁸ The charge of hubris is the more serious one. Justice Scalia thinks that common law methods compromise democratic values, by allowing judges an excessive role in policymaking.⁹ He also thinks that common law methods introduce a high degree of unpredictability, increasing judicial discretion and at the same time depriving others, citizens as well as legislators, of a clear background against which to work.¹⁰

Justice Scalia intends, then, to defend a species of *democratic formalism*. We might even say that Justice Scalia is the clearest and most self-conscious expositor of democratic formalism in the long history of American law. Justice Scalia is a democrat in the sense that much of his jurisprudence is designed to ensure that judgments are made by those with a superior democratic pedigree. Above all, he seeks to develop rules of interpretation that will limit the policymaking authority and decisional discretion of the judiciary, the least accountable branch of government. Justice Scalia is a formalist in the particular sense that he favors clear rules, seeks to treat statutory and constitutional texts as rules, and distrusts the view that legal texts should be understood by reference either to intentions or to canons of construction that live outside of

5. See HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION* 127 (1990); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards*, 83 *YALE L.J.* 221, 265-311 (1973); see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 877-79 (1996).

6. *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997) [hereinafter *A MATTER OF INTERPRETATION*]. The book consists of Justice Scalia's central essay; commentaries of Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin; and a reply from Justice Scalia. I focus on the central essay with occasional reference to the reply, though the commentaries contain a good deal of interesting material.

7. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*, *supra* note 6, at 3.

8. See *id.* at 9.

9. See *id.* at 47.

10. See *id.* at 9-12.

authoritative texts.¹¹ Democratic formalism finds its interpretive foundation in textualism. Thus Justice Scalia writes: "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic!* The rule of law is *about* form . . . Long live formalism. It is what makes a government a government of laws and not of men."¹²

As a judicial creed, democratic formalism is intelligible and coherent in part because it argues in favor of interpretive principles and statutory default rules that will create a clear background for Congress, in the process imposing the right incentives on lawmakers. Justice Scalia's preferred default rules are intended to make the law readily predictable and to ensure that Congress will legislate in the constitutionally preferred fashion.

Where does all this leave the common law? For the democrat and for the formalist, the common law raises many doubts. The common law, of course, owes its content not to electoral processes but to decisions by people who are mostly unelected.¹³ And common law judges are free to eschew rules and to act on a case-by-case basis. Indeed, the glory of the common law is often said to consist in its particularism—its careful attention to the facts of the particular case, its provision of an individualized hearing for each litigant.¹⁴ Justice Scalia's attack on the common law legacy is thus rooted in distrust of particularism—especially judicial particularism—and in enthusiasm for rule-bound interpretation that relies, in both statutory and constitutional interpretation, on a single foundation: *the meaning of the relevant legal text as it was understood at the time of enactment.*¹⁵

This is an elegant book, and it is a great pleasure to read. My central objection is that Justice Scalia's argument on behalf of democratic formalism does not come to terms with three important problems for democratic formalism: the internal morality of the democratic ideal; the existence of reasonable, alternative, nonformalist approaches to interpretation, designed to limit judicial discretion, promote stability, and enhance democratic self-

11. The best discussion of formalism is FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991). Schauer sees that whether formalism makes sense depends on a pragmatic inquiry, prominently involving the capacities of various institutions. *See id.* at 196-206. A different kind of formalism—the kind that makes the term "formalism" appropriately an epithet—refers to the masking of a value judgment by reference to a judgment of law that actually encodes the value judgment. An especially good discussion of this type of formalism is JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 314-19 (1996).

12. Scalia, *supra* note 7, at 25.

13. Justice Scalia is self-consciously a legal realist as well as a legal formalist. *See id.* at 10. A competing view would say that the common law has a democratic pedigree because and to the extent that it simply tracks custom. There is an interesting current revival of attention to the role of norms and genuinely customary law. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991).

14. *See, e.g.*, EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4-6 (1949).

15. This view is traceable to Justice Holmes: "[W]e ask, not what [the author] meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . ." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *HARV. L. REV.* 417, 417-18 (1899). The view is criticized, by an admirer of Holmes, in RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 262-69 (1990).

government; and (most surprising) the place of administrative agencies in the structure of modern public law. It is not clear that democratic formalism actually promotes democracy, rightly understood. Moreover, there are other ways of limiting judicial power and judicial discretion, ways that are familiar to, even constitutive of, the common law tradition as it has come to be understood in the United States. The principal virtue of democratic formalism is that it may be the best way of promoting predictability,¹⁶ but even here there are reasonable alternatives, and it is far from clear that predictability trumps all other values.

In a short, vivid essay of this kind, originally presented as a public lecture, Justice Scalia cannot be expected to have laid all doubts to rest, or to have answered all questions in legal theory. But his defense of his own position works too often by hyperbolic slippery slope arguments, by opposing democratic formalism to positions that no one really holds, and most of all by invoking the specter of untrammelled judicial control over political outcomes. It is as if those who reject Justice Scalia's particular approach hope to give, and inevitably will give, unelected judges the power to do whatever they wish. But the choice between democratic formalism and the real alternatives calls for more fine-grained and, in part, empirical judgments about the capacities of real-world institutions. If, for example, judges interpret statutes in accordance with the original meaning of their text, will legislative drafting be improved, and will legislatures correct obvious mistakes? If judges do not use legislative history, might ambiguous texts be interpreted by reference to the judges' own views about policy and principle? If judges abandon the original understanding of the constitutional text, are there alternative positions that would limit judicial discretion and allow appropriate space for electoral politics? And just what is the role of administrative agencies, which might, in a post-*Chevron*¹⁷ era, perform, and be authorized to perform, the role formerly carried out by common law courts? Justice Scalia's silence on the last question is especially disappointing: At this stage in American history, no treatment of legal interpretation is complete if it neglects the enormous *de facto* and *de jure* interpretive function of administrative agencies.

If a goal of a system of interpretation is to constrain judicial discretion, and particularly if we attend to the role of regulatory agencies, it is far from clear that Justice Scalia's approach is superior to the alternatives actually favored by the American tradition of public law. And if (as Justice Scalia rightly insists) a goal of a system of legal interpretation is to promote democratic self-government, it is not at all clear that Justice Scalia's approach

16. Even this is not clear because the original meaning may have involved a concept that would change over time, and because there may be hard questions in deciding how to understand original meaning when facts and values have changed. See *infra* text accompanying notes 137-144 (discussing FDA regulation of tobacco products).

17. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

is better than that favored by our tradition, which uses interpretive principles to promote democratic goals, not only in the area of statutory construction but also in administrative and constitutional law. A great defect of democratic formalism is that it identifies democracy with whatever happens to emerge from majoritarian politics. If we insist (with the Constitution's Framers)¹⁸ that there is a difference between a well-functioning system of deliberative democracy and simple majoritarian politics, we may well favor principles of interpretation that promote that very system, perhaps by allowing administrative agencies some license to adjust text to circumstance, certainly through "clear statement" principles, and not least by invalidating outcomes that are inconsistent with what we might consider the internal morality of democracy.

In any case, this will be my basic argument here. Part I summarizes Justice Scalia's essay. Part II deals with the topic of statutory interpretation—Justice Scalia's particular passion and the highlight of his essay here. This part outlines the stakes, explores the great case of *Church of the Holy Trinity v. United States*,¹⁹ and examines the role of administrative agencies in legal interpretation. Its principal theme is that Justice Scalia's discussion neglects the possibility that administrative agencies can discharge some of the functions of common law courts without compromising democratic values. Part III explores the Constitution. It argues that the interests in ensuring stability, constraining judicial discretion, and promoting democratic self-government do argue for some version of the principles of stare decisis and judicial restraint, but not the particular form of originalism favored by Justice Scalia.

I. AGAINST THE COMMON LAW

The principal essay in *A Matter of Interpretation* comes in three parts. The first part is an attack on the common law. The second part is a discussion of statutory interpretation. The third part deals with constitutional law.

A. Broken-Field Runners

Justice Scalia's discussion of the common law is sharp, clever, and at times hilarious. In some ways it amounts to an indictment of legal education. Justice Scalia thinks that the first year of law school has "an enormous impact upon the mind,"²⁰ and much of that impact comes from the student's immersion in judge-made common law. There is a difference, for Justice Scalia, between law that is common in the sense of "customary" and law that

18. See WILLIAM BESSETTE, *THE MILD VOICE OF REASON* 6-46 (1994) (discussing the premium placed by the Framers on democratic deliberation and reflection)

19. 143 U.S. 457 (1892).

20. Scalia, *supra* note 7, at 3.

is “common” in the sense that it is the creation of judges. That latter form of law is not created through practice but is the stuff of law schools, hypotheticals, and analogical thinking:

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting!²¹

The student comes to have a distinctive picture of the great judge, with a large influence on American legal culture, as the person

who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.²²

What is wrong with this picture? Justice Scalia thinks that the problem is simple: “a trend in government that has developed in recent centuries, called democracy.”²³ Legal realism has taught us what is now obvious, that common law judges make and do not find law. This does not mean the common law should be eliminated from its own domain, but it does mean the *attitude* of common law judges is inappropriate for most of the work of federal judges and much of the work of state judges.²⁴ “We live in an age of legislation, and most new law is statutory law.”²⁵ And the common law method has two basic problems. First, it is insufficiently democratic, since it threatens rule by judges.²⁶ Second, the common law method is insufficiently formal, because it is too highly particularistic, too unpredictable, too rule-free.²⁷

B. “What a Waste”

Justice Scalia brings these points to bear on the topic of statutory interpretation, a real highlight of the book and clearly one of his passions.²⁸

21. *Id.* at 7.

22. *Id.* at 9.

23. *Id.*

24. Many state court judges are, of course, elected. Justice Scalia does not say how this might bear on his argument.

25. Scalia, *supra* note 7, at 13.

26. *See id.* at 9, 47.

27. *See id.* at 6-12.

28. Justice Scalia deplors what he sees as an absence of academic attention to statutory interpretation, an odd view in light of the recent outpouring of work on that subject, inspired above all by William

His basic complaint is that American judges and academics "are unconcerned with the fact that we have no intelligible theory" of statutory construction.²⁹ His central claim is that what matters is the objective meaning of the text, not the subjective intentions of Congress. "It is the *law* that governs, not the intent of the lawgiver."³⁰ Interpretation actually turns on "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."³¹ Because subjective intent is so murky, Justice Scalia thinks that its use risks substitution of judicial policy preferences for those of the legislature.

His case in chief in this regard is *Church of the Holy Trinity v. United States*.³² There the Court held, contrary to the apparently plain language of the governing statute banning the importation of foreign labor, that a church could pay for the transportation of a rector to the United States.³³ Justice Scalia reads *Holy Trinity* (not at all unreasonably) as a case about the substitution of legislative intent for text. In his view, what the church did violated "the letter of the statute, and was therefore within the statute: end of case."³⁴ Thus Justice Scalia adopts textualism. But he offers two important clarifications. First, he disfavors "strict construction": "I am not a strict constructionist, and no one ought to be"³⁵ Textualists give to the text its ordinary meaning, construing it neither broadly nor narrowly. Nor does Justice Scalia favor literalism.³⁶ He emphasizes that meaning is a function of context. What he urges is that courts should refuse to go beyond the range of meaning offered by a reasonable understanding of statutory terms, taken in their context.

