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ORIGINALISM, VINTAGE OR NOUVEAU: “HE SAID, SHE SAID” LAW

*Tara Smith**

INTRODUCTION: AN OVERVIEW OF ORIGINALISM’S BASIC FAILURE

I begin with a brief overview of originalism’s central failings. I then consider three lines of defense that help to explain its resilient appeal and proceed to critique those three lines of reasoning. Through its various incarnations, I contend, originalism is guilty of a fatal contradiction.

Law represents coercion. A legal system governs by force; that is the tool that gives teeth to its rules. I say this not as an indictment of law or of government; it is simply a fact—a fact that is significant to the proper conduct of judicial review.

A legal system also works by words, which state the authority that it does and does not possess and how its coercive power will be used. This is why an account of the meaning of words is so pivotal to the exercise of legal power.

Originalism is a theory of judicial review that centers around words’ meaning. It holds that the meaning of the Constitution should be settled by reference to the original understanding of those who enacted it. The law means what it meant according to conventional usage of its terms at the time it was adopted. In this way, the law’s meaning is fixed.¹ Coming after earlier waves of Intentions Originalism, Textualist Originalism, and Public Understanding Originalism, “New” Originalism is where things grow murky, for me. For the term has been used to refer to a number of different things:

- The Public Understanding version of originalism that is most associated with Keith Whittington and Randy Barnett

* Professor of Philosophy, University of Texas at Austin. Numerous people have given me valuable thoughts either on drafts of this paper or on some of the larger issues that it addresses. Special thanks to the organizers and participants at the extremely worthwhile *The New Originalism in Constitutional Law* Symposium, as well as to Onkar Ghate, Robert Mayhew, Greg Salmieri, Pete Boetke, Larry Salzman, Tom Bowden, Dana Berliner, and Lin Zinser. This Article retains some of the informal tone of oral remarks originally given at the Symposium.

1. I will speak of the meaning of the Constitution and the meaning of the law largely interchangeably. While different considerations might enter into the full determination of the meaning of one as opposed to the other, for our purposes, these should not matter. For a good, fuller statement of the basic originalist view, see Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 77 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

- The emphasis on constitutional construction, prominent in the work of Barnett and Larry Solum
- The “New Textualism” of Akhil Amar—a holistic view of meaning that seeks to honor law’s original meaning, but that understands “original” as part of a more complete context that involves an unwritten constitution to supplement the written
- “Progressive Constitutionalism,” the “Living” Originalism of Jack Balkin and others, in which longtime opponents of originalism now justify their reading of law by originalist methods²

Rather than pursue the obvious question of *how* originalist these new-fangled forms truly are, I will concentrate on the throughline, the shared essence uniting all professed originalists: roughly, the belief that the objective understanding and application of law today requires fidelity to its original meaning.

There is much that is right-minded in originalism, I think, particularly in what it opposes. Yet when we examine its own prescriptions for judicial review, we find that it does not capture those considerations needed to glean the objective meaning of the law. My central contention is that all forms of originalism worship the wrong god: originalness of meaning. In doing so, what originalists actually honor is not the meaning of the law, but the first *meaners*. And this subverts the very thing that originalists wish to protect: the rule of law.

Originalism espouses deference—that is, judicial restraint. A court must refrain from overstepping its authority or imposing its will. “We are like umpires,” originalist jurists maintain; “we are mere messengers, conveying the meaning that we’re given, set by those who came before.”³ The problem is that this method of judicial review outsources the dirty work to justices’ predecessors—the difficult, controversial work of logically sorting out the meaning of abstract concepts (such as *search*, *commerce*, *public use*, and *equal protection*) and their proper application to specific cases. In practice, originalism elevates “who” over “what.” Rather than explaining *why* a certain meaning is in fact the valid understanding of a law, it points to predecessors, observing, “This is what they thought”—and treats that as conclusive.

Yet even when originalists’ history is accurate and they do nail what previous legal officials thought, that does not provide the objective meaning

2. Sandy Levinson would be another of the “turned” former critics. Solum has provided a useful account of New Originalism which seems to capture the major features that are increasingly commonly accepted as the distinguishing marks of this school. *See id.* at 2–4, 54–58. On construction in particular, *see id.* at 22–26, 69–71.

3. This characterizes the basic view. For a specific such statement, see JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 281 (2007) (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (“Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.”)).

of law. Originalism conflates objective meaning with original meaning.⁴ On their view, all we have to go by is someone's say-so: theirs or ours—people then, or us, now. What originalism heeds is ultimately not *what* is said and its actual meaning, but the beliefs of the figures saying it. It thereby skirts the critical question and reduces law to a “he said, she said” dispute, providing nothing stronger than clashing assertions. Originalism honors what earlier lawmakers did *in a way* that glorifies the sheer fact of their having said it. Consider: according to originalism, what validates those specific laws that our predecessors adopted? The fact that they spoke first. But this grants unjustified authority to the saying.

The saying matters, to be sure; it *is* necessary. But it is not sufficient. And that is the originalist mistake: supposing that courts should defer to the date of a belief about meaning rather than the substance of the belief—to *when* an idea was expressed rather than the actual meaning of what was said. (This should become clearer in my discussion of the originalists' portrait of language in Part II.)

So, if originalism is as misguided as I suggest, why do bright people continue to embrace it? Its various iterations have long been subjected to incisive, sometimes devastating criticism from many quarters, yet it stands as the single most widely advocated theory of judicial review—certainly at the popular level, but increasingly, also in the academy.

I. ORIGINALISM'S RESILIENCE: THREE LINES OF APPEAL

What is the appeal of originalism? What is the magnet luring us to the past, the “original”? At least three significant ideas help us understand the hard-to-deny sense that *something* is right about it.⁵

4. The objectivity of original meaning is assumed by most originalists (although this is often implicit rather than explicit). Among those who make the assumption explicit, Randy Barnett has claimed that Public Understanding Originalism represents an advance “from subjective to objective meaning.” RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 94 (2004). Barnett equates the public meaning with the objective meaning when presenting the core meaning of the public understanding view. *Id.* at 92.

