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### Judge Posner's Simple Law

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## JUDGE POSNER'S SIMPLE LAW

*Mitchell N. Berman\**

REFLECTIONS ON JUDGING. By *Richard A. Posner*. Cambridge and London: Harvard University Press. 2013. P. 366. \$29.95.

### INTRODUCTION

The world is complex, Richard Posner<sup>1</sup> observes in his most recent book, *Reflections on Judging*. It follows that, for judges to achieve “sensible”<sup>2</sup> resolutions of real-world disputes—by which Judge Posner means “in a way that can be explained in ordinary language and justified as consistent with the expectations of normal people” (p. 354)—they must be able to navigate the world’s complexity successfully. To apply legal rules correctly and (where judicial lawmaking is called for) to formulate legal rules prudently, judges must understand the causal mechanisms and processes that undergird complex systems, and they must be able to draw sound factual inferences from multivocal or opaque data.

The problem that animates the book is that, thanks to some combination of disposition, training, and professional incentives, judges are often not adept at these tasks. Indeed, the situation is worse than that. The legal system generates its own complexity (what Posner terms “internal” complexity) precisely to enable judges “to avoid rather than meet and overcome the challenge of complexity” that the world serves up (or “external” complexity, in Posner’s terms) (p. 14). His “reflections” concern mostly how this occurs and how it can be corrected.

If Posner’s choice of noun in the title suggests that the explorations contained in the book will be more casual than systematic and that the analyses more gestural than fully developed, such impressions prove apt. Consisting mostly of revised versions of previously published articles and essays, the book is a somewhat meandering “study of the judicial process mixed with personal recollections, references to a number of [Judge Posner’s] own judicial opinions, and recommendations to judges and judicial administrators,” as well as to lawyers and members of the legal academy (pp. 11–12). Posner’s critical scrutiny ranges widely, latching onto such disparate targets as the *Bluebook* (pp. 96–104); bloated judicial staffs (pp. 40–50); legal jargon

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1. Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, University of Chicago Law School.

2. *E.g.*, pp. 6, 111, 131.

(pp. 111–12) and the delegation of opinion-writing to clerks (pp. 127–28); bad, stilted advocacy (pp. 269–76); unreasoned norms against the use of illustrations, maps, and photographs in judicial opinions (pp. 143–48); overly circumscribed rules against judicial research into facts (pp. 138–43); and much else.

But the principal culprit, in this book as in many of Posner's previous writings, is legal formalism and, in particular, the textualist and originalist approaches to statutory and constitutional interpretation prominently associated with Justice Antonin Scalia. In 2012, Posner wrote a scathing review in the *New Republic*<sup>3</sup> of Justice Scalia's just-published book, coauthored with legal lexicographer Bryan Garner, *Reading Law: The Interpretation of Legal Texts*.<sup>4</sup> Posner's review generated substantial attention and provoked heated responses by *Reading Law*'s defenders, including Garner himself,<sup>5</sup> which prompted a brief reply from Posner.<sup>6</sup> A substantially expanded version of that review constitutes the longest chapter of *Reflections*, and Posner's attack on Scalia's views serves as a focal point and organizing device throughout the book.<sup>7</sup> Accordingly, the main body of this Review will focus on the debate between Posner and Scalia. And that debate, I will argue, illustrates—in ways not yet appreciated by either jurist—what is most fundamentally in dispute between their competing approaches to constitutional interpretation.

The arguments that follow will reveal a double irony. First, Posner's criticisms of Scalia and Garner are less forceful than he believes (although more forceful than Scalia and Garner's defenders acknowledge) precisely because Posner fails to appreciate the irreducible complexity of law. The world, Posner rightly insists, is complex. Yet the central thrust of his argument is that law is excepted from this general truth. Law's complexity, in Posner's eyes, is only contingent. Legal elites—judges most particularly—create complexity for corrupt or self-serving reasons. Law, Posner maintains, can be simple if stripped of this gratuitous and contrived complexity. I believe this is mistaken. More importantly, it is a mistake that lies at the heart of originalism's appeal.

Contemporary originalism's center of gravity is not, contrary to the common rhetoric, fundamentally a position about the activity denominated

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3. Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, *NEW REPUBLIC*, Sept. 13, 2012, at 18, available at <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

4. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

5. E.g., Bryan A. Garner, *Response to Richard A. Posner*, *LAW PROSE* (Sept. 5, 2012), <http://www.lawprose.org/blog/?p=570> (“[Posner] instead smears [*Reading Law*] with accusations of sloppy research and poor case explanations. . . . Judge Posner's critiques repeatedly miss the mark.”).

6. Bryan A. Garner & Richard A. Posner, *How Nuanced Is Justice Scalia's Judicial Philosophy? An Exchange*, *NEW REPUBLIC* (Sept. 10, 2012), <http://www.newrepublic.com/article/politics/107001/how-nuanced-justice-scalias-judicial-philosophy-exchange>.