Justice Scalia is aware that some cases involve a fairly wide range of textual meanings, and that the text can leave ambiguities. What aids are permissible? It is entirely acceptable to interpret statutory terms with structural aids, resolving ambiguities so as to make statutes both internally consistent and consistent with previously enacted laws. His textualism is thus supplemented with the structure of the relevant statute and indeed the structure of the law as a whole.³⁷

Eskridge and Philip Frickey. See ESKRIDGE, *supra* note 4, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (2d ed. 1995).

29. Scalia, *supra* note 7, at 14.

30. *Id.* at 17.

31. *Id.*

32. 143 U.S. 457 (1892).

33. See *id.* at 472; see also *infra* text accompanying notes 75-78.

34. Scalia, *supra* note 7, at 20.

35. *Id.* at 23.

36. See *id.* at 24.

37. See *id.* at 16-17; see also Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION*, *supra* note 6, at 134. Page 134 offers a gloss on pages 16-17, in response to Tribe's commentary. See Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 6, at 81.

Justice Scalia also defends canons of construction as legitimate and helpful to the extent that they are common sense ways of understanding the meaning of text. This is true of the ancient canons with Latin names, such as the old favorite, *expressio unius est exclusio alterius* (expression of the one is exclusion of the other). In urging the use of such canons, Justice Scalia takes a stand against Karl Llewellyn's famous attempt to demolish the canons by showing that for every canon there is an equal canon pointing in the opposite direction.³⁸ Justice Scalia says, very reasonably, that there are not really opposites on almost every point, and he thinks that the most that Llewellyn has shown is that the canons are not absolute,³⁹ which is not exactly news.

Justice Scalia is much less enthusiastic about substantive canons and presumptions, as in the idea that courts should construe statutes favorably to Native Americans, leniently on behalf of criminal defendants, narrowly if they are in derogation of the common law, narrowly if they waive sovereign immunity, and so forth. For textualists, substantive canons are "a lot of trouble."⁴⁰ They lack clear legitimacy (because it is not clear where courts get the authority to use them), and they have indeterminate weight, thus increasing the unpredictability and possible arbitrariness of judicial decision. On the other hand, some substantive presumptions may be reasonable if they attempt to get at meaning or if they have the warrant of antiquity. Thus, extraordinary acts, like the congressional elimination of state sovereign immunity or perhaps the waiver of sovereign immunity, require a clear statement, because that is what one would expect were extraordinary acts intended. And the rule of lenity may be justified by its age. But others, like the rule that statutes in derogation of the common law will be narrowly construed, look like "a sheer judicial power-grab."⁴¹

For a long time, Justice Scalia has been critical of judicial use of legislative history.⁴² Here he makes two central points. First, legislative intent is not the proper basis of interpretation, and hence legislative history focuses judicial attention on the wrong question,⁴³ away from meaning and toward subjective understandings of meaning. Second, use of history involves a lot of time and expense, and it is "more likely to produce a false or contrived legislative intent than a genuine one."⁴⁴ This is because there is in 99.99% of cases no such thing, and the archives are unreliable in any case. "In the only case I recall in which, had I followed legislative history, I *would* have come

38. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

39. See Scalia, *supra* note 7, at 27.

40. *Id.* at 28.

41. *Id.* at 29.

42. See, e.g., *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

43. See Scalia, *supra* note 7, at 31.

44. *Id.* at 32.

out the other way, the rest of my colleagues (who *did* use legislative history) did not come out the other way either. . . . What a waste."⁴⁵

C. "A Rock-Solid, Unchanging Constitution"

Constitutional interpretation, for Justice Scalia, is a place not for special principles but for the usual ones just described. His basic argument is that the Constitution's meaning is set not by the original intention but by the original meaning of its text. Alexander Hamilton and James Madison receive attention not because they were Framers whose subjective intentions matter, but because they (no more than John Jay and Thomas Jefferson, who were not Framers) can help us identify the original meaning. For Justice Scalia, originalism opposes those who think, in common law fashion, that the Constitution is "living" and should be understood by reference to "current" meaning.⁴⁶ The notion of a "living constitution" is an invitation to the broken-field running characteristic of common law thinking, or decision by reference to cases instead of authoritative text. Justice Scalia particularly deplores the fact that constitutional law is made after consulting recent cases rather than original intention. For Justice Scalia, the result is "a common-law way of making law, and not the way of construing a democratically adopted text."⁴⁷ The consequence is that the Constitution means whatever the judges think it should mean.

Against the view that the "living constitution" is necessary to promote flexibility over time, Justice Scalia argues that the "living constitution" approach actually reduces the capacity for democratic experimentation, by allowing judges to prevent elected officials from engaging in new experiments.⁴⁸ Against the view that the "living constitution" is necessary to protect an ample category of rights, Justice Scalia argues that it need not increase the category of rights at all. In many cases—property rights, Second Amendment rights,⁴⁹ Confrontation Clause rights⁵⁰—originalism offers a more expansive rather than less expansive understanding of rights.⁵¹ That understanding may be ill-suited to current social desires. But it is emphatically not a truncated understanding of rights.

Justice Scalia's fundamental objections to a common law understanding of the Constitution are that it lacks legitimacy and that it is too discretionary. Freed from the original meaning, judges consult their own judgments of policy

45. *Id.* at 36-37.

46. *See id.* at 38.

47. *Id.* at 40.

48. *See id.* at 42.

49. *See* U.S. CONST. amend. II. It is especially noteworthy—even news—that Justice Scalia questions the constitutional validity of gun control laws at the national level. *See* Scalia, *supra* note 7, at 43.

50. *See* U.S. CONST. amend. VI, cl. 2.

51. *See* Scalia, *supra* note 7, at 43-44.

and principle and are effectively untethered. “[T]here is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.”⁵² To be sure, originalists disagree among themselves; history can be ambiguous and, importantly, as Justice Scalia notes, there are questions about applying the original meaning to “new and unforeseen phenomena,” such as sound trucks and television.⁵³ But these are minor problems compared to those raised when people who, believing in a “living constitution,” take the Constitution to mean what it should and hence authorize judges to understand the Constitution to be whatever “the majority wants.”⁵⁴ “This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing . . . we shall have caused it to do nothing at all.”⁵⁵

II. STATUTES, CONTEXTS, AND CLEAR STATEMENTS

A. *Interpretive Goals: Decisional Burdens, Stability, Democracy, and Restraint*

What are the goals of Justice Scalia’s approach to interpretation?⁵⁶ One goal is to reduce the sheer costs of decision, so that the burden on courts and litigants is relatively low. A closely related goal is to make law relatively certain and predictable, so that people know where they stand and do not have to puzzle much over the content of law. Yet another goal is to control the discretion of those institutions whom we trust least or fear most. A system of interpretation might well be designed to reduce the role of courts in establishing social policies or governing principles, certainly if it seems that courts ought not to be entrusted with that kind of business.⁵⁷ Justice Scalia thinks that his version of textualism will effectively control judicial power, while at the same time increasing the policymaking primacy of the legislature, in part by giving it appropriate incentives. If, for example, legislative history will not be used, legislators will be under considerable pressure to increase

52. *Id.* at 45.

53. *Id.* at 45; see also Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (arguing that maintaining interpretive fidelity with past understandings of the Constitution may require adapting old readings to new social reality). I do not discuss that kind of objection here, though some of what I say below bears on it. See *infra* text accompanying notes 137-146.

54. Scalia, *supra* note 7, at 47.

55. *Id.*

56. I do not discuss here the suggestion that a theory of interpretation is appropriately rooted in a theory of authority or the accompanying claim that reference to lawmaker intention is therefore a part of the appropriate theory of interpretation. See ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 113-23 (1992). Scalia’s general approach might be aided by assessing claims of this sort.

57. Some people, of course, think that courts have comparative advantages at least on the question of principles. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 23-33 (1962); RONALD DWORKIN, *LAW’S EMPIRE* 375 (1986).

statutory clarity. These points are about reducing the burdens of decision and the costs of uncertainty.

But Justice Scalia seeks most fundamentally to promote democratic self-government and the primacy of the system of lawmaking set out in Article I of the Constitution. The reduction of judicial discretion via textualism serves both of these fundamental goals.⁵⁸ In so doing, democratic formalism ensures that statutory and constitutional provisions will not be given "spirits" and "purposes" attributable to the (unenacted) political morality of any particular era. A ban on "dynamic" interpretation, and a requirement of fidelity to enacted law, ensures that courts will not bow to political will or bend statutes to prevailing political winds except to the extent that they have produced actual legislation.⁵⁹

It is worth speculating about why and how Justice Scalia, educated at Harvard Law School in the era of Hart and Sacks,⁶⁰ actually came to this position. Henry Hart and Albert Sacks, of course, saw continuity between the common law and statutory interpretation; they placed a large emphasis on the collaborative role of courts, not least in the process of statutory interpretation, which they thought was best rooted in identification of statutory "purpose," supplemented by an array of judge-made clear statement principles.⁶¹ Justice Scalia has suggested that years ago he was sympathetic to this position, or at least to judicial particularism.⁶² We may speculate⁶³ that Justice Scalia's self-professed shift in view may have emerged from the nation's experience with both particularism and purposive interpretation in the period between, say, 1965 and the present. In this period, particularism occasionally has produced a high degree of confusion, as case-by-case decisions allow judges to have

58. Note in this regard that after World War II, Britain and America responded to Nazism in part by ensuring that such laws as had been enacted in the Hitler period and had not been voided were to be interpreted "in accordance with the plain meaning of the text and without regard to objectives or meanings ascribed in preambles or other pronouncements." INGO MÜLLER, *HITLER'S JUSTICE* at xvi (1991) (omitting citation). Note also Müller's demonstration that the principal technique used by Hitler's judges was emphatically antiformalist, a form of purposive, dynamic statutory construction intended to link statutory meaning with prevailing ideals. *See id.* at 92, 104-05, 117

59. Müller's book is a good warning in this regard. *See id.*

60. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958)

61. *See id.* at 1111-380. For an outstanding statement of the central organizing themes, *see id.* at 1374-80. To get a sense of its flavor, consider the following

In interpreting a statute a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—
 - (a) a meaning they will not bear, or
 - (b) a meaning which would violate any established policy of clear statement

Id. at 1374.

62. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989)

63. Speculation of this kind risks recklessness. If what is said in this paragraph does not reflect Justice Scalia's own experience, at least it might be said to reflect the possible experience of some people disaffected with the use of statutory purpose or with common law decisionmaking in public law

continuing room to maneuver and make predictability hard to maintain. Perhaps even worse, resort to statutory and, above all, constitutional purpose has led Justices in directions that, by Justice Scalia's lights, must seem highly ideological—much less a matter of finding something than a matter of making things up.⁶⁴ And what is made up might well seem to reflect the views of a “new class” of intellectuals having political commitments very different from those of Justice Scalia himself and perhaps the nation as a whole.

In brief: When particularism and purposivism invite courts to take stands on the great issues of the day, or on “*Kulturkampf*,”⁶⁵ formalism reemerges as an appealing alternative.⁶⁶ A shift from particularism and purposivism to formalism represents a natural odyssey for students of Hart and Sacks, disappointed by personal experience with an apparently ideological, particularistic, and purposive judiciary, and seeking to impose sharp constraints on judicial discretion.⁶⁷ Some help in this regard emerges from work in cognitive psychology suggesting that people often overstate the value of case-by-case, intuitionistic judgments, and understate the value of (admittedly somewhat crude) rules.⁶⁸

What I will be arguing here is that, despite appearances, Justice Scalia's argument cannot really rely on abstract or a priori claims about Article I of the Constitution or on arguments about democratic rule.⁶⁹ Those claims do not support Justice Scalia's distinctive approach. Instead, that approach must be defended by a set of pragmatic and empirical claims about various governmental institutions and how those institutions are likely to respond to

64. See, e.g., *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2361-62 (1996) (Scalia, J., dissenting); *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 156 (1994) (Scalia, J., dissenting). These are recent cases, but the same general point holds, for many observers, as the general symbol of the Warren Court.