I have critiqued this confusion of the two in detail. See Tara Smith, *Originalism's Misplaced Fidelity: 'Original' Meaning Is Not Objective*, 26 CONST. COMMENT. 1 (2009) [hereinafter Smith, *Misplaced Fidelity*] (focusing on Public Understanding Originalism); see also Tara Smith, *Why Originalism Won't Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159 (2007) [hereinafter Smith, *Common Mistakes*] (considering a variety of schools but treating Scalia's textualist species of Originalism at some length). Widespread misconceptions concerning the nature of objectivity itself exacerbate confusions in understanding the objective meaning of law. It is especially important not to equate group subjectivism (the fact that a large number of people share the same view) with objectivity. It is the basis of a view that is pivotal to its objectivity, not the number or character of a view's proponents. I examine some of these issues in a book-in-progress, tentatively titled *Judicial Review in an Objective Legal System*. Tara Smith, *Judicial Review in an Objective Legal System* (Oct. 21, 2013) (unpublished manuscript) (on file with author) [hereinafter Smith, *Judicial Review in an Objective Legal System*].

5. These three are not exhaustive and certainly can be described and packaged differently. Solum, for instance, claims that originalism is founded on two principal

A. *The Rule of Law and Protection Against Political Contamination*

First, originalism seeks to maintain the rule of *law*—as opposed to subjecting us to the arbitrary preferences of those who happen to hold office at a given time (the men and women on the bench or in any branch). It honors the distinction between law and politics. If we are truly to be governed by law, judicial review must be apolitical. Courts' actions should not extend into the work of the so-called political branches.

B. *Judicial Self-Discipline*

While the first line of appeal is a point about law, the second features a belief about human nature: we are weak. Even without intending to, we often indulge biases. Strict adherence to original meanings is thus a precaution, a prudent safeguard to protect against unwitting subjectivism. Experience teaches that people's judgment is often slanted. The higher the stakes, the greater the likelihood of "motivated reasoning"⁶ or rationalization. The originalist humbly recognizes that men's judgment cannot be trusted. Who are *they* to say what the law means? ("They" being those guys on the bench.) Thus, to rein in political animals and minimize the danger of even inadvertent judicial bias, originalism locks the liquor bin by insisting on a posture of pure deference to lawmakers. Its method limits the opportunity for wayward considerations to infect legal analysis.

The reasoning here is straightforward: if judges are to uphold the law rather than to make law, then when questions of a specific law's meaning and application arise, judges should take their cues from those who made the laws by asking, "What did *they* mean?" and be guided by the answer. If other men hold the authority to make the law, those men's understanding of *what* they made should be sovereign, shouldn't it? A court proceeding by anything other than that would subvert lawmakers' authority and, as such, undermine the governance of the law. So this second worry concerns the potential corruption of law by any method other than devotion to original meaning.⁷

C. *An Account of Language: Respect What Speakers Meant*

Finally, a third line of support: originalism stands on a commonsense plank about language, namely, the belief that words' meaning cannot be severed from what *speakers* meant. In order to be faithful to the law, we must be faithful to the expression of the law and what the authors meant by

arguments, emanating from the ideals of popular sovereignty and the rule of law. *Solum*, *supra* note 1, at 62.

6. This is a term used to refer to thinking or decisionmaking that is skewed by the thinker's desire to favor certain beliefs or conclusions. For example, if I *want* to think that I have compelling reasons to vote for my brother in the local mayoral election, I may unconsciously distort my thinking process in ways geared to make that conclusion seem more reasonable than it otherwise would.

7. See BARNETT, *supra* note 4, at 105–06, 116–17; KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50–61 (1999).

the words that they used. Originalism, allegedly, is our only means of doing so.⁸

Lawrence Solum has offered an especially robust version of this reasoning.⁹ Solum contends that anyone ever making a constitution, whether today or in the past, must be an originalist insofar as he must rely on words to maintain constant meanings.¹⁰ That is, a necessary presupposition of the enterprise of adopting laws that will govern into the future is that the words that convey the law retain the meanings that they have when they are adopted as the law. This is vital to a constitution being able to do its work. “In the shoes of the framers of a new constitution,” Solum argues, “we would have no choice but to be originalists. The original public meaning of language would be the only tool we had.”¹¹ As a result, “whatever we wanted to accomplish, we would need to rely on the conventional semantic meanings and the rules of English syntax and grammar.”¹² In effect, the contention is, we are all in the iron grip of originalism, whether we recognize it or not.¹³

Again, I find a lot to like in originalism. These rationales reflect worthy values: the rule of law, fidelity to language and to law, and the desire to responsibly discipline ourselves against possible blindness to inappropriate favoritism. These are laudable ends. Problems surface when we look into what originalists mean by some of the pivotal concepts, however, and the conclusions that they draw.

II. A CRITIQUE OF THE THREE LINES OF DEFENSE

Despite their natural appeal, none of these lines of reasoning can withstand scrutiny.

A. *Critique of the Rule of Law Argument, Protecting Law from Politics*

Concerning the originalists’ first line of defense, it is certainly appropriate to insist on prizing the rule of law and protecting law from politics.¹⁴ Yet, in their effort to prevent contamination by judges’ personal preferences, originalists, in effect, shrink the law, omitting a crucial

8. Whittington and Barnett forcefully present this view. See BARNETT, *supra* note 4; WHITTINGTON, *supra* note 7. Larry Alexander has vigorously advocated a variant of this thinking that especially emphasizes the role of authors’ intentions. See generally Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539 (2013).

9. Solum, *supra* note 1, at 75–76.

10. See generally *id.*

11. *Id.* at 76.

12. *Id.* at 75.

13. See Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 38–69 (2009) (discussing a related argument in an analysis of “Hard” Originalism); see also JAMES E. FLEMING & SOTIRIOS A. BARBER, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 94–97 (2007).

14. All three are related, and full answers to each involve more than I can present here. I offer somewhat fuller discussion of some of these issues in other works. See Smith, *Misplaced Fidelity*, *supra* note 4; Smith, *Common Mistakes*, *supra* note 4; Smith, *Judicial Review in an Objective Legal System*, *supra* note 4.

component of what the law *is*. They contend that originalist methods are necessary to keep law apolitical. The problem is, the law *is* political. Not in licensing judges to distort law to advance their individual political preferences and not in being nothing but what the latest polls record a majority as wanting the law to be. But the law is political at a deeper level: in its origin and authority.