7. E.g., pp. 2, 14.

“interpretation.” It is fundamentally a claim about the content of law. Contemporary originalists by and large believe that what the law is—what our legal powers, duties, and rights are—is fully determined by semantic qualities of promulgated texts.<sup>8</sup> What those texts *say* is, for that reason, what the law *is*. As Steven Calabresi, a former clerk for Justice Scalia and a cofounder of the Federalist Society, puts it in an article coauthored with Saikrishna Prakash, a former clerk for Justice Thomas: “Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.”<sup>9</sup> That is the now-orthodox originalist contention: our supreme law is just the communicative content of the constitutional text.<sup>10</sup> It is a breathtakingly simple picture of law. And while, admittedly, originalism might not depend on such a simple account of the determinants or constituents of law, nonoriginalism probably does depend on its denial. In short, the canard that law is simple is vastly more congenial to modern originalism than it is to whatever nonoriginalist picture of law Posner might have in mind, even if inchoately.

That is the first irony. Here is the second. If the standard originalist conception of law is mistaken, the community of scholars and legal practitioners is far from having settled on the correct, more complex, account. To be sure, some thoughtful scholars and lawyers believe that H.L.A. Hart (as standardly interpreted) got it right,<sup>11</sup> others cast their lots with Ronald Dworkin,<sup>12</sup> and a few are actively developing and defending accounts of their own.<sup>13</sup> But many others, especially among jurisprudentially sophisticated nonoriginalists, believe that law has yet to surrender its secrets. Perhaps we will never adequately understand how law works—how the normative entities that are legal powers, duties, rights, and permissions correspond to or are produced by such facts in the world as the enactment of legal texts, the issuance of judicial opinions, and the behaviors and dispositions of legal actors. But if we are to gain a richer and more accurate understanding of law than orthodox originalism offers, it will be, almost certainly, thanks to advances in legal theory. Yet Posner, here as elsewhere, is openly disdainful of

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8. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 551–53 (1994).

9. *Id.* at 552.

10. At least putting aside the impact of constitutional decisions by the judiciary. How the proposition in the text would have to be qualified to accommodate judicial precedents is famously controversial among originalists.

11. *E.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 *N.C. L. REV.* 1107 (2008).

12. *E.g.*, James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 *B.U. L. REV.* 1171 (2012).

13. *E.g.*, SCOTT J. SHAPIRO, *LEGALITY* (2011) (conceiving of law as social planning); Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288 (2014) (maintaining that law is the moral impact of the relevant actions of legal institutions).

legal and constitutional theory—not only of its current practitioners but of the field itself.<sup>14</sup>

That is unfortunate. *Reflections on Judging* is an interesting and often engaging book, but Posner's arguments against textualism and originalism fall some considerable distance short of his stated ambitions. Whether originalism provides the correct account of legal content is a theoretical question. And what is the correct account if not originalism? That too is a theoretical matter. Posner's enterprise depends, in ways he has not yet recognized, on answers to these and similar questions. He should not be so dismissive of the field that aims to supply them.

Part I of this Review offers a thumbnail summary of Posner's exploration of complexity and the law. Part II introduces and evaluates his broadside against Scalia (alone and with Garner). Part III examines what Posner's criticisms of Scalia have to do with his stated topic—complexity and the law—and concludes that the relationship is far from straightforward. Part IV offers an account of what is really at stake in Posner's dispute with Scalia.

#### I. OF COMPLEXITY, EXTERNAL AND INTERNAL

What is complexity? "A question is complex," in Posner's terms, "when it is difficult by virtue of involving complicated interconnections or interactions—in other words when it is a question about a system rather than a monad" (pp. 54–55). A system that generates complexity can be, for example, economic, political, ecological, or technological. "Indeed, it can be almost anything—a business firm, a college, the cells of a living body, the combination of subatomic particles that form an atom, the solar system" (p. 4). Questions involving such systems "are ones that specialists understand and often can solve but that generalists have difficulty understanding" (p. 55).

The illustrations just provided "are examples of complexity that are external to the legal system, that are part of the environment that generates cases" (p. 4). And what about law itself? In addition to being a mechanism that interacts with and operates on complex systems,<sup>15</sup> is it a complex system in its own right?

To ask this question, I should think, is to answer it. Modern legal systems, such as those found in the contemporary United States, strike me as staggeringly complex. To start, the United States embraces not a single integrated legal system but one national legal system above and beside fifty state legal systems, with countless points of interpenetration, all hedged by international legal instruments of controversial status. The national legal system alone consists of a very large number of distinct institutions and roles that

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14. *E.g.*, pp. 166, 220, 234; Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1 (1998).

15. "Complex system" is redundant if, as Posner suggests, it is part of the nature of a system—any system—to be complex. But complexity is a scalar, not a binary, quality. So "complex systems" are those systems that involve meaningfully greater complexity than whatever minimal degree of complexity is baked into systematicity.

encompass an immense number of individuals: a multitiered judiciary composed of district courts, two levels of appellate courts, specialized courts and magistrates, legislative bodies and committees, police, prosecutors, executive officers, the practicing bar, and legal scholars, among others. The sources of law are diverse: one old, hard-to-amend Constitution; countless statutes and treatises; administrative regulations, highly integrated codes, and executive orders; common law that stands on its own bottom and judicial opinions that gloss other legal texts; and so on. And these sources form more-or-less distinct and coherent bodies or fields of law—for example, contract, tort, and environmental law—that are understood to have some measure of internal coherence without being discretely sealed off, one from another. And all this is just a partial catalogue of uncontroversial surface features. Entirely appropriately, then, Posner acknowledges that “the law itself is a complex system, and also a system of such systems” (p. 57).