65. *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting); see also MÖLLER, *supra* note 58, at 4-5 (discussing Hitler's judges).

66. Indeed, a characteristic response to a perceived failure of purposive interpretation is formalism, whereas another response involves general claims of indeterminacy or of the illusory character of the distinction between law and politics. It will emerge from the discussion that I believe both of these responses are inadequate.

67. See MÖLLER, *supra* note 58, at 39-119, for a valuable discussion of the role of purposive interpretation in extending the agenda of the Nazi party. The German judges read longstanding statutes consistently with the prevailing political order, both purposively and dynamically, in a way that very much promoted Hitler's goals. Müller's book is a valuable warning about the ideological uses of purposive interpretation and the possible advantages, from the standpoint of liberty, of formalism; it casts Scalia's argument in a vividly appealing light. If formalism is less appealing for America than it was for Germany during or immediately after the Nazi era, it is because of America's common law tradition, which embeds an enduring political morality that can hardly be treated as a transient pathology, and which contains values that are compatible with both democracy and the rule of law. Consider, for example, background principles requiring criminal statutes to be construed leniently, see, e.g., *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992), or so as not to raise serious constitutional doubts, see, e.g., *Kent v. Dulles*, 357 U.S. 116, 128-30 (1958). I am grateful to Richard Pildes for referring me to Müller's book and for helpful discussion of the issues in this paragraph.

68. See, e.g., Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 *MGMT. SCI.* 17, 19-20 (1993).

69. Cf. Scalia, *supra* note 7, at 9, 14-17.

different interpretive strategies. Justice Scalia does not defend those pragmatic and empirical claims. Thus, he has not shown that his approach is preferable to reasonable alternatives, including those that stress the role of administrative agencies in the modern state.

The most basic point is that no context-free view of legal interpretation will make much sense.⁷⁰ And while judgments about the future are inevitably speculative, America's own experience, with its distinctive history, suggests that democratic formalism is likely to be inferior to the alternatives actually favored by the American legal tradition.⁷¹ We might take this to be a neo-Burkean point, intended as a challenge to Justice Scalia's neo-Benthamite attack on the common law.⁷²

It is highly revealing in this connection that there is a substantial overlap between the interpretive practices of common law and civil law courts, each of which uses similar presumptions and canons, not only linguistic but also substantive.⁷³ Thus, Justice Scalia's attack on common law practices cannot easily survive an encounter with civil law systems, whose courts are only intermittently textualist, and which are permeated by interpretive practices of the kind he disfavors.⁷⁴

70. This is a lesson of P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 298-335 (1987), which connects different styles of interpretation to differences in legislatures in America and England.

71. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 868-74 (1992), for a similar conclusion on a point stressed by Justice Scalia. One qualification is necessary: Our own legal tradition has yet to come to terms with the sea-change inaugurated by the rise of administrative agencies, and that development calls for some new analysis. See *infra* text accompanying notes 123-125. It is here, for example, that Judge Calabresi's proposal might be faulted on the ground that the principal updating role should come from regulatory agencies. But see CALABRESI, *supra* note 1, at 56 ("To allow the truly dependent agency to act to update our laws would, in fact, be to cut through our checks and balances by allowing a majoritarian but unrestrained executive to enforce its views of the popular will . . .").

72. See Strauss, *supra* note 5, at 925-34. For Justice Scalia's approving discussion of the codification movement, see Scalia, *supra* note 7, at 11-12. Bentham's own view on the role of common law particularism was quite complex. See GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 440-64 (1986).

73. See Massimo La Torre et al., *Statutory Interpretation in Italy*, in *INTERPRETING STATUTES* 213, 222 (D. Neil MacCormick & Robert S. Summers eds., 1991); D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, in *INTERPRETING STATUTES*, *supra*, at 511, 514-15, 518-21, 535-39; Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in *INTERPRETING STATUTES*, *supra*, at 461, 468-69, 485-86.

74. See, e.g., Aulis Aarnio, *Statutory Interpretation in Finland*, in *INTERPRETING STATUTES*, *supra* note 73, at 123, 142-43; Robert Alexy & Ralf Dreier, *Statutory Interpretation in the Federal Republic of Germany*, in *INTERPRETING STATUTES*, *supra* note 73, at 73, 90; La Torre et al., *supra* note 73, at 213, 222-23, 244; Michel Troper et al., *Statutory Interpretation in France*, in *INTERPRETING STATUTES*, *supra* note 73, at 171, 189; see also Summers & Taruffo, *supra* note 73, at 485 (suggesting that when there is "a conflict between an argument from ordinary or technical meaning, on the one hand, and the argument that this meaning leads to an absurd or manifestly unjust result, on the other," the "latter argument is recognized in virtually every system in our study, though not always in the same form"), *id.* at 486 (suggesting that "[w]ithin limits, the higher courts of all countries in our study adjust the ordinary or technical meaning of a statute to take due account of its datedness or obsolescence [so] [t]he theory would appear to be that the force or weight of any 'old' meaning is outweighed").

B. Holy Trinity, *Excessive Generality*, and *Presumptions*

Let us approach these points by focusing on *Church of the Holy Trinity v. United States*,⁷⁵ Justice Scalia's *bête noire*. The *Holy Trinity* case raises a large number of the issues dealt with in Justice Scalia's discussion of statutory interpretation; by discussing *Holy Trinity*, we can discuss many of the issues raised in the book. In 1885, largely in response to an influx of immigrant labor, Congress made it unlawful

for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States⁷⁶

The problem arose because the Church of the Holy Trinity made a contract with E. Walpole Warren, an alien residing in England, to pay for his transportation to the United States, where he was to work as a rector and pastor. The United States claimed that the church had acted unlawfully.⁷⁷ The Supreme Court disagreed. It said that the text of the statute was not controlling.⁷⁸

The Court's opinion was very complex, with multiple strands. It can be read in three different ways, each with support in the opinion itself.

(1) General language will not be taken to produce an outcome that would, in context, be absurd, at least if there is no affirmative evidence that this result was intended by the enacting legislature.

[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.⁷⁹

On this view, *Holy Trinity* is a rerun of the famous case of *Riggs v. Palmer*,⁸⁰ in which the New York Court of Appeals held that a statute governing

75. 143 U.S. 457 (1892).

76. *Id.* at 458.

77. *See id.* at 458.

78. *See id.* at 472.

79. *Id.* at 459.

80. 22 N.E. 188 (N.Y. 1889).

inheritance would not be interpreted to allow a nephew to inherit from his uncle's will when the uncle's death resulted from his murder at the nephew's hands.⁸¹

(2) General language will not be taken to produce an outcome that was clearly not intended by the enacting legislature, as those intentions are revealed by context, including legislative history.

[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. . . .

. . . It appears . . . in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble

. . . We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.⁸²

On this view, *Holy Trinity* advocates legislative history and consideration of legislative intent.

(3) General language will not be taken to depart from longstanding social understandings and practices, at least or especially if the departure would raise serious constitutional doubts.

[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. . . .

. . . .
 . . . [S]hall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?⁸³

On this view, the background tradition of religious liberty operates as a "clear statement" principle, one that requires Congress to speak unambiguously if it wishes to intrude on that tradition. Congress will not be taken to have barred a church from paying for the transportation of a rector unless there is affirmative evidence that Congress intended to do precisely that. Congress will not be taken to have interfered with religious liberty through inadvertence or loose language.

81. *See id.* at 191.

82. *Holy Trinity*, 143 U.S. at 463-65.

83. *Id.* at 465, 471.

Justice Scalia appears to think that each of these three principles is wrong, certainly as applied to *Holy Trinity*.⁸⁴ Let us take up these principles in turn.

Understood according to principle (1), *Holy Trinity* presents a familiar, even mundane problem, that is, the problem introduced by linguistic generality. In a famous passage, Wittgenstein describes the problem in this way: "Someone says to me: 'Shew [sic] the children a game.' I teach them gaming with dice, and the other says, 'I didn't mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?"⁸⁵

Wittgenstein's clear implication is that it need not. In daily communication, and without thinking about it, we carve out exceptions from general language;⁸⁶ we do not consult the dictionary meaning of the words and act in accordance with what we find there. It is tempting to respond that there is a difference between daily communication and a legislative command; perhaps the latter should be presumed not to be sloppy. But this response misses the point, which has nothing to do with sloppiness and everything to do with the cognitive limits of human beings. Because of the inevitable limitations of human foresight, even the most carefully chosen words can become unclear because and not in spite of their generality.⁸⁷ Textualists who fail to see this point can be found only in science fiction novels populated by androids and aliens,⁸⁸ whose misunderstandings and befuddlement are a direct consequence of their textualism. Now, Justice Scalia is not a literalist; he is at

84. There is some doubt about whether he sees a limited place for principles (2) and (3) in general. See Scalia, *supra* note 7, at 20 n.22 (acknowledging a role for principle (3) but seeing it as inapplicable to *Holy Trinity*); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (arguing for statutory interpretation based on context, ordinary usage, and compatibility with surrounding law).

85. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33 (G.E.M. Anscombe trans., MacMillan 1960) (1953).

86. In ordinary communication, we do not think of it as making "exceptions." It all happens very quickly and naturally. For example, "Don't bother me during the next hour" (but what if the house catches fire?), or "Clean up your room completely" (but what if a certain level of messiness is standard in the family?).

87. See H.L.A. HART, *THE CONCEPT OF LAW* 124-36 (2d ed. 1994). As Hart writes:

[W]e are men, not gods; it is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact; the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they combine were known to us, then provision could be made in advance for every possibility Plainly this world is not our world; human legislators can have no such knowledge of all possible combinations of circumstances which the future may bring. This inability to anticipate things brings with it a relative indeterminacy of aim.

Id. at 128.

88. Cf. POSNER, *supra* note 15, at 268 ("A normal English speaker does not interpret a message merely by consulting the dictionary definitions of each word (assume these definitions are stored in his brain) and the relevant grammatical and syntactical principles."). Science fiction enthusiasts may wish to consider *Star Trek's* android character Data. See *Star Trek: The Next Generation* (Paramount syndicated television broadcast).

pains to distinguish textualism from literalism, and he knows that the meaning of text is a function of context. But once we insist on that point, just why is principle (1) so bad? Why is it not an ordinary application of the idea that the meaning of words depends on context?