To explain, we should first recognize the different senses in which the term is used these days, as well as its often unflattering connotations. In everyday conversation, “politics” increasingly implies dirty politics—a coarse, ugly activity reflecting the baser regions of human nature. The political is widely associated with the unprincipled, the partisan, or the narrowly self-interested (the predator’s sense of interest). Somewhat less negatively, “leave it to the political process” usually means “leave it to the electoral process, let the voters decide.” For our purposes, it is most helpful to distinguish three common senses of the term.

First, “political” is sometimes used to refer to the subject matter of political philosophy—the fundamental issue of how people should live together in organized society. Its questions concern the role of government, man’s rights, equality, and so on—questions whose answers properly inform the construction of a legal system. Political philosophy subsumes the kinds of issues that Aristotle, Thomas Hobbes, John Locke, John Stuart Mill, and a long trail of thinkers have wrestled with over the centuries.

Once people have erected a government, another kind of political issue arises. In a second prevalent sense, the term “political” refers to disputes over proper uses of government power. What should our laws and associated policies be? Should we legalize gay marriage? Strengthen gun control? Commit troops to Syria? When we speak of people’s “political differences,” we are typically referring to their views on these sorts of questions.¹⁵

And third, the “political” can refer to questions of how to gain office or win influence over those in office. These are the concerns with elections, poll results, and popularity among demographic groups that dominate the “political news” that we wake up to on the radio and online each morning. It is the specialized work of coveted consultants such as Karl Rove and David Axelrod.

When I claim that the law *is* political, it is in the first of these senses: law is (properly) shaped by the broader conclusions of the political philosophy on which it stands. A legal system embraces and embeds certain ends as good. In saying this, I do not endorse legal moralism, but simply recognize the fact that any legal system is, inescapably, a *moral* system in one critical respect: it reflects a conviction about how coercive

15. Strictly, I think that these are distinctively legal questions that must be answered in a way that adheres to the governing political principles, but that further thought should not make a difference to our immediate concerns. What is important for assessing originalism is that we recognize the differences between the three senses of the term “political” that are commonly used.

power may be legitimately used against people. To make laws is to take a stand on the proper relationship between governors and the governed, a stand on the kinds of restrictions that it is legitimate to forcibly impose on people. In this specific philosophical sense, then, law is political, and judicial rulings about the meanings of laws must be informed by these premises.¹⁶

In a legal system that is worth maintaining, the law is not value vacant. Certain moral commitments are woven into its fabric. Readings of the law must interpret it accordingly, applying the law in ways that respect those values. When a court does so, it is not deviating from the rule of law, as originalists allege. It is simply respecting the full, relevant context.¹⁷

In a proper legal system, laws are not arbitrary mandates or ends in themselves. Originalism at times seems to reduce to a kind of Rulism: imploring us to honor rules as such, setting aside concern with why the rules exist and the reasons why they should be respected. On the originalist view, if a court considers anything beyond the sheer fact that *this* is what the law's words say and *this* is what original speakers thought that law meant, it is betraying both those speakers and the law. But that ignores the underlying commitments that animate a legal system's authority. Truly, the fundamental reason why we should follow laws (a legal system's moral authority) provides the context necessary for understanding individual laws' legitimate meaning. A "meaning" that exceeds the scope of a legal system's authority could not be valid.¹⁸

To frame this point in somewhat different terms: a legal system's reason for being rests in certain ends that are embraced as worthy. Choices must be made about the basic ends to be sought through the government's coercive powers. Properly, the laws of a given government are what they are, based on the belief that this set of laws will advance these particular ends. What those ends should be—egalitarian, libertarian, socialist, religious—will be a subject of dispute (as are many other types of "political" questions). "Subject of dispute" does not mean "incapable of correct answer," but simply: controversial. A legal system cannot eliminate value questions or the disagreements that they typically bring. Law is a

16. I am speaking of a proper legal system that aspires to hold authority for its actions, as opposed to simply possessing sufficient power to impose its will and compel submission.

17. For much more on why the rule of law is not a purely formal, value-neutral ideal, see Tara Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JURIS. REV. 49 (2011).

18. A little more precisely, it could not be a valid understanding of the provision *as law*, that is, as genuinely carrying the authority of law. It might be a valid understanding of the very same sequence of words, were those words used in certain different contexts. But this simply underscores the significance of context to objective meaning. For a similar thought, see Andrei Marmor's claim that the meaning of a constitution depends in part on the purpose of that constitution. Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577, 577, 593–96 (2013).

means of “doing values’ business” (some of that business, not all).¹⁹ It provides a practical service to substantive ends.

Two points emerge from this: First, every legal system is at least implicitly committed to certain overarching values. Second, and more salient to the critique of originalism, the logical interpretation of laws must be guided by those values, understanding particular laws as the *means by which* a legal system serves (or attempts to serve) those ends. And in this way, the law *is* political—it reflects the values endorsed by its underlying political philosophy.

So, to return more directly to the originalists’ argument, their concern for the judiciary’s respecting the rule of law is justified, insofar as it pertains to the separation of powers. Each branch must confine itself to its distinct role. The demand for apolitical judging, however, typically packages together two senses of “political” that are importantly different. What is true is this: courts should not engage in political decisionmaking of the type that is concerned with who should hold office, which laws to enact, or which specific policies will best serve the government’s mission. But courts should be political in the distinct sense that their understanding of specific laws must be rendered in full cognizance of the context of those political values that shape the law.

Note that this does not assign courts the very same role as political philosophers, who seek to determine what the proper ends of government are. Nor does it assign courts the role of those who design a constitution, which involves political philosophy in a different way. Nor does it assign courts the role of those under a constitution who are to enact specific laws or enforce them. Judges are not authorized to select political principles to implement by law. They are, though, to respect the political principles they find in the law.

And it is important to appreciate why this matters. An unwarranted insistence on apolitical judicial review encourages judges to try to do something that they cannot: to issue value-neutral decisions. Given that a legal system forces people to comply with its strictures, laws are not value-neutral and cannot be applied in value-neutral ways. If, in the conscientious attempt to avoid any whiff of the political, however, judges are not guided by those political values that are in the legal system, they will be compelled to import other values (however inadvertently or however well-intended). What is decisive under such a practice would not be the law (as properly understood in its full context), but subjective additions to the law. And as a

19. The proper domain of government is the particular subset of moral questions that concern individual rights to freedom from others’ forceful interference. The need for a government to protect this is not license for legal moralism (the imposition of which would in fact require violations of rights). The concept of rights addresses the question of individuals’ moral *jurisdiction* rather than the overall moral propriety of their actions. See TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM 21–23, 195–99 (1995) (discussing this concept in greater detail); Tara Smith, *Rights Conflicts: The Undoing of Rights*, 26 J. SOC. PHIL. 139, 141 (1995) (same).

result, we would suffer the very politicization that originalists wish to prevent.