But—and here is the striking point to which I will return in Part IV—whereas other systems are irreducibly or inescapably complex, or complex by their very nature, the complexity of law, in Posner’s telling, is contrived and avoidable.<sup>16</sup> “Abetted by lawyers, law professors, law clerks, and legislators, judges ‘complexify’ the legal process needlessly—and do so in part to avoid the struggle to understand the complex real-world environment that generates much of the business of a modern court” (p. 4). Thus, for example, the “formalist wants to use a complex style of legal analysis . . . to resolve cases without having to understand factual complexities” (p. 4). In contrast, “[t]he realist thinks that law is or can be made simple but that the subject matter of many legal cases is irreducibly complex” (p. 4). Posner is a realist (p. 1). His ambition is to show how law can be made simple or, better, how the excrescences that have attached to law can be pared away, allowing its intrinsic simplicity to emerge.

A full enumeration of Posner’s complaints and recommendations would be tedious. Here is a sampling. Supreme Court justices employ too many law clerks (pp. 51–52), and, along with other appellate judges, they use their clerks poorly (pp. 46, 240–42). Law clerks should not write bench memos or draft opinions but should instead edit and critique drafts written by the judge (pp. 241–42). Judicial opinions are poorly written, verbose, and laden with jargon (pp. 236–37). Hypertrophy of the *Bluebook* and obsessive adherence to it by judges and practitioners wastes time and gives legal documents a patina of carefulness and comprehensiveness that can lead naïve readers, and their authors, to overlook more substantive deficiencies (pp. 96–97). Judges should do more independent research into “background facts,” and,

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16. An appendix to the book’s introductory chapter labeled “External Versus Internal Complexity in Federal Adjudication” makes vivid the difference. Pp. 14–17. It lists forty-five “Sources of Complexity That Are External to the Judicial System”—such intrinsically complicated phenomena as economics, jury psychology, mental illness, and national security. In contrast, under the heading “Sources of Complexity That Are Internal to the Federal Judicial System,” Posner lists only six items, and every one is a vice that he believes can and should be eliminated, from “Delegation of Opinion Drafting to Law Clerks,” pp. 99–100, to “Obsession with Citation Form,” pp. 240–41.

to make the bases for their rulings more transparent to readers, they should include more maps and photos in their opinions (pp. 137, 143). Continuing judicial education should be improved, with an emphasis on educating judges (who generally lack technical sophistication) about the world, not about developments in law (pp. 335–37). The law school curriculum should be revised to include more required courses in accounting, statistics, and other technical fields (p. 347).

Some of Posner's diagnoses and prescriptions strike me as sound and helpful. I agree that "bluebooking" has turned into a fetish, even if I'm less persuaded than he is that it's a particularly harmful one. I too like photos, and I share Posner's preference for a more informal tone in judicial opinions. "Part of being realistic is to be practical and candid, and part of sounding realistic is to be informal . . ." (p. 257). But other recommendations are more dubious. For one example, Frederick Schauer argues that Posner's cavalier attitude toward the distinction between legislative and adjudicative facts leads him to make factual findings that, for reasons of both process and accuracy, should have been subject to adversarial argumentation.<sup>17</sup>

## II. POSNER V. SCALIA—TAKE I: THE PARTICULARS

All of that is appetizer. Posner's principal target is the "arch formalist" Justice Scalia, particularly as embodied in his coauthored book, *Reading Law* (p. 115). Posner's criticisms are fierce, and they have provoked equally blistering rebuttals from Scalia's defenders.<sup>18</sup> This Part offers a preliminary examination of the debate. Section II.A provides a nutshell summary of *Reading Law*. Section II.B presents Posner's criticisms. Section II.C then evaluates those criticisms, paying particular attention to the defenses that Garner and his allies advance. This Part concludes, in short, and perhaps not surprisingly, that some of Posner's charges survive scrutiny and that others do not.

### A. *Reading Law*

The central thrust of *Reading Law* is well described in the book's preface. "Our legal system," Scalia and Garner write, has in recent generations lost "a generally agreed-on approach to the interpretation of legal texts."<sup>19</sup> For generations, indeed centuries, Anglo-American law has been governed by a "textualist" approach to the interpretation of authoritative legal texts—one that instructs interpreters to "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived

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17. Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51 (2013).

18. See *supra* note 5 and accompanying text.

19. SCALIA & GARNER, *supra* note 4, at xxvii.



purposes and the desirability of the fair reading's anticipated consequences."<sup>20</sup> This method, Scalia and Garner contend, "is the soundest, most principled one that exists,"<sup>21</sup> and it should be restored. Its restoration "will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences";<sup>22</sup> will "discourage legislative free-riding";<sup>23</sup> will make legal dispositions more predictable; will promote equal treatment of litigants; and will strengthen our democratic processes.<sup>24</sup>

One obstacle to restoring textualism, presumably, is that many judges do not wish to be constrained by the text's objective and unchanging meaning; they like to make policy. Scalia and Garner offer no cure for that problem. A second obstacle is that even well-intentioned judges lack the knowledge and training that textualist interpretation requires. *Reading Law* aims to fill that gap.