Perhaps Justice Scalia would respond that this principle increases the costs of decisions for judges; perhaps an approach that takes Congress "at its word" produces more mechanical (simpler, more predictable) jurisprudence. Perhaps Justice Scalia would add that absurdity is in the eye of the beholder, so that principle (1) also introduces risks of error in the form of judicial misjudgments about what counts as absurd. And perhaps Justice Scalia would insist that Congress would respond well to his approach to *Holy Trinity*. Knowledge of judicial refusal to make exceptions for absurdity might increase legislative care with drafting and thus decrease excessive generality before the fact. Or perhaps Congress would respond promptly and effectively to mistakes introduced by excessive generality; Congress would therefore correct the outcome in *Holy Trinity* if it really objects.⁸⁹ If all this is true, Justice Scalia's approach would produce few mistakes, and those mistakes that it does produce would find easy correction.⁹⁰

If we understand Justice Scalia's argument to be defensible in these terms,⁹¹ the debate over principle (1) is really a debate about the costs of decision and the costs of error.⁹² More particularly, it is a special case of the debate over rules and standards. The *Holy Trinity* Court treated the text of the statute as a kind of standard, inviting inquiry into underlying purposes. Justice Scalia wants to treat it as a kind of rule, fully specifying outcomes in advance. The dispute cannot be resolved on the basis of abstractions.⁹³ It is better to ask about which approach will (roughly speaking) minimize the costs of decision and the costs of error. Justice Scalia can be taken to suggest that his approach will reduce the sum of aggregate decision costs and aggregate error costs, and under imaginable assumptions, he is entirely right.

89. Relevant evidence of congressional rejection of judicial interpretation can be found in William N Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L J 331 (1991).

90. Note here the relatively formalistic nature of statutory interpretation in England and the distinctive context in which that formalism may make sense: highly professional drafting and a responsive Parliament ready and willing to correct errors after they have arisen. See ATIYAH & SUMMERS, *supra* note 70, at 104, 315-23.

91. For proposition (1), Article I of the Constitution is a red herring, the question is what the relevant statute means.

92. There are of course qualitative differences among the various kinds of errors, and judgments must be made about which errors are worst, both qualitatively and quantitatively. There is also a question about what counts as an error at all. Perhaps Justice Scalia would contend that his approach—textualism—produces no errors. But this begs the question by defining errors as whatever emerges from other approaches. To be sure, it is not clear that errors can be defined as such apart from some antecedent account of appropriate interpretation. I am attempting to build on the common intuition that an interpreter blunders if he interprets a word to produce an outcome that would generally be taken as absurd.

93. The same conclusion can be found in SCHAUER, *supra* note 11, at 222-28, which defends formalism as a possible approach to interpretation.

But are the assumptions correct? This is far from obvious. Perhaps a judicial role of the sort suggested in *Holy Trinity* will not introduce much uncertainty; perhaps cases in which textual generality produces absurdity are few in number and easily recognized as such. If so, principle (1) may not much increase decision costs, and it may greatly reduce error (understood as such if the outcome would be by general agreement absurd). And perhaps it is very hard for legislatures to anticipate cases of this kind in advance—and also costly and complex for legislatures, with so much business to transact, to spend all the resources necessary to fix the errors of excessive generality. Formalism may decrease costs at the judicial level while also increasing costs, perhaps dramatically, at the legislative level. If all this is true, *Holy Trinity* is right as an example of principle (1).

If we are talking about the modern state, it makes sense to say that administrative agencies should be permitted to act as the Court did in *Holy Trinity* (a point to which I will return⁹⁴). And a reasonable assessment of the practical issues would suggest that courts should feel free to make exceptions for applications that seem unquestionably absurd. Then the question would be whether the application in *Holy Trinity* falls in that category. To know that, we have to know some details, but certainly it cannot be said that the outcome is implausible or an abuse.

Justice Scalia is correct in objecting to principle (2) if he understands that principle to suggest that clearly expressed legislative history (in, for example, committee reports) should trump clearly expressed text. He is also right to say that the text, and not the history, is the law; no one should doubt that point. And it is sensible for Justice Scalia to insist on a distinction between subjective intent (something actually in the minds of legislators) and “objectified intent,” understood as “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”⁹⁵ But suppose that we do not trouble ourselves with the complexities of psychological inquiry into the subjective intentions of collective decisionmaking bodies, and suppose that we use legislative history only in cases of interpretive doubt, not because it is “the law” but because it helps identify the meaning of the law. Suppose too that interpretive doubt can be created either by ambiguous terms or by what appears to be excessive generality. Here legislative history would matter for the same reason that Madison and Hamilton matter. Words are hard to understand without some conception of their purpose, and the distinction between purpose and intention (suitably “objectified”) is thin.

Indeed, textualism itself cannot do without some crucial subjective elements. Recall that meaning is, for Justice Scalia, to be determined by

94. See *infra* notes 128-129 and accompanying text.

95. Scalia, *supra* note 7, at 17.

exploring what was commonly understood at the time of enactment.⁹⁶ But common understandings are best uncovered by figuring out *what people thought*. Thus the movement from “intentions” to “meaning,” while entirely sensible, is not a movement from something (entirely) subjective to something (entirely) objective. If the question is what relevant people understood a term to mean, legislative history may well be useful. Of course, legislative history should not be used when it is uninformative, or when it is so extensive and broad that a judge is using it not to figure out what Congress meant, but instead to support judicial policy preferences. Of course the text has priority, and it is right to insist that what appears in the legislative history may be the view of one side in a debate, or of a private interest group unable to get its way with Congress.⁹⁷ But these points do not support a bar on use of legislative history; they lead in the direction of pragmatism and caution.⁹⁸

Justice Scalia’s suggestion that the use of legislative history is akin to “posting edicts high up on the pillars, so that they could not easily be read”⁹⁹ is certainly relevant, but standing alone it cannot carry much weight. Citizens do not always have easy access to statutory text (ask a nonlawyer neighbor to track down 42 U.S.C. § 7521(j)(2)(B)(ii), by, say, tomorrow morning), and those who can find the text can often, without expending a lot more effort, find the history. And where there are ambiguities and doubts, might it not be better to look at legislative history than to consult dictionaries, or one’s own views about policy and principle, at least if the ordinary meaning of the term, taken in its context, is what governs? Why might not legislative history be useful in showing that the term in question is not sensibly interpreted to cover the problem at hand?

These questions need hardly be taken as decisive. We can imagine a world in which resort to legislative history would be more trouble than it is worth, because courts and legislatures, in that world, would respond well if courts relied only on text and applicable canons of construction. In that imaginable world, legislative history would not be very helpful (because it would be impossibly ambiguous); courts would use legislative history to reach the results that they liked best, which (let us suppose) would be independently very bad; and the use of legislative history would have unfortunate effects on the legislature by discouraging it from legislating clearly. Perhaps some state court systems do not use legislative history for this reason,¹⁰⁰ and what Justice Scalia says helps support their practice. But we can also imagine a legal

96. See *supra* text accompanying note 15

97. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 108-09 (1981), for a good example.

98. See Breyer, *supra* note 71, at 847-60

99. Scalia, *supra* note 7, at 17

100. Cf., e.g., GWENDOLYN B. FOLSOM, LEGISLATIVE HISTORY RESEARCH FOR THE INTERPRETATION OF LAWS 5 (1972) (“Use of legislative history by the state courts has come more slowly and is still much less extensive than in the federal courts.”)

culture in which legislative history helps to discipline judges, by giving them a sense of context and purpose, without creating serious problems at the legislative stage. There is no way to know whether, in the abstract, the use of legislative history is good or bad. So long as courts proceed sensibly, first principles involving political legitimacy cannot resolve that question. Whether it makes sense to use legislative history depends on such issues as the simple costs of using the history, the likelihood that it will increase rather than decrease errors, the availability of other more reliable sources of meaning, and the consequences for the legislature itself of using legislative history or not using it.

Justice Scalia is convincing in urging that legislative text and structure deserve priority. He is right to say that courts have often misused legislative history and that the use of history can increase costs of decision while also creating more rather than fewer mistakes. Certainly a movement in the direction of a firm judicial principle of textual primacy would make a good deal of sense.¹⁰¹ But he has not demonstrated that where other sources of meaning leave doubt, courts should not consult legislative history. Perhaps a legal system starting from scratch would do best to forbid courts from consulting history. Perhaps American public law would be better if a ban on the use of history were enacted; this is far from implausible. But in light of our longstanding traditions, a dramatic shift of the sort proposed by Justice Scalia bears a heavy burden of justification, and he has not met that burden here.

What about principle (3)? Justice Scalia does not discuss it in any detail. But it is not hard to imagine how clear statement rules might be defended. Justice Scalia willingly acknowledges that extraordinary acts are not expected and that courts should not find such acts unless there is clear indication that they were intended;¹⁰² this idea is part of a defense of principle (3). Justice Scalia also insists that courts should try to fit ambiguous texts with the rest of existing law, and *Holy Trinity* was written very much in this spirit.¹⁰³ And there is a third possible defense of principle (3); it has to do with the nondelegation doctrine, whose purpose is to ensure that legislatures, rather than bureaucracies or courts, actually make the most important decisions of policy.¹⁰⁴ Perhaps courts should require Congress—not the executive branch—to decide, with particularity, if it wants to force judges to resolve a serious constitutional problem. On this view, vague or general language should not be taken to require judicial resolution of a hard constitutional judgment; there is too great a likelihood that, if it is so taken, Congress itself will not have thought about the constitutional issue at all. Certainly it is most unlikely

101. See the discussion of textual priority in ACKERMAN & HASSLER, *supra* note 97, at 108-09.

102. See Scalia, *supra* note 7, at 29.

103. See the reference to background norms in POSNER, *supra* note 15, at 268-69.

104. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2111-12 (1990).

that the Congress that enacted the statute at issue in *Holy Trinity* actually decided to apply the ban on importation of labor to churches.¹⁰⁵

Of course, the nondelegation doctrine is effectively dead, in part because courts cannot easily enforce it.¹⁰⁶ But many clear statement principles or substantive canons—prominently including the principle requiring Congress to speak clearly if it wants to raise a serious constitutional problem—can be seen as narrower, more modest, more targeted nondelegation doctrines. The basic defense of principle (3) is that it has a democracy-forcing character. It requires the national legislature to make a highly focused decision, reflecting its own choices about constitutionally sensitive issues. Many substantive canons of construction have this purpose. They are designed to ensure that the legislature focuses with particularity on some issue, largely for reasons with roots in the Constitution, American history, or both. Thus, ambiguous statutes will be read so as not to preempt state law, or favorably to Native Americans, or so as not to apply extraterritorially, or favorably to criminal defendants, or so as not to intrude on the traditional authority of the President.¹⁰⁷

We can agree that the statutory text deserves priority over legislative history and that courts should ordinarily rely on a reasonable understanding of the text at the time of enactment. But Justice Scalia provides no convincing argument against principles (1), (2), or (3). A general conclusion follows. Any approach to statutory interpretation depends on judgments, partly pragmatic and empirical in nature, about the capacities of both courts and legislatures, and about the likely effects on both institutions of different interpretive approaches.¹⁰⁸ Those who endorse principles (1), (2), and (3), or imaginable cousins and variations, have to defend those principles against the objection that they increase uncertainty (thus jeopardizing rule of law values) and also the number and magnitude of mistakes. Justice Scalia's approach must be defended not only on the ground that it increases certainty (a reasonable proposition, though a questionable one if textual ambiguity is pervasive) but also on the ground that it will not lead to errors that are large in number and

105. Justice Scalia, it will be recalled, *see supra* text accompanying notes 30-31, is not concerned with subjective intentions, and for legitimate reasons I make this point here not to support psychological investigation but to say that the generality of the statute should not be taken to suggest that the relevant words, understood in accordance with "objectified intent," would have been understood to apply to churches within the relevant community—that is, the ordinary audience of the statute.