To wrap up this point: there *is* a difference between law and politics that is important for courts to respect. But it is not the difference between value-charged politics on the one side and value-virgin law on the other. Law is not devoid of values, and judicial review should not pretend otherwise. The fact that the judiciary is not authorized to make laws that reflect values does not mean that the judiciary should be oblivious to those values that are in the law, nor that anyone should expect its rulings to carry no consequences for values. A legal system is a manifestation of certain value judgments. The originalist premise that courts should be apolitical typically rests on an impoverished conception of what the law is—in particular, of its moral character.²⁰

B. A Critique of Judicial Self-Discipline: Precaution Against Bias

The second defense of originalism casts it as prudent self-discipline against the temptations of bias. Here, too, the aim is laudable but the means are misguided.

One problem is simply double standards: Why doesn't the same humility about potential biases of judges apply to law's authors? If we are to assume that judges cannot judge objectively—if “who are they to say?” is reason for judges to defer to legislators—who are *they* to say? What special capacity do lawmakers possess by virtue of which they should be treated as if they *are* able to judge objectively?²¹

Recall the reasoning for this deference: if judges are to uphold the law rather than make it, then they should take their cues in interpreting law from those who made it. Lawmakers' understanding of *what* they made should be sovereign, shouldn't it?

Well, no. That would follow only on a faulty supposition: that lawmakers are infallible in the use of their constitutional authority. If courts must defer to *whatever* lawmakers enact, that would be the implication.

Now in its defense, originalism does not claim that courts must always defer to lawmakers. It holds that courts must defer to *original* meaning; thus if subsequent lawmakers enact a law at odds with that meaning, courts should strike that law down. This defense of originalism misses the point, though, simply shifting which lawmakers are regarded as immune from correction: original authors or later legislators. The deeper, common problem is that originalism treats “original meaning” as meaning *as set* by the law's makers, as those lawmakers dictate. It treats them not only as lawmakers but as meaning-makers. And that, they are not.

20. Thus, my earlier reference to originalism shrinking the law. *See supra* pp. 623–24.

21. The deference considered appropriate is sometimes to people other than lawmakers, such as those in the executive branch, certain kinds of experts, or the people at large. For simplicity, however, since my point clearly holds for any of these others, I will refer only to deference to legislators.

Under originalism, the lawmaking activity is regarded as irreproachable, beyond legal accountability. It is not. If it were, then the Constitution would be tissue—and the Constitution's authority, a joke.

Now, originalists will immediately object that in their view, the Constitution is the check on lawmakers, thus it is not endangered by anything that lawmakers under it might do. My point, though, is that the Constitution's protections are undermined by the originalists' *theory of language*—which applies to the makers of the Constitution as much as to those subsequently under it.

These are obviously large subjects that I cannot do justice to here. I will say more about the originalist theory of language in the next section, and I have elaborated on some of these issues elsewhere.²² More immediately, though, let me offer a few thoughts about originalism's ominous implications for authority.

The originalist account of language commits it to a particular view of law's authority, namely, that the ultimate root of legal authority is to be equated with what some people think. Because, on the originalist view, law's authority stems entirely from the meaning of the Constitution *and* because the meaning of the Constitution is taken to stem entirely from the authors' understandings of the words that they use, the effect is to award these authors whatever authority they claim. It treats them as *authority-makers*.

To frame this thought from a different perspective: according to originalism, where does legal authority come from? The meaning of the words in the law. And where does meaning come from? Why does "speech" mean *that*, or "equal protection" mean *that*? Because the law's originators thought that it did.

In other words, lawmakers get to confer authority upon themselves. They are treated as free agents, unconstrained in establishing the meaning of the law's provisions.²³

This is a mistake. On the belief that there is difference in kind between the power of a legal system and the authority of a legal system,²⁴ it follows that a legal system cannot be genuinely worthy of obedience merely because some men made that legal system and meant something by the

22. See generally Smith, *Misplaced Fidelity*, *supra* note 4; Smith, *Common Mistakes*, *supra* note 4; Smith, *Judicial Review in an Objective Legal System*, *supra* note 4.

23. Note that this is a distinct activity from adopting the provisions themselves. One does not use a code in the very same act of creating that code or assigning meaning to its constituents. A code can only be used once it has been set. Similarly, when it comes to lawmaking, one can believe that lawmakers are free to adopt whatever laws they think appropriate without holding that they are free to use language however they wish. My point is not to defend the former (some restraints on the law that lawmakers may make do apply), but to bring out the significant difference between the two.

24. A belief that is shared by just about all defenders of originalism, critics of originalism, and nearly everyone who debates the appropriate methods of judicial review. By "power," I mean the sheer might or ability to control people, and by "authority," I mean moral legitimacy. These are explained much more fully in Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 5–6.

words they used, when they did. On the originalist view of language, however, this is exactly what is held. Authority is a matter of somebody's say-so all the way down. Nothing other than that validates the legal system's presumed right to compel compliance with its strictures. I would argue, on the contrary, that others' say-so is not the source of individual rights—of a person's moral title to be treated as an end in himself and to lead his life as he likes—nor, correlatively, of a government's authority to rule him.²⁵

Again, the originalists' wish to resist even inadvertent judicial bias is commendable. And the defect in their position is not bad faith, as is often charged.²⁶ Rather, the problem rests in what they have faith in: original meaning *understood as* whatever a law's authors "meant" by the words used. I will say much more on this in the next section.

C. Critique of Originalism's Portrait of Language

Finally, let us turn to the third facet of Originalism's appeal: its professed respect for the discipline imposed by language.

And let's begin by revisiting the "iron grip" argument, the contention that the very enterprise of making a constitution commits us to the originalist account of word meaning, whether we realize that or not. While there is something right about this observation (namely, meaning requires a degree of stability), it does not show what Solum and company think it does. For it makes too basic a point—a point about the conditions of communication, truly—to support originalism's distinctive thesis (namely, that the correct way to determine what that meaning is, is by reference to the original lawmakers' beliefs about the referents of their words).