Texts do not bear meaning naturally, but only by convention. You understand the meaning that this text conveys, if you do, because you are versed in the "conventions" that collectively constitute the English language, circa 2015. Similarly, you can play music from a score only if you know the conventions of the musical notation that the score employs. In like fashion, to grasp the meaning of a legal text requires that you possess knowledge, not only of the conventions of the natural language in which the text was written but also of the conventions, if any, particular to the legal system of which the text is a part. And in fact, Scalia and Garner observe, "Anglo-American law has always been rich in interpretive conventions," what the law frequently terms "canons."<sup>25</sup> Unfortunately, they continue, "since the mid-20th century, there has been a breakdown in the transmission of this heritage to successive generations of lawyers and lawmakers—indeed, a positive disparagement of the conventions by teachers responsible for their transmission."<sup>26</sup> As a promised corrective to this particular problem, *Reading Law* collects, catalogues, illustrates, and explicates fifty-seven canons and cognate "principles" that its authors contend have traditionally undergirded or populated our law—from "semantic" canons such as *expressio unius* and "contextual" canons such as the canon against surplusage, to canons applicable specifically to governmental prescriptions such as the presumption against retroactivity.<sup>27</sup> If judges master and employ these canons correctly, "then over time the law will be more certain, and the rule of law will be more secure."<sup>28</sup>

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20. *Id.* at xxvii–xxix.

21. *Id.* at xxvii.

22. *Id.* at xxviii.

23. *Id.*

24. *Id.* at xxvii.

25. *Id.*

26. *Id.* at xxvii–xxviii.

27. *See generally id.* at 53–339.

28. *Id.* at 414.



B. *Posner's Broadside*

Posner's attack on the arguments in *Reading Law* is blistering and multifaceted.

Most fundamentally, Posner ridicules the authors' promise that the canons can be applied in something approaching an objective fashion and therefore that their approach—what Posner terms “textual originalism”—substitutes for a judge's pursuit of his own ideological commitments and policy preferences (p. 209). In part, Posner's reasons for disputing this picture are general. Echoing a routine complaint against originalism, Posner observes that “[j]udges are not competent historians,” and “[e]ven real historiography is frequently indeterminate, as real historians acknowledge” (p. 185).

In additional and even greater part, however, Posner's grounds for rejecting *Reading Law's* assurances regarding objectivity are ad hominem. Although he doesn't level the charge in precisely these terms, it is clear that Posner thinks Scalia is a liar. Scalia claims, Posner says accurately, “that his judicial votes are generated by an objective interpretive methodology (the only objective methodology, he claims) and that because it is objective, ideology, including his own fervent ideology, plays no role” (p. 182). Posner finds this claim risible. Deeming the Scalia-and-Garner version of originalism “mush” (p. 216), Posner offers several illustrations of Scalia's judicial performance to demonstrate that “[t]he canons don't discipline Justice Scalia's judicial votes, which appear to reflect his personal beliefs more than they do any politically neutral analytical system” (pp. 217–18).

The decision on which Posner expends by far the greatest energy is Scalia's majority opinion in *District of Columbia v. Heller*, which held that the Second Amendment<sup>29</sup> constitutionalizes a preexisting common law right to possess a handgun for self-defense.<sup>30</sup> Posner's criticisms of the opinion are familiar, but he presses them with uncommon verve. Among Posner's complaints are that Scalia's treatment of the preamble (which plainly “implies that the Second Amendment is not about personal self-defense but about forbidding the federal government to disarm state militias”) is unduly “dismissive[ ]” and “contrary to the favorable treatment of preambles” in *Reading Law* (p. 186); that “[t]here is an unrecognized tension between Justice Scalia's angry disdain for legislative history as an aid in interpreting statutes and his enthusiastic mining” of seventeenth- and eighteenth-century sources to unearth the “original meaning” of constitutional provisions (pp. 189–90); and that Scalia “jettisons originalism” opportunistically when assuring readers that a raft of sensible restrictions on gun ownership can stand (for example, prohibitions on firearm possession by felons and the mentally ill and across-the-board bans on especially dangerous guns) without making any “effort to root them in eighteenth-century thought” (p. 194). Perhaps most

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29. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II.

30. 554 U.S. 570, 571, 592 (2008).

significantly, Posner derides Scalia's purported demonstration of a preexisting British common law right of armed self-defense as "law office history" (p. 190; internal quotation marks omitted)—motivated, not disinterested. Noting that the strong weight of opinion expressed by professional historians runs against Scalia (pp. 187–88), Posner concludes that "[t]he range of historical references in the majority opinion is breathtaking, but it is not evidence of disinterested historical inquiry; it is evidence of the ability of well-staffed courts to produce snow jobs" (p. 191).