106. *See Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

107. See the extensive catalogue of background norms and principles in *ESKRIDGE*, *supra* note 4, app. 3, at 323-28.

108. This is true for "dynamic interpretation." Should statutory meaning change over time? Some statutory terms seem to invite changes of a sort, and thus Congress sometimes seems to contemplate changed readings. Dynamic interpretation, undertaken with regard to statutory purposes, might be justified as part of the interpretive project, on roughly the same ground as *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). *See supra* text accompanying notes 80-81, 95-101. Of course a great deal turns on what the statute actually says. Some statutes, understood in accordance with their original meaning, call for dynamic interpretation; some do not; and sometimes there is no clear understanding one way or the other. For discussions of this, see *ESKRIDGE*, *supra* note 4, at 9-105, and *CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION* 174-78 (1990).

serious in magnitude. A good deal turns on the likely performance of courts and legislatures and on legislators' responsiveness to judicial interpretation.

Justice Scalia has offered only the beginning of a defense in the necessary terms. He does not show that the actual practices of American courts reveal systematic abuses of principles (1), (2), and (3). Certainly a more extended empirical study would be helpful here.

C. *A Dog That Did Not Bark: Have Administrative Agencies Become Our Common Law Courts?*

There is a notable and surprising gap in Justice Scalia's argument: the administrative state. Justice Scalia is, of course, a specialist on administrative law, whose rise has, in practice, greatly transformed the practice of interpretation in public law. Most of the key work of statutory interpretation is done not by courts at all, but by federal agencies. Justice Scalia has also written an important and illuminating essay¹⁰⁹ on *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹¹⁰ which is unquestionably the most important case about legal interpretation in the last thirty years. Note in this regard that in its relatively short period on the scene, *Chevron*, a kind of counter-*Marbury*¹¹¹ for the administrative state, has been cited more frequently (3977 times)¹¹² than *Marbury v. Madison* (948 times), *Brown v. Board of Education*¹¹³ (1520 times), or *Roe v. Wade*¹¹⁴ (1556 times), and if present trends continue it will soon have been cited more frequently than all those cases put together. Indeed, *Chevron* may qualify as the most cited case in federal courts.

Chevron holds that where statutes are ambiguous, courts should accept any reasonable interpretation by the agency charged with their implementation.¹¹⁵ *Chevron* also appears to accept the legal realist suggestion, central to Justice Scalia's essay here, that the decision of how to read ambiguities in law involves no "brooding omnipresence in the sky"¹¹⁶ but an emphatically human judgment about policy or principle. And *Chevron* concludes, in a way

109. Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511.

110. 467 U.S. 837 (1984).

111. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

112. Quick Cite search of WESTLAW, Allfeds Database (Oct. 1, 1997).

113. 347 U.S. 483 (1954).

114. 410 U.S. 113 (1973).

115. See *Chevron*, 467 U.S. at 842-45. This simplifies some complex issues. For discussion, see 1 RICHARD J. PIERCE, JR. & KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 109-31 (3d ed. 1994); *id.* at 147-51, 258-59 (3d ed. Supp. 1996); and Sunstein, *supra* note 104.

116. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Hence, *Chevron* has much in common with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Both cases involve a rejection of the view that federal courts could neutrally declare "the law," and both cases, following that rejection, reallocate legal authority from federal courts to other institutions. For a provocative discussion of the "Erie effect," see Lawrence Lessig, *Erie Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1797-800 (1997).

endorsed by Justice Scalia and very much bearing on the democracy prong of his argument, that where underlying statutes are ambiguous, Congress should be taken to have decided that agencies are in a better position to make that judgment than courts.¹¹⁷ Agencies are in that better position because, *Chevron* emphasizes, the President is generally in charge of their policy judgments, and hence agencies have a kind of democratic pedigree, certainly a better one than the courts.¹¹⁸ Administrative agencies are, of course, influenced by shifting political judgments, and their approaches are likely to reflect the President's basic commitments.¹¹⁹ I am speaking here of the comparative advantages of agencies over courts in the interpretation of ambiguous statutes because of the agencies' greater accountability and their greater technical specialization. For this reason, agencies are better equipped to decide on the appropriate definition of vague or ambiguous statutory terms. An emphasis on these points does not embrace simple majoritarianism, nor does it neglect the internal morality of democracy, which authorizes courts to constrain agencies both through clear statement principles¹²⁰ and through constitutional law.¹²¹ To say that agencies have comparative advantages in the interpretation of statutes is to say very little about constitutional interpretation. The special case for deference to agency interpretations has a great deal to do with the agency's immersion in technically complex issues, a consideration that has far less importance in the context of constitutional law.¹²²

If this is so, debates over statutory interpretation must include not only Congress and courts but also administrative agencies, which may be in an especially good position to carry out the updating and particularizing functions of common law judges. This is a point missed both by Justice Scalia and by Judge Calabresi in his vigorous argument for more federal common law.¹²³

117. Technically speaking, Justice Scalia argues—in my view convincingly—that *Chevron* is best taken to hold that the question of deference will be resolved by reference to Congress's instructions, that Congress has not spoken clearly on that subject, and that in light of the value of providing a clear background rule, and a reasonable understanding of Congress's views about relevant institutional capacities, statutes will generally be read to require courts to defer to reasonable agency interpretations of law. See Scalia, *supra* note 109, at 516.

118. The *Chevron* Court noted that

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865. In some ways, perhaps, agencies have a stronger democratic pedigree than Congress itself, though the *Chevron* Court did not so argue. For an argument to this effect, see JERRY MASHAW, *GREED, CHAOS, AND GOVERNANCE* 131-57 (1997).

119. See generally MASHAW, *supra* note 118, at 106-30.

120. See *supra* text accompanying note 107.

121. See *infra* note 125.

122. See *infra* text accompanying notes 130-144.

123. See CALABRESI, *supra* note 1.

Justice Scalia has argued elsewhere that plain text always counts against an agency interpretation;¹²⁴ in his view—consistent with his argument in this book—*Chevron* deference is never due to an agency that counteracts text (defined by reference to ordinary understandings). But perhaps this view is itself anachronistic. Indeed, we ultimately might conclude that we can obtain the right mix of democratic and common law virtues if and only if we decide that the adaptation of statutory text to particular applications (including the exemption of absurd outcomes), and the use of applicable canons of construction, is an entirely appropriate *administrative* task.¹²⁵

On this view, *Holy Trinity* might be seen very differently in the context of the twenty-first century, whose public law would pose as a central question: What are the views of any agency charged with implementation of this law?¹²⁶ To the suggestion that this position means that some statutes (more accurately their terms in some applications) might be lost or misdirected as a result of new agency rulings, a response might be given in Justice Scalia's own words: "[L]ots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday's herald is today's bore—although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it."¹²⁷

As against Judge Calabresi's plea for judicial updating, we might claim that the argument itself needs to be updated: For the most part, appropriate solutions to the problem of statutory obsolescence should come from administrative agencies, immersed in the problems at hand and having both technocratic and democratic virtues as compared to courts. And as against Justice Scalia, we might urge that administrative agencies should be authorized to reject the "text" in a way that would go well beyond the common law role envisaged by *Holy Trinity*, at least when there is no evidence of a considered

124. See Scalia, *supra* note 109, at 520.

125. Of course, administrative judgments may be inconsistent with the internal morality of democracy. If this is so, those judgments may be unconstitutional or interpreted as exceeding statutory authority. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (interpreting a statute narrowly so as to allow a communist to travel abroad). My point here is that whatever one's account of democracy, agency adaptation of text to circumstance is generally legitimate, at least where there is no clear congressional instruction the other way. The dictionary definition of the term ought not to be taken to be decisive.

126. *Holy Trinity* involved the government as prosecutor, see *Church of the Holy Trinity v. United States*, 143 U.S. 457, 457-58 (1892); hence there would be no deference under ordinary understandings of the reach of *Chevron*. But see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 493-506 (1996) (arguing for *Chevron* deference to the Department of Justice). Even if *Holy Trinity* is not itself a case for *Chevron* deference, other cases involving the molding of text to unanticipated applications might well be such cases. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 115 S. Ct. 2407, 2410 (1995) (deferring to agency interpretation of the Endangered Species Act); *Les v. Reilly*, 968 F.2d 985, 987, 989 (9th Cir. 1992) (literally interpreting the Delaney Clause, which banned carcinogens in food additives); *Public Citizen v. Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987) (same).

127. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

legislative judgment against the agency's interpretation.¹²⁸ In modern *Holy Trinity* cases, courts would not do the work on their own, but would permit agencies to engage in a degree of statutory adaptation, not at all on the theory that agencies can violate the text, but on a finding that agencies reasonably concluded that despite the generality of the text, there was no considered legislative judgment that the text should be applied in a way contrary to the agency's view.¹²⁹

Consider, for example, a fairly conventional case, *American Mining Congress v. EPA*.¹³⁰ Congress had not clearly dealt with the problem of how to handle materials held for recycling, and the relevant EPA regulation defined certain materials involved in recycling as "solid waste." In particular, the regulation said that spent materials, sludges, scrap metal, and the like would be treated as solid waste if they were not directly reused but were instead held as part of an industry's ongoing production process.¹³¹ The EPA reasoned that materials that were stored, transported, and held for recycling were associated with the same kinds of environmental harms as materials that were abandoned or disposed of in some final way.¹³² The court of appeals struck down the EPA regulation on the ground that the governing statute defined solid waste as "'garbage, refuse, sludge . . . and other discarded material'";¹³³ for the court, material held for recycling was not "discarded."¹³⁴ Citing the dictionary, the court thought that the "ordinary plain-English meaning" was decisive.¹³⁵ If the question was an internal dispute in a court of appeals about the best interpretation of a statutory term, perhaps the majority would be right. But the question involved the validity of an EPA regulation, produced after a complex process involving a number of political interests, an extended process of intergovernmental deliberation, and an elaborate inquiry into the underlying issues of substance. Even if a court would be reluctant to adapt the meaning of a term like "discarded" to fit with context—even if this is a weaker case than *Holy Trinity* for contextual adaptation—is it not hubristic for judges, unelected and relatively unknowledgeable about the enormously complex subject at hand, to invoke dictionaries (compiled after all by human beings) to invalidate executive branch decisions that cannot reasonably be said to run

128. Thus, *Sweet Home Chapter* can be seen as a case in which an agency, armed with a particular understanding of the problem at hand and subject to democratic controls, is permitted to adapt a statutory term as it sees fit, regardless of what dictionaries say. See *Sweet Home Chapter*, 115 S. Ct. at 2418 (referring to agency competence). This is only a possible example because the statutory term, "harm," might well be taken as ambiguous. See *id.* at 2411-18.

129. On this view, the cases interpreting the Delancy Clause literally were wrongly decided. See *Les*, 968 F.2d at 990; *Public Citizen*, 831 F.2d at 1123.

130. 824 F.2d 1177 (D.C. Cir. 1987).

131. See *id.* at 1179.

132. See *id.*

133. *Id.* (quoting 42 U.S.C. § 6903(27) (1986)).

134. *Id.* at 1185-86.

135. *Id.* at 1184 n.7.

afoul of any judgment from Congress? The EPA's decision followed a sustained period of public comment, and undoubtedly the government would be held accountable for any decision about the reach of the Resource Conservation and Recovery Act of 1976.¹³⁶ If the EPA's decision runs afoul of dictionary decisions but of no actual decision by Congress, should it really be struck down?