Notice that we would not even be able to discuss originalism if words' meanings were not constant in *some* way. Without that constancy, all intelligible communication would be thwarted. (Indeed, we would not be able to deny originalism, to criticize originalism, or to offer arguments supporting various alternatives to originalism.) Yet if Solum's observation about language is a necessary precondition of the very intelligibility of originalism, then it cannot be an argument *for* originalism. Its use in that role would beg the question; he would be taking for granted the same thing (the constancy of language's meaning) that he is purporting to demonstrate. (And if he intends to establish a claim more specific than meaning's need for constancy, then his observation that meaning requires constancy, although true, would not advance the case.) In other words, while Solum's observation is true, it is too primitive a truth about language to support the distinctive thesis of originalism.

25. See SMITH, *supra* note 19 (defending this view in depth); see also Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 5 (indicating this view's gist more briefly).

26. Obviously, some advocates of originalism may be guilty of that, but bad faith is hardly a danger unique to originalism.

The meaning of language *is* constant in an important respect, as the originalists contend, but what preserves its constancy is not what the originalists think it is. Objective meaning is anchored, at the most fundamental level, in the nature of the object referred to by a word and not in the beliefs of particular people using that word.²⁷

Originalists fail to adequately distinguish the speaker from the thing spoken. More exactly, their method of interpretation inflates the role of the speaker and deflates the roles of the word spoken and the law that is thereby enacted. We all understand²⁸ that what I say on a given occasion (the words that I write or speak) has an identity that is something other than what I mean (in the sense of what I intend to convey). Those are distinct phenomena. They can overlap in a given case (and usually do), but the meaning of a statement is not simply one and the same thing as that which I have in mind when uttering that statement. This is so for at least two obvious reasons: I could misspeak, or I could misuse words (i.e., speaking correctly by saying what I wish to say, but doing so on a misunderstanding of the meaning of the words that I use).

It is crucial to appreciate that people could not communicate unless words had meanings that were independent of their particular beliefs about the meanings of those words. We would have no way of accessing what it is that a person had in mind unless we used symbols (such as words) whose meaning was distinct from what users thought it was. Communication requires a medium to transmit what is in one person's mind to another

27. "Objects" here encompasses physical entities, actions, relationships, properties, etc. By "objective" meaning, essentially, I refer to meaning that is anchored in the actual nature of the object to which the word is being attached. A meaning is objective insofar as it reflects the deliberate, logic-guided attempt to accurately grasp and portray the distinctive character of the relevant phenomena (e.g., of those actions that are being identified as cases of "commerce" or as instances of "speech"). This entails that meaning is not determined by the beliefs or attitudes of a given group of people.

Here, I am obviously offering only an extremely abbreviated, rough characterization of objectivity, but it should be adequate for our purposes. See Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 2 (providing a much fuller explanation). Note that the success of a person's attempt to accurately grasp things' actual character is not a necessary condition of his objectivity; honest mistakes do not render a person's process nonobjective.

Simply to indicate the basic sense of my account, consider a child who is acquiring his most rudimentary vocabulary. How do we teach a child words? By pointing to the nature of the objects in question, pointing out features of those things that *are* balls, or bears, or red, or square. We point out those characteristics that *these* animals have in common, for example, which other animals do not, or the shapes that these objects share and that those objects do not. Consider the sciences, for that matter, which advance by the same essential process, namely, studious observation of the phenomena in question. We group and name things as the same in kind (combustible, contagious, cancer) based on their observed properties, behavior, relationships, and the like. For the same basic reasons, my claim is that a meaning or conclusion is objective insofar as it is determined by the fundamental nature of the object in question (as sought by means of logic), rather than by a group of people's beliefs about that object.

28. Thanks largely to the work of Ronald Dworkin. See, e.g., RONALD DWORGIN, *LAW'S EMPIRE* 71–74 (1986); Ronald Dworkin, *Comment to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 116–22 (1997).

mind. In order for the medium to be able to do that, however, it must have a definite, stable identity—an identity that is independent of and not reducible to the shifting, variable understandings of particular individuals. If the meaning of a word varied depending on the person or persons who were using that word, words could not serve as reliable means of designating things that others could be reasonably expected to understand.²⁹ Let me illustrate with a simple example.

Suppose Larry's use of "cold" meant one thing (because of what he thought "cold" meant) and Randy's use of "cold" meant something a little different, and Mitch's, something still different in a different way, and Ben's, yet something else in a radically different way, and so on. When I come along and hear these people talk about something being cold, how would I know what the hell they are talking about? If "cold" did not mean cold, but rather: "cold" when spoken by Ben means that which Ben has in mind when he uses that word, and "cold," when spoken by Larry means that which Larry has in mind when he uses that word, and so on for Randy, and for Mitch, and for you, and me, and for every conceivable speaker, communication would be thwarted—because we do not read minds. We read language.³⁰

Many New Originalists have a more sophisticated appreciation of language than some of their predecessors and recognize that original authors' expectations about how a term would be applied may be incorrect. They thus disentangle the meaning of a term from the expected applications of that term in earlier word users' minds.³¹ While this does seem an advance in a certain respect, it remains an untenable portrait of meaning, for it remains subjectivist. While these originalists no longer equate meaning with the lists of concrete instances in first-speakers' heads, they continue to locate meaning in individual minds by equating meaning with the concept that a word designates *as a particular set of people understood that concept or would define that concept on a specific date*. But this qualification is fatal. It forfeits the desired objectivity by tying meaning to particular individuals' fixed, fallible notions of meaning (or of what the word refers

29. "Reliable" does not mean failsafe or incapable of ever being misunderstood.

30. To vary the example, try understanding originalism based on this portrait of language. Or try understanding this Article. It would be utterly overwhelming. Indeed, it would be impossible—impossible either to understand it or to misunderstand it, for the meanings of the terms used in *your* interpretation would be completely dependent on what you believed they meant. This entails that any "understanding" is exempt from error and that my Article is conveniently immune from logical criticism: your objections to any of my reasoning can be smoothly dismissed as reflecting a different use of language. Truly, of course, this reveals the absurdity of this account of language. If language meaning rests in the eye (or mouth or hand) of the language user, we are denied the common subject matter that is needed for genuine engagement on an issue.