If Scalia's *Heller* opinion is inconsistent with his avowed originalism, so too, says Posner, is Scalia's embrace of *Brown v. Board of Education*. For generations, scholarly wisdom has held that *Brown* cannot be supported on originalist premises, whether the originalist touchstone is the framers' or ratifiers' intent or the original public meaning of the text. As Posner puts it, had the Fourteenth Amendment "been thought to forbid racial segregation of public schools it would not have been ratified. And 'separate but equal' is consistent at the textual originalist level with 'equal protection'" (p. 198). Yet aiming to make peace with *Brown*,

Scalia and Garner claim that "recent research persuasively establishes that this [that is, the ruling in *Brown* that separate but equal is not equal] was the original understanding of the post-Civil War Amendments." They cite for this proposition a single law review article and omit to mention a powerful criticism of the article by a leading legal historian, which the author of the article they cite is not, although he is a distinguished constitutional law professor and former federal judge.<sup>31</sup>

Furthermore, the analysis that Scalia and Garner credit "is based almost entirely on bills and floor debates in Congress" after ratification of the Fourteenth Amendment—a form of "post-enactment legislative history" that is wholly inconsistent with Scalia's stated commitments (p. 199).

Scalia and Garner's failure to cite that prominent legal historian (Michael Klarman) or to acknowledge that the weight of scholarly opinion lies against Michael McConnell (the author of the law review article on which they rely) is not an isolated oversight. Rather, "[o]mission to mention contrary evidence," Posner charges, is "Scalia and Garner's favorite rhetorical device. Repeatedly they cite cases (both state and federal) as exemplars either of textual originalism or of a disreputable rejection of it, while ignoring critical passages that show the judges neither ignoring text nor tethered to textual originalism" (p. 199).

For want of space, I will offer only two examples. The first case involved the question of whether tacos, burritos, and quesadillas are "sandwiches" for purposes of a lease between a shopping center and a restaurant. The lease forbade the shopping center from renting space to any other restaurant that

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31. Pp. 198–99 (alteration in original) (footnotes omitted) (quoting SCALIA & GARNER, *supra* note 4, at 88). See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950–52 (1995), for the argument that *Brown* can be supported on originalist premises. The criticism of McConnell appears in Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

would be expected to derive more than 10 percent of its income from the sale of “sandwiches.”<sup>32</sup> Scalia and Garner describe the decision as follows:

*Sandwiches* not being a defined term in the lease, the court sensibly relied on a reputable dictionary, which defined a sandwich as “two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them.” . . . The injunction was properly denied on grounds that no reasonable speaker of English would call a taco, a burrito, or a quesadilla a “sandwich.”<sup>33</sup>

“Scalia and Garner stop there,” says Posner, “as if that dictionary reference were the court’s entire decision and therefore establishes the utility and propriety of judges’ using dictionaries as a guide to the meaning of legal documents. But the court had not stopped with the dictionary; it had begun there” (pp. 199–200).

After quoting the dictionary, the court went on to observe that the plaintiff restaurant had drafted the exclusivity clause, that it had known, prior to executing the lease, that other restaurants in the vicinity sold Mexican food, and that it had offered no evidence that the parties intended for the clause to cover burritos and the like.<sup>34</sup> “These,” Posner opines, “are more persuasive points than the dictionary’s definition of ‘sandwich’”—all the more so because “the court got the definition wrong” (p. 200):

A sandwich does not have to have two slices of bread; it can have more than two (a club sandwich), and it can have just one (an open-faced sandwich). The slices of bread do not have to be thin, and the layer between them does not have to be thin either. The slices do not have to be slices of bread: a hamburger is generally regarded as a sandwich, as is also a hot dog—and some people regard tacos and burritos as sandwiches, and a quesadilla is even more sandwich-like. (p. 200)

Posner’s conclusion? “Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless” (p. 200).

The second case, involving the application of an animal-cruelty law to cockfighting, was addressed by Scalia and Garner in just two sentences: “Courts have sometimes ignored plain meaning in astonishing ways. The Kansas Supreme Court, for example, perversely held that roosters are not ‘animals,’ so that cockfighting was not outlawed by a statute making it illegal to ‘subject[ ] any animal to cruel mistreatment.’”<sup>35</sup> Posner objects that the Kansas court actually acknowledged that “biologically speaking a fowl is an animal,” (p. 201; internal quotation marks omitted) but gave several reasons for concluding that roosters are nonetheless not covered by the statute:

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32. *White City Shopping Ctr., LP v. PR Rests., LLC*, No. 2006196313, 2006 WL 3292641 (Mass. Super. Ct. Oct. 31, 2006).

33. SCALIA & GARNER, *supra* note 4, at 55.

34. *White City*, 2006 WL 3292641, at \*3.

35. SCALIA & GARNER, *supra* note 4, at 72 (alteration in original) (citing *State ex rel. Miller v. Claiborne*, 505 P.2d 732, 733 (Kan. 1973)).