Or consider an especially important recent case, upholding the power of the FDA to regulate tobacco products as "drugs" or "devices."¹³⁷ The FDA contended that the current meaning of the Federal Food, Drug, and Cosmetic Act,¹³⁸ as enacted in 1938, allows it to regulate tobacco products.¹³⁹ At first glance, it seems clear that in 1938, the terms "drug" and "device" were not understood to include tobacco products.¹⁴⁰ But might not an executive agency, subject as it is to political checks and immersed as it is in the technical details, be entitled to interpret those terms to include tobacco products in 1997? The statute defines "drug" to include articles "intended to affect the structure or any function of the body of man or other animals,"¹⁴¹ and it defines "device" to include any "article" that is similarly intended and that "does not achieve its primary intended purposes" through chemical action or through being metabolized.¹⁴² The court held that the FDA could rely on foreseeability, consumer use, and internal manufacturer memoranda to establish intended use "to affect the structure or any function of the body."¹⁴³ And the court added that the FDA could conclude that tobacco products contain "device components" designed to ensure an (admittedly indirect) effect on the structure or function of the body.¹⁴⁴ What is striking about the court's conclusions is that they were based not on the ordinary understanding of the statutory terms at the time of enactment, but on the agency's authority to interpret those terms in a way consistent with (what accountable and informed officials could conclude is) their current meaning.

Without attempting to resolve the underlying issues here, I think that the court's decision is reasonable and probably correct. To be sure, the original meaning of "drug" and "device" may not, to the relevant community, have

136. 42 U.S.C. §§ 6901-6992k (1994).

137. See *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997).

138. 21 U.S.C. §§ 301-395 (1994).

139. See *Coyne Beahm*, 966 F. Supp. at 1379 (citing 21 U.S.C. § 321(g)-(h)).

140. The qualification "at first glance" is necessary because it is unclear whether the community would take Congress to have referred to existing understandings of what count as drugs and devices or to have set out a general concept whose particular content would or should vary over time, with new understandings of fact and value. If the second view is correct, then *Coyne Beahm* is rightly decided even under Justice Scalia's view of interpretation. What I am suggesting here is that the case is probably right even if the first view is correct. In reality it is unlikely that there was a general understanding one way or the other.

141. 21 U.S.C. § 321(g)(1)(c).

142. 21 U.S.C. § 321(h)(3).

143. *Coyne Beahm*, 966 F. Supp. at 1389-91.

144. *Id.* at 1394.

included tobacco products.¹⁴⁵ But Congress enacted general terms, not its particular understandings of what those terms meant. And in view of new judgments about relevant facts and belief-influenced changes in values, it seems appropriate to allow a specialized agency, accountable as it is to political forces, to interpret these (general and ambiguous) terms as it did in 1997. There can be little doubt that the FDA's decision was a product of a set of legitimate political influences and that it emerged after a sustained period of highly visible deliberation on the issues at hand, with involvement from the President himself. And, of course, Congress can override the interpretation if it chooses.

A broader conclusion follows. It is one thing to say that courts should be permitted to reject original meaning in favor of current meaning; it is quite another thing to say that agencies, with their comparative advantages, should be permitted to do precisely that. These are separate debates, and it is possible to resolve the first question against the courts while at the same time resolving the second question in favor of the agencies.¹⁴⁶ What is disappointing is that Justice Scalia does not discuss these issues, which link his interests in statutory interpretation and administrative law, and which cast a new light on the court-legislature interactions that concern him here.

D. *An Analogy*

Allowing appropriate adjustments for administrative law, we can better understand statutory interpretation if we borrow from the law of contract. It is now familiar to see contract law as consisting largely of default rules, specifying how to understand gaps or silences from the parties and also how to understand provisions that seem vague or ambiguous.¹⁴⁷ The law of contract contains three kinds of default rules. First, some default rules are designed to find out the instructions of the parties. What would they have done, if they had made provision on the point? Such default rules are market-mimicking.¹⁴⁸ Second, some default rules are designed not to implement the parties' will, but to impose on the party who can do so most cheaply the incentive to make a clear provision on the point.¹⁴⁹ Default rules of this kind

145. An underlying issue is that sometimes Congress enacts a general term, having a particular understanding of the term's meaning, but with a complementary understanding that the meaning of the term may and should shift over time; consider the terms "public policy," "reasonable," and "psychopathic." See ESKRIDGE, *supra* note 4, at 61-64; SUNSTEIN, *supra* note 108, at 174-78.

146. It follows that the enterprise of translation might well be permissible for agencies whether or not it is permissible for the courts. See generally Lessig, *supra* note 53 (arguing for translation of constitutional meaning).

147. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989).

148. See *id.* at 97-100.

149. See *id.*; see also U.C.C. § 2-201 (1989) (setting forth the statute of frauds); *Jessen v. Ashland*, 281 N.W.2d 210 (Neb. 1979) (applying the statute of frauds).

are information-eliciting, intended not to mimic the parties' wishes but to make sure that those wishes are made clear by the parties themselves. It also seems clear how to choose between market-mimicking and information-eliciting default rules. If the court is clear on what the market-mimicking rule is, it should choose that rule. But if the court is unsure on that question—if the costs of decision and costs of error for the judge seeking to discern the market mimicking rule are very high—the court might do better to impose an information-eliciting default, designed to penalize the party in the best position to make explicit provision for the matter at hand.

Courts also have a third kind of default rule. Some such rules are based on considerations of public policy that have little or nothing to do with implementing or eliciting the parties' instructions.¹⁵⁰ Such considerations might involve, for example, the protection of third parties, or they might be intended to shift the parties' preferences and values in a certain direction.

Much of legal interpretation is, or is about, default rules.¹⁵¹ Now, it may be tempting to suppose that federal courts, lacking common law authority, ought not to use such rules, and that statutory construction should proceed without them. But a moment's reflection should show that statutory default rules, in some form, are not so much desirable as inevitable. As the law of contract helps reveal, words cannot have meaning without background understandings of various sorts. Usually those understandings are so taken for granted, so highly internalized, that they seem invisible, and part of the necessary meaning of words. But they are nonetheless in place; they make communication possible. And often legal interpretation is possible only because of background principles or rules, some of them so taken for granted that they are invisible, some of them contested enough to be visible but not highly controversial, some of them at the heart of spirited debates in public law. If, for example, a federal statute does not say whether state law is preempted, what happens? If a statute is silent on the existence of private rights of action, do such rights exist? A default rule, principle, or presumption is necessary one way or the other. The legal system cannot proceed without them. The question is not whether to have statutory default rules but which statutory default rules to have.

Some default rules¹⁵² may be designed to find out the legislature's actual

150. *See, e.g.*, *Petermann v. Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (holding that "in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for a unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury").

151. *See generally* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 453-54 (1989).

152. As the previous paragraph suggests, the term "rules" is not entirely accurate. Sometimes the background understandings operate as presumptions or principles, not as rules. I use the term "rules" as a placeholder for a wide range of background understandings, many of them, technically speaking, not rules at all.

instructions. Such rules are the analogue, in statutory interpretation, of market-mimicking default rules. But statutory default rules might also operate to elicit information, with the purpose of encouraging Congress to act in a certain way, by creating appropriate incentives. Courts might, for example, ask which party is in the best position to correct any errors in Congress or ask which approach is likely to ensure that Congress will legislate clearly. Some of Justice Scalia's jurisprudence is best understood as a series of information-eliciting default rules. Textualism itself has, as part of its defense, the idea that it will encourage Congress to state its will clearly. Similarly, the ban on use of legislative history imposes on Congress an incentive to say what it means in the constitutionally favored form. We can also understand some statutory default rules as having purposes not involving congressional instructions; these are the analogue to "public policy" defaults in the law of contract. Consider the ideas that statutes will be construed favorably to Native Americans,¹⁵³ that statutes will be construed so as not to raise constitutional doubts,¹⁵⁴ and that statutes will be construed so as not to preempt state law.¹⁵⁵

Justice Scalia is, as noted, skeptical of these kinds of interpretive principles, on the ground that they have unclear foundations in sources external to judicial will and are too likely to represent some judicial "power-grab."¹⁵⁶ But some such principles are inevitable, and in any case Justice Scalia is not at all skeptical of the crucially important idea that statutory ambiguities will be resolved by the agency charged with implementing the relevant statute,¹⁵⁷ nor is he unwilling to qualify that very principle by reference to some clear statement principles that operate as information-eliciting defaults.¹⁵⁸ The contract law analogy shows that terms have no meaning without default rules and that there is a place for default rules that serve purposes external to the will of the parties; it also helps us disentangle the diverse functions of the interpretive principles favored or, for that matter, disfavored by Justice Scalia. In any case much work remains to be done on the relationship between default rules in contract law and default rules in the law of statutory interpretation.¹⁵⁹

153. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

154. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988).

155. *See, e.g.*, *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

156. *See supra* text accompanying notes 40-41.

157. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453-55 (1987) (Scalia, J., concurring).

158. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259-60 (1991) (Scalia, J., concurring) (invoking a clear statement principle against the extraterritorial application of American law, notwithstanding the view of the relevant agency).

159. I am grateful to Richard Craswell and Einer Elhague for valuable discussion of the analogy between contractual and statutory default rules.

III. THE CONSTITUTION AND THE COMMON LAW

Justice Scalia's attack on a version of common law constitutionalism, in favor of a species of originalism, raises a number of questions, and I will attend to only a few of them here.¹⁶⁰

A. *Originalisms*

Are we all originalists now? In the commentaries in this book, Ronald Dworkin¹⁶¹ and Laurence Tribe¹⁶² write as originalists, and with suitable qualifications, most of their work can fly comfortably under the originalist banner. For most participants in the continuing debates, the question is emphatically not whether the original understanding is controlling; it is how the original understanding is best understood. Some people think that the original understanding is best taken as setting out abstract moral principles.¹⁶³ Others think that the original understanding points to abstract principles¹⁶⁴—in the context of the ban on cruel and unusual punishment, for example, it “forbid[s] whatever punishments are in fact cruel and unusual.”¹⁶⁵ Still others think that however the original understanding is described, its provisions must be “translated” in order to be applied to new problems.¹⁶⁶

Justice Scalia claims that he does take the Constitution to embody “abstract principles.” What it sets forth “is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel.”¹⁶⁷ Thus, the Eighth Amendment is to be understood not by “what we consider cruel today” but instead by “the moral perceptions of the time.”¹⁶⁸ Of course, this formulation raises many

160. Thus I do not discuss, except in passing, the following questions: (1) Is Justice Scalia a good originalist? (2) Did the Framers understand constitutional interpretation in originalist terms, or did they favor some other method? (3) Is it appropriate for an originalist to focus on the particular expectations the original community had of a provision’s reach, or should originalists look elsewhere?

161. See Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 6, at 115.

162. See Tribe, *supra* note 37.

163. See, e.g., Dworkin, *supra* note 161, at 115, 126.

164. Dworkin, who says that he is a “semantic originalist,” is interested in what the Constitution “says,” and claims that what it “says” is a matter of abstract principles. See *id.* at 119, 122, 126. But what it “says” is a function of our account of interpretation, and it does not contain abstract principles unless we have decided, according to our (pre- or extra-semantic) account, that it should do so. Thus, Dworkin’s approach, insofar as it is about judicial review, must be rooted in arguments about institutional capacities. Dworkin expressly recognizes this point and makes some such arguments. See *DWORKIN*, *supra* note 57, at 373-79.