31. See, e.g., Dworkin, *supra* note 28; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 378–82 (2013). To use one of Dworkin's helpful distinctions, these originalists graduate from locating meaning in particular men's *conceptions* of a word's meaning to recognizing that it is the broader *concept* that a word signifies. Correspondingly, they recognize that the proper grasp of a concept will permit the correction, at times, of earlier misconceptions concerning its valid application.

to). Whether “meaning” is hinged to earlier language users’ lists of concrete referents (the “expected applications” view) or to the criteria by which they would select those lists (the broader “concept”), the fundamental problem persists. For both these views identify meaning with the understanding of meaning. But this changes the subject; these are not the same thing.

A word designates things of a certain kind—“cats” refers to a certain kind of animals; “speech,” to a certain kind of human action; “equality,” to a certain kind of relationship. A word does not designate someone’s *understanding* of those things. A concept is a mental integration of existents. That is, concepts represent man’s intellectual grasp of actually existing things (objects, actions, relationships, properties, emotions, states of consciousness—the full gamut) whose existence is independent of our awareness of their existence. Correspondingly, these things’ natures are independent of our awareness of their natures.³² Thus, it is a mistake to equate the meaning of a concept with the understanding of that concept that prevails on a certain date for the same reason that it is a mistake to equate meaning with particular speakers’ expected applications of a concept: both treat speakers’ beliefs about a subject as definitive of the nature of the subject. But they are not.³³

In other words, even those originalists who are more sophisticated in their understanding of language are mired in the subjectivism entailed by originalism’s core thesis. All originalism directs our attention within—to the minds and thoughts of language users rather than to the phenomena referred to by our language. They treat language users’ beliefs about phenomena (about speech or equality, for instance) as if that were the *subject* of language, rather than the phenomena themselves. This is a recipe for nonobjective law. For your concept of “speech” is not about your concept of speech; it is about speech. The originalists’ account of language, however, makes the people under a legal system answerable not on the basis of the character of their actions (and the actions’ relationship to the

32. See Smith, *Misplaced Fidelity*, *supra* note 4; Smith, *Common Mistakes*, *supra* note 4; Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 2; see also Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 8 (discussing the same with regard to judicial review). For a much fuller explanation of the underlying epistemology, see LEONARD PEIKOFF, *OBJECTIVISM: THE PHILOSOPHY OF AYN RAND* 73–151 (1991), and AYN RAND, *INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY* (Harry Binswanger & Leonard Peikoff eds., 2d ed. 1990).

33. This also entails that we should not confuse a concept with the definition of that concept that a particular group of people might have given on a certain date. A concept is not one and the same as its reigning definition at any particular moment. For a definition simply reflects the then-present state of understanding (quite possibly flawed and incomplete) of the phenomena in question. See RAND, *supra* note 32, at 40–54 (discussing the nature and role of definitions); Allan Gotthelf, *Ayn Rand’s Theory of Concepts*, in *CONCEPTS AND THEIR ROLE IN KNOWLEDGE* 29–35 (Allan Gotthelf ed., 2013) (same); Smith, *Misplaced Fidelity*, *supra* note 4, at 46–48 (same).

written law), but on the basis of others' beliefs about their actions (as reflected in their beliefs about the meaning of the written law).³⁴

In much simpler terms, we might say that originalists distort the value of the original. They accord the original understanding of a term the power to paralyze all future growth and refinement in knowledge, preventing a fuller and more accurate understanding of the phenomena named in a law from informing its governance. The sense in which the original understanding is, in fact, salient to contemporary meaning is comparatively modest: to ensure that we are talking about the same kind of thing. That is, contemporary interpreters applying the law do need to respect language as referring to the same *kind* of thing that the law's authors thought it referred to, and may not pretend that we and they uniformly used the same words to refer to the same phenomena when it is clear that we do not (consider completely distinct meanings of "domestic violence," for example). But that is hardly adequate grounds from which to fashion a full-fledged method of objective interpretation. As Benjamin Zipursky has observed, that a valid understanding of the content of written law is properly constrained by the original public meaning does not mean that a valid understanding of content just *is* that original public meaning—that the two are one and the same.³⁵

Viewed through a still different lens, a persistent problem is that originalism grants too great a role to language users' intentions. That is, even those species of originalism that distance themselves from the Intentions school, because of their insistence on the originalness of meaning and on the "original" as consisting of some men's beliefs about words' referents, implicitly afford an unduly powerful role to the intentions of the law's framers. It is unduly powerful because it defeats the point of objectifying the law in publicly available language.

To clarify: we commit the law to writing in order to make it intelligible beyond particular lawmakers' conceptions of it. The writing and publication of the law lends it objectivity; it allows everyone to know what the government and citizens may and may not do. To then maintain that authors' intent is decisive in determining the meaning of that written law

34. Note that Supreme Court justices have often recognized that the traditional understandings of pivotal concepts do not, simply by virtue of being traditional, displace the principles of our Constitution. A traditional understanding might be a misunderstanding of the relevant reality, after all. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (Stevens, J., dissenting) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986))); *Heller v. Doe*, 509 U.S. 312, 326 (1993) (“Ancient lineage of a legal concept does not give it immunity from attack . . .”); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 92 (1990) (Stevens, J., concurring) (“The tradition that is relevant in these cases is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution.”). Even Justice Scalia has written that “no tradition can supersede the Constitution.” *Id.* at 95 n.1 (Scalia, J., dissenting).

35. Benjamin Zipursky, Remarks at the Fordham Law Review Symposium: The New Originalism in Constitutional Law (Mar. 1, 2013).

would defeat the point. Why commit law to writing, if the writing is secondary and intent can overrule it? Under that account of meaning, the people governed would need to read minds, rather than to read language.³⁶

An originalist might defend the importance of intentions by pointing to our typical treatment of the discovery of a systematic error in the use of a certain term. Suppose we learned that the original lawmakers made such an error, consistently using a particular word to represent something that we designate by a completely different word (using the word *equal* to refer to *that which is caused by*, for instance, or using the word *enforce* to refer to *that which precipitates a distinct effect*). Presumably, on making such a discovery, we would agree that we were obligated to uphold what the lawmakers intended to express rather than the now conventional meaning associated with the word that they used. They used the language to do something, after all, and that is what matters: what they intended to do and believed that they *were* doing. It would be a breach of faith to retroactively substitute what we think a word means. If we know (gleaned from all available evidence) that what they really meant was *x* (something that we call by a different word than the word they used), it would be dishonest to “interpret” their language otherwise. An originalist might argue, though, that such deference to their intended meaning testifies to his claim that intent does establish meaning.