The court's most cogent reason was that the Kansas legislature had passed a statute forbidding cockfighting on Sundays, implying that it was permissible the rest of the week, and had later repealed the statute, implying that cockfighting was again permissible on *any* day of the week—and in fact cockfighting was an open and notorious sport in Kansas (to the surprise and disgust of the judges). (p. 201)

The first lesson of these and other cases, for Posner, is that courts do not in fact rely only on the canons. And they couldn't even if they wanted to, for it is a "fallacy of textual originalism . . . that a *single* canon of construction can decide more than a tiny handful of cases; no single canon can decide most of the cases that Scalia and Garner discuss" (p. 208). Furthermore, even insofar as courts do or should rely on the canons, that provides only limited support for textual originalism, given that many of the canons that Scalia and Garner "approve of [such as the constitutional doubt canon] are not just nontextual but antitextual" (p. 209). This is why courts routinely turn to consideration of purposes and consequences, just as pragmatism counsels.

### C. *An Assessment*

Posner and Scalia are very likely today's two great heavyweights of judicial conservatism.<sup>36</sup> But the Thrilla in Manila this exchange isn't, for neither book shows its judicial author at the top of his game. Given the vast number of complaints, large and small, that Posner voices, I cannot attempt a comprehensive appraisal. A partial scorecard will have to suffice.

#### 1. Misses

To describe Posner's initial review as controversial would be an understatement. Edward Whelan, a former Scalia clerk and, as president of the Ethics and Public Policy Center, a prominent conservative legal commentator, authored a series of posts to the *National Review Online* where he excoriates Posner for "his contemptible smearing" of the book and derides the review as "laughably incompetent."<sup>37</sup> Michael Rappaport, a leading originalist scholar and theorist, deems the review "a hatchet job—an attempt to attack the book, without balance, from every possible direction."<sup>38</sup> But for

36. A decade or more ago, "indisputably" would have substituted for "very likely." But as conservatism has continued to plow aggressively rightward—and as Posner himself may well have moved some distance left—it can reasonably be questioned whether the ideological space he inhabits remains within contemporary American conservatism.

37. Ed Whelan, *Richard A. Posner's Badly Confused Attack on Scalia/Garner—Part 4*, NAT'L REV. ONLINE (Sept. 6, 2012, 11:45 AM), <http://www.nationalreview.com/bench-memos/316091/richard-posner-s-badly-confused-attack-scaliagarner-part-4-ed-whelan>. The entire series is available at <http://eppc.org/publications/richard-a-posnera%C2%80%C2%99s-badly-confused-attack-on-scaliagarner/>.

38. Mike Rappaport, *Posner on Scalia and Garner's Reading Law I: Textualism and Conservatism*, LIBRARY L. & LIBERTY (Sept. 1, 2012), <http://www.libertylawsite.org/2012/09/01/posner-on-scalia-and-garners-reading-law-i-textualism-and-conservatism/>.

all that the book's defenders found objectionable in Posner's review, his charge that Scalia and Garner misrepresented the cases they discuss provoked the most heated disagreement. Whelan calls this charge Posner's "most attention-grabbing claim"<sup>39</sup> and devotes more space endeavoring to repudiate it than to any other matter. Garner also focuses heavily on this aspect of Posner's review in an exchange with Posner on the *New Republic's* website.<sup>40</sup> And upon publication of the expanded review in *Reflections on Judging*, Garner commissioned a California attorney, Steven Hirsch, to evaluate Posner's charge of misrepresentation.<sup>41</sup> Hirsch, for his part, concluded that "in 8 of Posner's 12 examples, Posner's criticisms are unwarranted."<sup>42</sup> Hirsch also declared himself "struck by the needlessly *ad hominem* nature of Posner's analysis."<sup>43</sup>

As I will explain shortly, I believe that the grades that Hirsch gives Posner are too low.<sup>44</sup> Nonetheless, I do agree with Hirsch and other defenders of *Reading Law* that some of Posner's claimed misrepresentations are not misrepresentations at all.<sup>45</sup> Moreover, even giving Posner every reasonable benefit of the doubt on the cases he discusses, there is nothing in *Reflections on Judging* remotely to support his charge that Scalia and Garner "misread[ ] . . . case after case after case" (p. 208).

On various other fairly discrete issues, Posner similarly errs or overreaches. To mention just one, although I find his criticisms of Scalia's *Heller* opinion more apt than not, Posner's discerning a tension between Scalia's rejection of what he considers legislative history (roughly, statements in the legislative record leading up to passage of a bill) and the type of historical inquiry that he undertakes in *Heller* (and that all originalist investigations rely on) is—if not quite, as Scalia charged, "a lie"<sup>46</sup>—forced. Posner asks, rhetorically, "If eighteenth-century history can be reconstructed by a judge

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39. Ed Whelan, *Richard A. Posner's Badly Confused Attack on Scalia/Garner—Part 2*, NAT'L REV. ONLINE (Sept. 1, 2012, 9:15 PM), <http://www.nationalreview.com/bench-memos/315690/richard-posner-s-badly-confused-attack-scaliagarner-part-2-ed-whelan>.

40. Garner & Posner, *supra* note 6.

41. Bryan A. Garner, *Hirsch Report*, LAWPROSE (May 8, 2014), <http://www.lawprose.org/blog/?p=2744>.

42. Steven A. Hirsch, *Hirsch Report*, LAWPROSE 3, <http://www.lawprose.org/blog/wp-content/uploads/2014/05/Hirsch-report1.pdf> (last visited Nov. 15, 2014).