165. Scalia, *supra* note 37, at 145 (discussing Dworkin’s method of analysis and quoting Dworkin, *supra* note 161, at 115, 120).

166. See, e.g., Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 131-35.

167. Scalia, *supra* note 37, at 145.

168. *Id.*

questions. How do we characterize the moral perception of the time? At what level of abstraction? Apparently Justice Scalia believes that it must be characterized at a relatively low level of abstraction; his claim that the death penalty cannot possibly violate the Eighth Amendment's "abstract moral principle"¹⁶⁹ appears to be rooted in the fact that the moral principle held by the founding generation did not appear, to the Founding generation, to forbid the death penalty. But this raises many further questions. Does it follow that the Equal Protection Clause permits school segregation? That the national government, not bound by the Equal Protection Clause, can discriminate however it wishes? That the First Amendment does not disturb the common law of libel?

Justice Scalia does not answer these questions. I emphasize this point not to say that the originalist will necessarily arrive at unacceptable results,¹⁷⁰ but to suggest that there is not one kind of (canonical) originalism but a wide range of (plausible) originalisms. Justice Scalia has not adequately defended the particular kind that he favors.

B. *Originalism and Stare Decisis*

There is a pervasive problem for originalists: how to handle precedents that depart from originalism. In many areas of constitutional law, originalism as Justice Scalia understands it has been repudiated for a fairly long time, and key provisions now mean something other than what, on Justice Scalia's version of originalism, they were originally understood to mean. The question goes to the heart of the relationship between the Constitution and the common law method. Common law lawyers rely heavily on the doctrine of *stare decisis*; it is a foundation of their method. How should those skeptical of common law constitutionalism deal with the resulting doctrine?

Commenting in this volume, Professor Tribe argues that Justice Scalia is not really an originalist at all. Tribe objects that in several First Amendment cases (involving flag burning,¹⁷¹ cross burning,¹⁷² and animal sacrifice¹⁷³), Justice Scalia has voted to strike down statutes not inconsistent with the original understanding, narrowly understood.¹⁷⁴ But Justice Scalia acknowledges the problem. He answers that his votes are attributable not to a belief that the First Amendment sets out aspirations whose content changes over time, but to the unblinkable fact that for the First Amendment "the Court has developed long-standing and well-accepted principles (not out of accord

169. *Id.*

170. See *infra* notes 194-196 and accompanying text

171. See *Texas v. Johnson*, 491 U.S. 397 (1989)

172. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

173. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)

174. See Tribe, *supra* note 37, at 80-81

with the general practices of our people, whether or not they were constitutionally required as an original matter) that are effectively irreversible.”¹⁷⁵ The point of originalism is thus not to “roll[] back . . . accepted old principles of constitutional law” but to reject “usurpatious new ones.”¹⁷⁶ Justice Scalia explains in this fashion his recent votes against “novel constitutional rights”—the right against excessive damage awards,¹⁷⁷ the right against being excluded from government contracts because of party affiliation,¹⁷⁸ and the novel constitutional ban on some single-sex schooling.¹⁷⁹

Now, this is a large problem, faced in some form by every Justice, and Justice Scalia cannot be faulted for failing to resolve it in a brief essay and an even briefer reply to critics. But the difficulty with his claim here is that it is very hard to know when an originalist judge, concerned to respect precedent, is applying “accepted old principles” or instead creating “new constitutional rights.” Would it not be equally plausible to say that in the nonoriginalist judgments that Justice Scalia joined the Court created new rights, for example the right to burn the flag and the cross, and the right to sacrifice animals? Would it not be plausible to say that in the judgments from which Justice Scalia dissented,¹⁸⁰ the Court largely applied principles developed in older cases forbidding government from using outmoded sex stereotypes as a basis for segregating schools¹⁸¹ or from conditioning employment on party affiliation?¹⁸²

To answer these questions, everything depends on the level of generality at which old principles or new rights are described. The precedents in such areas as sex equality are well-entrenched, and Justice Scalia offers no basis on which to distinguish between a refusal to create “new rights” and a willingness to follow “old principles.” There is also a risk that the originalist judge, refusing to extend the principles reflected in old cases, will ensure incoherence in the law, and thus a form of unfairness, since similarly situated people will not be treated similarly. This might be referred to as the *Bowers v. Hardwick*¹⁸³ problem: “Thus far and no more!” does not produce much

175. Scalia, *supra* note 37, at 138. It is worthwhile to note that there are two points here: judicial understandings and consistency with “general practices of our people,” a notion that raises questions of its own.

176. *Id.* at 139.

177. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1610-14 (1996) (Scalia, J., dissenting).

178. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2361-74 (1996) (Scalia, J., dissenting).

179. See *United States v. Virginia*, 116 S. Ct. 2264, 2291-309 (1996) (Scalia, J., dissenting).

180. See, e.g., *O’Hare Truck Serv., Inc.*, 116 S. Ct. at 2361-74 (1996) (Scalia J., dissenting); *United States v. Virginia*, 116 S. Ct. at 2291-309 (1996) (Scalia J., dissenting).

181. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

182. See *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

183. 478 U.S. 186, 194-95 (1986) (arguing that the Court should not expand the category of fundamental rights).

coherence in the law.¹⁸⁴ Perhaps this sacrifice is inevitable and worthwhile—if it is the only way to restore judicial legitimacy without renovating existing law—but it creates problems of its own. To decide whether the resulting incoherence, and dissimilar treatment of the similarly situated, are worthwhile, it is necessary to balance the extent of the unfairness against the value of preventing further mistakes. This is a large problem, faced by anyone with confidence in a particular method of interpretation, and I cannot resolve it here.

C. *Why (and Which) Originalism?*

As Justice Scalia knows and acknowledges, the original understanding cannot be decisive simply because it *was* the original understanding. A defense of using the original understanding must itself be independent of the original understanding and thus must be made out in terms of political theory and good empirical assessments of institutional competence.¹⁸⁵ Lawyers cannot defend use of the original understanding, let alone any particular species of originalism, by reference to history. (Nor can they defend an approach other than Justice Scalia's by reference to originalism.) The question of whether the original understanding of an old text should bind current generations is not at all simple—why on earth should current Americans be bound by some understandings of some votes by some segment of the citizenry over two centuries ago?¹⁸⁶—and a reference to “democracy,” though a good start, cannot provide the necessary legitimation.

Justice Scalia suggests that his version of originalism will limit the policymaking authority of federal judges, and this is very plausibly true. But he also suggests—and this is mostly how he makes his argument—that judges have only two real alternatives: Follow the original understanding as he understands it or basically do whatever they want. This is implausible. Both originalist and nonoriginalist judges come in many different stripes, and the

184. I am pointing here to violations of integrity, as Dworkin understands that ideal. See DWORKIN, *supra* note 57, at 176-224.

185. Justice Scalia sees this point and refers to separation of powers, see Scalia, *supra* note 7, at 9, and to democracy, see *id.* at 9-12. These are certainly good places to start, but as we will see they are no more than that. It is necessary to specify these concepts in order to get them to do the necessary work, and the ideal of democracy by itself does not support originalism or a constrained judicial role. See MASHAW, *supra* note 118, at 201-02 (discussing flaws in the usual presentation of the counter-majoritarian difficulty). This ideal is too abstract and contested to support a particular view of interpretation, and, for reasons suggested below, see *infra* text accompanying notes 189-193, once specified, the ideal is best understood to allow courts a modest but hardly trivial role.

186. Of course, the ratifiers excluded all women and most African Americans. In fact, the question why the Constitution itself is binding is not entirely simple. To say that it is not simple is not to suggest that we should not take it to be binding; undoubtedly we should, partly for simple, pragmatic reasons. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 93-102 (1993). But the mix of arguments that make the Constitution binding do not make the original understanding, as Justice Scalia would describe it, binding. See *id.*

distinctions among them require a good deal of attention. Since Justice Scalia describes the alternative to his brand of originalism as free floating constitutional creativity, the discussion is unduly loaded from the beginning. The debate over methods of constitutional interpretation cannot sensibly be resolved by suggesting that anyone who disagrees is inviting judges to rule as they wish.

Let us imagine some more reasonable alternative positions. We can imagine judges who care a great deal about history, but who explore history to identify not particular understandings of particular problems, but overall goals and purposes. We can imagine judges who think, for example, that the First Amendment, understood in light of its historical roots, is centered above all on the preconditions for democratic self-government,¹⁸⁷ and that this idea calls for some particular results contrary to the originalist understanding—for example limits on use of the law of libel by public officials. We can imagine judges who think that interpretation calls for something like an act of translation to accommodate new circumstances, including unforeseen developments not only of fact but also of value.¹⁸⁸ Attentive to issues of democratic theory and the rule of law, such judges may well try to devise strategies to reduce their own discretion and policymaking authority. They might, for example, care a great deal about precedent, using previous holdings and rationales to discipline their own discretion. They might also think that courts should be reluctant to invalidate outcomes of electoral processes unless it is very clear that something has gone wrong.

Such judges might emphasize—and this is particularly important—that the case for judicial intrusion is strongest, under an ambiguous constitutional provision, when there is some defect in the process of democratic deliberation that gave rise to the relevant law.¹⁸⁹ Despite Justice Scalia's presentation here, democracy should not be identified with the outcomes of majoritarian politics; it is no mere statistical affair. Whatever emerges from a particular political process should not be identified with the ideal itself.¹⁹⁰ Democracy comes equipped with its own internal morality,¹⁹¹ which constrains what a

187. See Justice Breyer's suggestion to this effect in *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1204 (1997) (Breyer, J., concurring).

188. See generally Lessig, *supra* note 53.

189. Of course, JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), is the classic statement of this position.

190. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 274-86 (William Rehg trans., 1996). For relevant work from quite different angles, see AVISHAI MARGALIT, *THE DECENT SOCIETY* (Naomi Goldblum trans., 1996), which suggests that a decent society ensures that its own citizens will not be "humiliated" by official institutions; and MASHAW, *supra* note 118, at 202, which suggests that "a moment's reflection on the teaching of voting theory makes clear that whatever the difficulty with judicial review, countermajoritarianism is an odd way to put the problem." Margalit's suggested ban on official humiliation might well be taken to be part of democracy's internal morality. Cf. *Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding that an amendment to the Colorado Constitution denying legislative, judicial, and executive antidiscrimination protection to homosexuals violated the Equal Protection Clause).

191. See HABERMAS, *supra* note 190, at 274-86; SUNSTEIN, *supra* note 186, at 162-94.

majority may do, consistent with the commitment to democracy. A majority may not, for example, disenfranchise people, impose a regime of political inequality, or act solely on the basis of contempt for fellow citizens.¹⁹²

Judges of this kind come in many shapes and sizes; they might well think of themselves as originalists. What matters is that such judges are much influenced by the common law tradition, and it is by no means clear that judges of that kind have less legitimacy or are worse than originalist judges of the kind that Justice Scalia favors. A federal judiciary that proceeds in common law fashion and that treats constitutional rights as aspirations (given content by concrete cases and invoked sparingly to invalidate the outcomes of ordinary politics) might well, because of its very insulation, produce a better system of constitutional democracy. It might do so because it has certain advantages in deliberating on questions of basic justice,¹⁹³ or—in my view far more likely—it might do so because and to the extent that it focuses on ensuring the preconditions for a well-functioning democratic regime. Justice Scalia thinks that, even if this is true, a judicial role of this kind is fundamentally illegitimate and without authority, because it is not authorized by the Constitution. But the Constitution does not set out the principles governing its own interpretation; certainly the Constitution itself does not contain an interpretive principle of originalism. Any judgment about the appropriate content of governing interpretive principles must invoke not the Constitution but political theory of some kind. The claim that the text must be interpreted in light of the original understanding as Justice Scalia conceives it is not an implausible argument. But it depends both on contested ideals and on highly contingent and largely empirical claims about what system of interpretation is likely to be or to do best, all things considered.