A few observations in response. First, note that the substance of the law at issue will significantly color the plausibility of this suggestion. The more innocuous the example, the more readily we might acquiesce to unusual usage (unusual by contemporary standards). The more that a usage seems not simply different, but to reflect a mistake about the reference class of a particular concept (whether blacks or women or Japanese immigrants qualify as “persons,” for example) and the greater the stakes (such as the rights held by persons and nonpersons or the punishments attendant to an offense’s constituting insubordination or treason), the more reluctant we are to simply accede to lawmakers’ beliefs. What is responsible for our reluctance, I would suggest, is implicit recognition that there is a fact of the matter that language seeks to capture. We think that earlier lawmakers were mistaken in their beliefs about women being persons, for instance. We believe, in other words, that our use of language and our laws should “get reality right.”

My point here is not to thrash out particular examples. I raise these simply to explore the deeper problem. While the “systematic error” scenario illustrates that we do normally recognize intent as playing a role in words’ meaning, it does not show that intent is the sole, all-powerful determinant of words’ meaning. The originalist conclusion is a non sequitur. Indeed, its position is internally inconsistent, given that the identification of error requires a benchmark. How could we identify a

36. I do not mean to imply that text alone contains meaning. See Smith, *Common Mistakes*, *supra* note 4, at 166–70 (providing reasons for rejecting that view); Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 7, pt. 2 (same).

usage as erroneous without presupposing that certain usages are correct? And how could we identify the correct use of a word without relying on a benchmark that is independent of the speakers' intent? If language users' intent were all that meaning consisted of (or even, as those who reject the Intentions school continue to maintain at least implicitly, if speakers' intent were a necessary condition of words' meaning), we would have no basis for claiming that their usage was mistaken (or that any usage was ever mistaken).

In short, the logic of this reasoning implicitly relies on the meanings of words being something other than speakers' intent, something that is not wholly or crucially determined by that intent. Yet the lesson that originalists draw from it is that words' meaning *is* determined essentially by the speakers' intent. It cannot be both.

The conclusion that we are coming to is that, because of its essential subjectivism, originalism sabotages the very ideal that it seeks to secure: the rule of law.³⁷ If language does not have meaning that is independent of what particular people think that meaning is, then we cannot have objective law.³⁸ If words mean, at root, whatever speakers think they mean, then there is nothing, in principle, that our lawmakers may not do. Words cannot constrain if their meanings are not constrained (which they are not, if words have no userproof identities). Laws, expressed through words, cannot constrain either. Beneath the surface, that is the implication of Originalism.

Now that may sound too harsh. Originalism is the school most known for insisting on language's firm meaning, after all. So I should be more exact: words cannot constrain properly, on the basis of the nature of the objects they refer to rather than as the say-so of particular individuals, if their meanings are taken to consist simply of some people's beliefs about meanings, be those beliefs correct or incorrect. Under that account of language, to be a law-abiding citizen, I must actually be a *them*-abiding citizen: obedient to the beliefs of lawmakers because they are their beliefs.

A little further attention to the role of intentions may be helpful here. For some of originalism's appeal seems to arise from failing to appreciate the two very different ways in which intent is involved in words' meaning. Intent *is* important in people's adoption of a linguistic code, when determining which letter strings will designate what exact content (c-o-l-d to refer to this sort of property, b-o-l-d to refer to that, s-e-a-r-c-h to refer to that type of action, and so on).³⁹ Intent also comes into play subsequently,

37. See Smith, *Common Mistakes*, *supra* note 4, at 192–208 (explaining this subjectivism more fully).

38. "Independent" not of all concern with what words' users take themselves to be doing in using particular words, but independent of the particular understandings that particular users may harbor about the exact compass and distinct, concrete referents of a word.

39. This is not to suggest that this is done in nearly as formal or deliberate a manner as that in which laws are adopted; language speakers do not regularly convene to vote on new vocabulary. Yet the de facto assignment (through use) of specific sounds and letters to designate specific concepts is a prerequisite of meaningful language.

in individual speakers using that code on specific occasions to refer to things of the relevant kinds (claiming that Jones's action on Friday night was a search, for instance). Originalists are right that "first speakers" get to set the code, but not that that requires us to treat their subsequent use of it as unerringly correct. While it would be dishonest of contemporary interpreters to treat the law written in an earlier era as employing a different code than it did (that is, to substitute a different one), it is not dishonest to recognize laws' authors as fallible and nonomniscient users of that code (just as we are). Indeed, that recognition of fallibility is imperative if we are to be ruled by law, rather than by some men's beliefs about the referents of the law.

Put it this way: the fact that the adoption of a particular symbol to represent a certain kind of referent must be respected, if we are to be faithful to law, does not entail that all errors in the use of that term must also be respected *as if* they are not errors (that we must treat the early users as infallible on the valid application of words). While it would be illegitimate to substitute a different code for theirs (pretending that "gay" designated "homosexual" hundreds of years before the word was ever used in that way, for example), it would be equally illegitimate to treat their particular beliefs about the application of that code as beyond correction and unalterably decisive for those bound to obey the laws. For that would misrepresent the nature of language and subject us to subjective belief rather than to objective law.⁴⁰

Let me posit a bolder thesis. On the view that words do not have objective meaning but that the meaning attached to a word is, in the end, nothing but that which a certain group of people think is the meaning, might makes right. There can be no such thing as *authority* to distinguish *rightful* rulers from those who are merely the most mighty if the concepts "authority" and "rightful" boil down to contests of who seized a word first.

This is obviously a serious charge; its full explanation requires delving further into the meaning of meaning and the implications of various planks in the arguments back and forth. The basic thought, however, is fairly straightforward: originalists cannot simultaneously adopt a subjectivist account of language (*a word means whatever some people think it means, just because they do*) while maintaining that respect for that language will give us objective law. If we cannot say that the initiation of force against innocent people is wrong—wrong in fact, rather than simply as what those words happen to stand for in some individuals' minds—then the rule of law

40. Across numerous fields, people routinely correct mistaken beliefs about concepts' exact referents and accurate definition without, by doing so, treasonously abandoning those concepts. The history of science offers a stream of such examples. When whales were reclassified as mammals, for instance, biologists were not inappropriately "changing the subject." Revision of our understanding of concepts' definitions and range of referents is, in principle, perfectly objective. It is also quite different from the complete rejection of an earlier accepted concept (such as "phlogiston" or the bodily "humors") that is found to lack valid foundation. See James G. Lennox, *Concepts, Context, and the Advance of Science*, in CONCEPTS AND THEIR ROLE IN KNOWLEDGE, *supra* note 33, at 112.

is a farce and a “proper” use of judicial power is a contradiction in terms. There cannot be a proper manner of doing things that cannot be properly done. “Proper” would be drained of all valid reference.