43. *Id.*

44. *See infra* Section II.C.2.

45. *See*, in addition to the sources cited *supra* in notes 37 to 43, Orin Kerr, *Posner's Criticism Is Pretty Weak with This Example from the Scalia & Garner Book*, VOLOKH CONSPIRACY (Sept. 12, 2012, 12:28 AM), <http://www.volokh.com/2012/09/12/posners-criticism-is-pretty-weak-with-this-example-from-the-scalia-garner-book/>; and Kevin C. Walsh, *Posner v. Garner & Scalia on ejusdem generis in McBoyle v. United States*, WALSHSLAW (Sept. 11, 2012), <http://walshslaw.wordpress.com/2012/09/11/posner-v-garner-scalia-on-ejusdem-generis-in-mcboyle-v-united-states/> (both discussing and deeming meritless Posner's charge (p. 206) that a one-sentence summary that *Reading Law* offers of Justice Holmes's opinion in *McBoyle v. United States*, 283 U.S. 25 (1931), "distorts Holmes's analysis").

46. Terry Baynes, *Fanning Furor, Justice Scalia Says Appeals Court Judge Lied*, REUTERS (Sept. 17, 2012, 11:59 PM), <http://www.reuters.com/article/2012/09/18/us-usa-court-scalia->

and his law clerks, why not the twentieth- or twenty-first [-century] history of a modern statute?" (p. 189). But Scalia's objection is not that the history of a piece of legislation is beyond the courts' capacities to discover; it's that the materials that constitute "legislative history" are generally evidence of (from his perspective) the wrong things—namely, legislative intentions or purposes rather than textual meanings—and aren't even trustworthy evidence of that because they are inserted opportunistically.<sup>47</sup>

Moving to matters of somewhat greater generality, Garner and Whelan are right to complain that Posner presents canon-heavy textual originalism as more wooden and mechanical than the exposition in *Reading Law* warrants. Whereas Posner occasionally seems to characterize their approach as mere "obedience to the dictionary,"<sup>48</sup> Scalia and Garner expressly caution against the uncritical reliance on dictionary definitions.<sup>49</sup> Furthermore, Posner is wrong to attribute to Scalia and Garner "the suggestion that a *single* canon of construction can decide more than a tiny handful of cases" (p. 208). To the contrary, Scalia and Garner analogize the canons to clues in a mystery that "often point in different directions," and they counsel that "[t]he skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies."<sup>50</sup>

## 2. Hits

So far, so bad for Posner. Yet many of his blows do land—and, by and large, on matters of greater importance to the broader debate over textual originalism.

Let us return to Posner's claim that Scalia and Garner misrepresent the cases they discuss and dispose of one objection. Garner contends that the criticisms rest on a misconception of their project. Their book, he explains, discusses actual cases "merely to show *how each particular canon works*," not as evidence of any canon's authoritativeness.<sup>51</sup> "*Reading Law* is a normative, prescriptive book . . . So in citing examples, we were much more interested in the textual problems posed than in the solutions that courts provided."<sup>52</sup> In the same vein, Whelan argues that "Scalia and Garner offer the cases . . . *only* to illustrate particular canons."<sup>53</sup> This is a substantial overstatement. Scalia and Garner embed many descriptive or evaluative claims within their

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idUSBRE88H06X20120918 (citing Scalia as contending that Posner's charge that he "used legislative history [in *Heller*] is simply, to put it bluntly, a lie").

47. SCALIA & GARNER, *supra* note 4, at 373–78.

48. P. 201; *see also, e.g.*, pp. 204–05.

49. *See* SCALIA & GARNER, *supra* note 4, at 418–19.

50. *Id.* at 59.

51. Garner, *supra* note 5.

52. *Id.*

53. Whelan, *supra* note 39 (emphasis added).

case summaries. Insofar as any descriptive or evaluative statements are erroneous or misleading, it is entirely fair for Posner to call the authors on it, notwithstanding the project's overarching "normative" ambitions.

So, has Posner caught Scalia and Garner in such errors? Not, I have already said, as often as he thinks.<sup>54</sup> And yet more often than his critics recognize.

Take the sandwich case. I understand Posner to be making two related points. First, he takes issue with the (descriptive) statements that the court "relied" on the dictionary and that it denied the injunction "on grounds that no reasonable speaker of English would call a taco, a burrito, or a quesadilla a 'sandwich.'" <sup>55</sup> Posner claims, in effect, that the court's reliance on the dictionary was only partial and therefore that Scalia and Garner misleadingly characterize the "grounds" of the ruling.<sup>56</sup> His second and related point is that the other considerations the court invoked weren't incidental. Rather, reliance on extratextual considerations is made proper and frequently necessary by the seductive imprecision of dictionary definitions—even of so seemingly straightforward and concrete a word as "sandwich." The dictionary definition, Posner argues, is highly infirm—even if it is plausible enough at first glance that its defects escape the attention of our most textualist Supreme Court justice and the country's foremost legal lexicographer. Hirsch, Garner's chosen impartial arbitrator, mocks this claim, but Posner is right and Hirsch wrong.