For America, what system of interpretation would in fact be or do best? The past offers no clear answer, but it is a good place to start. It is highly relevant that an originalist approach of the sort favored by Justice Scalia would have very dramatic consequences (not acknowledged or discussed in his essay).¹⁹⁴ Such an approach may well, for example, mean that *Brown v. Board of Education*,¹⁹⁵ the cornerstone of modern equal protection doctrine, is wrong; that *New York Times Co. v. Sullivan*,¹⁹⁶ the cornerstone of modern free speech doctrine, is also wrong; that the Establishment Clause does not

192. This latter point underlies *Romer v. Evans*, 116 S. Ct. at 1627, see also Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59-64 (1996).

193. See BICKEL, *supra* note 57, at 23-28. A more recent version of the argument can be found in DWORKIN, *supra* note 57, at 373-79.

194. I am not arguing that originalism of the form that Justice Scalia defends would inevitably produce these outcomes. I am only suggesting that it is a serious possibility. There are continuing disputes about whether originalism would support outcomes of the kind discussed in the text, and a possible reaction to those debates is that often the historical materials leave ambiguities or gaps and nonhistorical judgments must be used, and are being used, to resolve the ambiguities.

195. 347 U.S. 483 (1954).

196. 376 U.S. 254 (1964).

apply to the states; that affirmative action raises no serious issue; that the federal government can discriminate on the basis of race and sex however it wishes; that nearly all sex discrimination by the states is unobjectionable; that compulsory school prayer is constitutionally acceptable; that, in short, most of modern constitutional law, now taken as constitutive of the American constitutional tradition by Americans and non-Americans alike, now taken as symbolic of our nation's commitment to liberty under law, and, for the last decade in particular an inspiration for constitution-making and constitution-building all over the globe, is illegitimate and fatally undemocratic. An approach that leads to conclusions of this kind may not be disqualified for that reason, but these possibilities show that slippery slope arguments can work in both directions.

Justice Scalia may believe that consequences are irrelevant.¹⁹⁷ It is tempting to think that the choice among interpretive approaches should not depend on outcomes; an important guarantee of neutrality might even be found in indifference to outcomes. But I think that this is a confusion. There is this much to be said for indifference to outcomes: Once an interpretive approach has been properly selected, it should not be abandoned simply because it produces a bad outcome. But any approach to interpretation must be defended partly by reference to its consequences, broadly conceived, and the set of relevant consequences includes emphatically its effects on human liberty and equality. No approach to interpretation can be defended without reference to the human interests that it affects. If consequences, broadly conceived,¹⁹⁸ do not matter, what does?

My central point is that other approaches to interpretation, whether or in whatever sense originalist, can accommodate our constitutional tradition as it has come to be understood without, at the same time, authorizing judges to do whatever they want. Justice Scalia is correct to say that common law thinking lies at the heart of American constitutional law.¹⁹⁹ But this way of thinking should be seen as part of judicial modesty, not judicial hubris. Certainly it allows for a degree of flexibility. But it also comes with its own constraints on judicial power, brought about through the doctrine of *stare decisis*, close

197. He may also believe that the results, to the extent they are objectionable, would find a legislative remedy. If this is so, his argument would be much strengthened, but there is little reason to believe that this is the case.

198. Of course, I do not suggest that consequences must be understood in utilitarian terms. A claim about consequences might be made out in terms of democracy, protection of basic rights, promotion of human capabilities and functionings, and much more.

199. It is important to emphasize that judicial discretion cannot be eliminated by the interpretive methods of civil law courts, or even by formalism, which will inevitably leave gaps. Indeed, there is a substantial overlap between the interpretive practices of common law and civil law courts, which use similar presumptions and canons, linguistic and substantive. See Summers & Taruffo, *supra* note 73. For a discussion comparing European civil lawyers to American lawyers, see Mary Ann Glendon, *Comment, in A MATTER OF INTERPRETATION*, *supra* note 6, at 95 *passim*.

attention to the details of cases,²⁰⁰ and a general reluctance to issue rules that depart much from the facts of particular disputes. It is part and parcel of the judiciary's distrust of large theories and its ordinary search for concrete outcomes and cautious principles on which theoretically diverse judges may agree.²⁰¹ Common law thinking is even connected with the Supreme Court's general and entirely appropriate reluctance to disturb the outcomes of political processes. To the extent that it partakes of ambitious theories at all, common law thinking, in its current incarnation in American public law, largely attempts to protect the workings of a well-functioning system of democratic deliberation. Of course, courts with the abilities of "broken-field runners" may be able to circumvent these constraints on judicial discretion. There are no guarantees here. All I mean to suggest is that the obligation to respect precedent and to proceed cautiously tend, in practice, to make constitutional law in its common law incarnation more open-ended than it might appear, even if less open-ended than those fearful of judicial discretion would wish.

From the standpoint of promoting democratic ideals, it is hardly clear that Justice Scalia's form of originalism is preferable. I have said that the choice of an approach to interpretation requires a judgment about political theory, and that means that the choice requires the specification of the right content of the democratic ideal. If democracy is not identified with the outcomes of majoritarian politics, and if its internal morality constrains what majorities may do, the American constitutional tradition has converged on an alternative far superior to Justice Scalia's approach.²⁰² From the standpoint of constraining judicial discretion, the common law method of constitutional law, properly understood, is at least a plausible competitor to Justice Scalia's form of originalism, in light of the many difficult questions that historical inquiry leaves unresolved and the difficulty of matching that form of originalism with a theory of stare decisis. If we are concerned about limiting judicial intrusions into politics, Justice Scalia's form of originalism may well be inferior to our tradition in its modern incarnation.²⁰³ That form of originalism is probably better at promoting predictability and stability. But these are hardly decisive virtues, and it is not clear that there is any other dimension along which Justice Scalia's approach is preferable to the serious alternatives.

200. Cf. Itzhak Gilboa & David Schmeidler, *Case-Based Decision Theory*, 110 Q J ECON 605 (1995) (arguing that people commonly select particular acts based on such acts' performance in similar circumstances).

201. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996), cf. Strauss, *supra* note 5, at 926-28 (discussing how common law constitutionalism influences judicial restraint)

202. Of course, there are questions about how to identify democracy's internal morality, and if judges were incompetent at that task, it might make sense to adopt Justice Scalia's form of originalism

203. Recall that Justice Scalia thinks that his form of originalism would doom far more legislation than the current approach, in areas involving property rights, Second Amendment rights, and Confrontation Clause rights. See *supra* text accompanying notes 49-51

IV. CONCLUSION

The distinctive virtues of the common law stem from the relative independence of common law judges, their caution about high theory, and their intense focus on particulars. These virtues allow a high degree of flexibility over diverse circumstances, prominently including those produced by new facts and values. These virtues are inseparable from the distinctive vices of the common law: its imperfectly democratic character, its lack of theoretical ambition, and its particularity, which may impede planning and lead to unfairness because the similarly situated are not treated similarly and because the judges' own judgments of value or fact play an excessive role. An effort to evaluate the place of common law thinking would do well to come to terms with the realities of the modern state, prominently including the large role of regulatory agencies, which engage in statutory interpretation far more frequently, and with far larger consequences, than do federal courts. Administrative agencies are law-interpreters, both in fact and in law, and it is striking that modern theories of statutory interpretation rarely come to terms with that phenomenon.²⁰⁴

Justice Scalia's approach to interpretation—democratic formalism—has two foundations: a strong commitment to rule-bound justice and a desire to ensure that discretion is exercised by democratically elected officials rather than by judges. Hence his overriding goal is to exorcise the common law from public law. He is correct to emphasize the common law heritage of the American legal tradition and much of modern public law: judicial treatment of many statutes as standards rather than rules; doctrines of interpretation that operate as standards or factors; and, perhaps above all, a system of case-based constitutional law that owes a great deal to the common law heritage.²⁰⁵ Many observers, above all Judge Calabresi, have celebrated common law methods and sought to reintroduce the virtues of common law judgment into a regulatory state founded mostly on statutory enactments. Justice Scalia's goal is the opposite: to reduce particularity in the hope that it will increase predictability, constrain the abusive exercise of discretion by judges, and increase democratic self-government by imposing good incentives on Congress.

Others might urge courts to make regulatory agencies a central ingredient in their theory of interpretation, on the theory that the traditional common law role of courts would be best carried out by administrative agencies authorized to make sense of statutory text²⁰⁶ when new applications arise, or when facts

204. This is a gap not only in Justice Scalia's essay, but also in DWORKIN, *supra* note 57. The administrative state has yet to be introduced into general accounts of legal interpretation. Here there is a great deal of room for positive and normative work.

205. See Strauss, *supra* note 5, for the best discussion of the way in which the common law explains and justifies current American constitutional law.

206. Of course, this claim does not mean that agencies may violate statutes. The claim is intended to allow agencies to handle ambiguities and excessive generality, subject, of course, to judicially administered

and values change. This is an approach toward which I have gestured in this Book Review, on the ground that it has the virtue of fitting nicely with the needs, values, and actual practices of modern government. Thus, I have attempted to sketch an alternative approach to interpretation, one that also places a premium on democratic values and that uses clear statement principles, agency interpretations, and democratic ideals to supplement and occasionally countermand the text as understood at the time of enactment. In statutory interpretation, this approach would allow regulatory agencies some room to adapt text to particular circumstances and would authorize courts, supplementing that agency role, to use canons and presumptions to make sense rather than nonsense out of the statutory law. In constitutional interpretation, this approach would combine a large dose of judicial modesty, favoring incompletely theorized agreements, with an occasional willingness to invoke the internal morality of democracy to look skeptically at laws that compromise the political process or attempt to impose second-class citizenship on members of disadvantaged social groups. My suggestion is that an approach of this sort would do far better than democratic formalism from the democratic point of view, that it would impose sufficient constraints on judicial power and judicial discretion, and that its only comparative defect, a modest one, is that it may suffer along the dimension of promoting predictability.

There is nothing wrong with Justice Scalia's arguments in the abstract. In an imaginable world, not unrecognizably far from our own, some or all of those arguments might become convincing. But there is also nothing right about Justice Scalia's arguments in the abstract. Whether those arguments are convincing depends on a range of practical and predictive judgments about the capacities of different governmental institutions. Justice Scalia does not defend the necessary practical or predictive judgments or even identify them as such. He writes instead as if his particular, sometimes radical, conclusions can be grounded in apocalyptic arguments about the slippery slope²⁰⁷ and in high-sounding abstractions about democracy.

It is to Justice Scalia's credit that he has laid out an approach to interpretation with a high degree of clarity and coherence. It is to his credit too that he has sketched an approach to interpretation that might make sense in some imaginable world. What he has not shown is that it makes sense in ours.

clear statement principles. For an example of restrictions on agency interpretive powers, see *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257-59 (1991), which uses a presumption against extraterritorial application of national law to trump an agency's view.

207. For example, Justice Scalia writes.

If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants . . . This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.

Scalia, *supra* note 7, at 47.