Objectivity of meaning and the security available from law go hand in hand. To be law governed is, in part, to be word governed, since words are a vital component in a legal system performing its job (in conferring powers, limiting powers, naming responsibilities, and serving as the check on a government’s use of its coercive power). Words can only play that role, however, and enable a legal system to fulfill its mission, when they have objective meaning. Originalism’s theory of language, unfortunately, because of its implicit subjectivism, denies words that enabling role.⁴¹

III. ORIGINALISM’S CORE CONTRADICTION

Originalism, new or old, is beset with a fatal contradiction: it asserts itself as *the* proper method of judicial review, vital to assure the authority of government actions, while its defining thesis removes the foundation from the idea of “proper” or “authority.” There can be no such thing, under its theory of what words mean. *Proper* meaning (like the “proper” exercise of legal power and “proper” adherence to law’s “actual” meaning) is bogus, once you deny the possibility of objective meaning by asserting, instead, that meaning lies in the minds of speakers, in the particular conceptions and misconceptions of a group of people (those who made the law).⁴²

In effect, originalism seeks the prestige of objective law without paying the price, for it does not recognize the conditions that support it. A method that is subjectivist at root cannot deliver objective law. While many originalists may not wish to be subjectivist, they cannot disown the implications of their account of language.⁴³

41. Some originalists might contend that if, as I urge, courts honor the “correct” meaning of a term, that simply privileges contemporary speakers over earlier ones and that I am equally arbitrary in insisting that what *we* think is paramount. Essentially, the objection would be, my view plays the same game of “he said, she said,” merely swapping who it is that should carry the day.

This objection would succeed, however, only if one assumed that *any* account of meaning is necessarily subjective—that is, that there is no such thing as objective meaning. On that premise, my position would presumably advocate adherence to “our say-so” strictly because it is ours. That is not my view, however. “Objective meaning” is not a euphemism for “whatever I and the like-minded believe, just because we do.” Obviously, this rests on a much fuller account of the meaning of objectivity. What is most salient here is that the *assumption* of subjectivity (which is implicit in the objection) cannot be used to support a conclusion of subjectivity (as in the charge that my position is arbitrary and thus subjective). See Tara Smith, “*Social*” *Objectivity and the Objectivity of Values*, in SCIENCE, VALUES, AND OBJECTIVITY 143 (Peter Machamer & Gereon Wolters eds., 2004) (explaining the basic character of objectivity); Tara Smith, *The Importance of the Subject in Objective Morality: Distinguishing Objective from Intrinsic Value*, 25 SOC. PHIL. & POL’Y 126 (2008) (same); Smith, *Judicial Review in an Objective Legal System*, *supra* note 4, at ch. 2 (same).

42. On that view’s premises, no interpretation can be any more valid than some alternative advocated by William Brennan, Ronald Dworkin, or any of the originalists’ most terrifying specters.

43. Some originalists, of course, are happy to embrace the subjectivism of this view and even regard the presumed subjectivism of values as a crucial part of originalism’s basis.

Originalism projects the aura of humility: judges adhering to it exhibit dutiful deference, serving as neutral recorders of balls and strikes. Critics often charge that it actually cloaks hubris: beneath the façade of legal fidelity lurks presumptuous political activism. My thought is that originalism actually cloaks cowardice: reticence to confront head-on the difficult, substantive issues that legal meaning often poses. Instead, originalists defer to what *those* guys thought: the original adopters of the law in question. Thus, originalist methodology inflates the power of the Constitution's makers as it deflates the authority of the Constitution itself. In the name of preserving the rule of law, it actually destroys the basis for a distinction between the rule of law and the rule of men. You cannot champion the rule of law if you don't have the chutzpah to say what the law is—if the only courage you've got is the courage of *their* convictions: the law's authors, the original "meaners." Just as our views about meanings are not correct just because we think they are, so the views of law's authors are not correct just because they thought they were. Objective judicial review demands direct engagement with complex conceptual questions. We cannot understand laws that take stands on substantive issues without grappling with that substance.⁴⁴

CONCLUSION

It is natural for originalists to greet some of their former opponents' "conversion" to New Originalism with the triumphant sense that it vindicates their views. It does not. On the contrary, it represents a deterioration of the debate. For the old foes of originalism who advocated a "living" constitution were right in one important respect: in recognizing that courts need to think about justice, equality, freedom, and rights—about the substance of what a legal system should do. Having a legitimate legal system entails grappling with these questions on an ongoing basis.

Now, an originalist might agree a legal system must address these questions, but insist that it is not the job of the judiciary to do that; that is for lawmakers. The problem, however, is that we cannot fully separate these tasks. Lawmaking *is* the role of the legislature, and I am not calling for courts to graft their personal philosophies about justice or equality onto the law. Yet, all branches need to grapple with the meaning of the concepts expressed in the Constitution in order to perform their work in ways that abide by the Constitution. Insofar as courts are charged to determine whether laws that have been made and applied in particular ways fall within constitutional bounds, they cannot avoid confronting such questions of substantive meaning. When their answers carry profound practical repercussions (as they sometimes will), that is not the "fault" of judicial overreach. It is the nature of law.

All of this is ultimately too cursory on complex issues. The kind of case I am making here relies on reasoning that needs to be developed much more

44. Judges do not get to plead "who am I to judge?" There are plenty of things that judges should not do, but judging the meaning of terms on the merits is not one of them.

fully. My parting thought is this: we must not let the many admirable aspirations of originalism blind us to the serious inadequacies of its practical prescriptions for judicial review. For originalism elevates the original *meaners* over objective meaning, thus delivering us to a “he said, she said” clash of assertions about law’s meaning that is detached from those considerations that would tell us whether either side’s assertions are valid. This does not provide the objective rule of law.