Posner's observation that a sandwich can have more or fewer than two slices of bread "ignores the fact[s]." Hirsch objects,

[A]s everyone knows, burritos, tacos, and quesadillas are made on tortillas, not bread. Tortillas are not "slices" of bread because they are not sliced from a larger loaf. And tortillas are ground meal that is pounded flat . . . They are about as much like sandwich bread as matzo crackers are. One wonders whether Judge Posner has ever eaten Mexican food or watched it being prepared.<sup>57</sup>

Fine, tortillas are like matzos. But that *supports* Posner's point. One wonders whether Hirsch has ever been to a Passover seder or heard of the Hillel sandwich.<sup>58</sup> Hirsch also objects that, the fact that the slices of bread do not have to be thin "is of no relevance to deciding the *White City* case, since tortillas are, by any measure, thin."<sup>59</sup> It might not be relevant to deciding the case; it *is* relevant to the adequacy of the dictionary definition.

Hirsch also ridicules Posner's observation that hamburgers and hot dogs are "generally regarded as . . . sandwich[es]" and that some people think that

54. See *supra* Section II.C.1.

55. SCALIA & GARNER, *supra* note 4, at 55.

56. Pp. 199–200 ("But the court had not stopped with the dictionary; it had begun there.").

57. Hirsch, *supra* note 42, at 4.

58. The Hillel sandwich consists of bitter herbs between two pieces of matzo. It is blessed and eaten before the festival meal is served.

59. Hirsch, *supra* note 42, at 4.



burritos and tacos are too. Hirsch does so by protesting that, in “normal conversation,” neither a customer nor a waiter would refer to, for example, a “burrito sandwich[ ]” or a “hamburger sandwich[ ].”<sup>60</sup> But Hirsch confuses whether something *is* a “sandwich” with whether it is idiomatic to refer to the thing by a name that includes the word “sandwich.” A negative answer to the second question does not entail a negative answer to the first. Hirsch’s imagined customer might request a “club sandwich” or a “pastrami sandwich” (and so on), but she would never request (if she’s a native speaker of American English) a “reuben sandwich”; she’d just ask for “a reuben.” But reubens are still sandwiches. The same might be true of hamburgers, hot dogs, and even quesadillas.

So we have to do better than ask whether it is idiomatic to speak of a “hamburger sandwich.” (Compare: poodles are dogs, although it’s nonidiomatic to refer to “poodle dogs.”) For instance, it might be more revealing to look at actual restaurant menus. A Google image search for “sandwich menus” returns many<sup>61</sup> that list hamburgers and even hot dogs under the heading “sandwiches.” It’s probably more usual still for menus to have separate categories captioned “sandwiches” and “hamburgers” or a single category captioned “sandwiches and burgers.” But the important points are that listing hamburgers and hot dogs under “sandwiches” is plenty common and that in no case is the inclusion jarring—not as it would be if the list of “sandwiches” included, say, salads or pastas or steak.

In short, Posner shows that the dictionary definition is actually pretty bad, and bad in lots of ways, all of which were overlooked by Scalia and Garner (and later also by Hirsch). The point of this showing is that *Reading Law* describes some of the opinions that it discusses in tendentious ways designed to pump readers’ intuitions that textual originalism, and it alone, produces sensible results. And that, of course, is precisely why Posner takes issue with *Reading Law*’s treatment of the rooster case. Posner’s objection is that Scalia and Garner improperly stack the deck against nontextual reasoning by characterizing the Kansas Supreme Court’s antiformalist decision as “perverse” without stating any of the arguments that the court invoked and, thus, without letting the reader judge for herself whether the decision was reasonable (p. 201). Hirsch misses this point entirely, objecting that Posner’s “criticism falls flat” unless he “can show that the court’s countervailing reasons were strong enough to overrule plain meaning.”<sup>62</sup> No. Posner’s burden was just to show that the countervailing reasons were strong enough to bear on the verdict of perversity.

Consider in this light a final case that I have not yet discussed. Scalia and Garner criticize a New York court for interpreting a rent-control statute that bars landlords from dispossessing a “member of the deceased tenant’s

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60. *Id.* (quoting REFLECTIONS ON JUDGING, p. 200).

61. How many? Enough to cause a reasonable person to stop keeping count.

62. See Hirsch, *supra* note 42, at 7–8.

family who has been living with the tenant”<sup>63</sup> to cover what Scalia and Garner describe as “a cohabiting nonrelative who had had an emotional commitment to the deceased tenant.”<sup>64</sup> Without approving the court’s decision, Posner writes:

[I]t is odd that Scalia and Garner failed to mention that the “family” in question was a homosexual couple at a time when homosexual marriage was not recognized in New York and that the two men had been living together just like spouses and had been accepted as such by their families (p. 202).

It is odd, and part of a disconcerting pattern. Scalia and Garner advocate a particular approach to constitutional interpretation (likely grounded, as I will argue below, in a particular account of the determinants of law) that is very far from universally accepted. And what argumentation they provide for that view is ad hoc and gestural. So a reader’s receptiveness to their prescription is bound to be influenced by her reactions to the particular cases discussed. The case descriptions can grease the skids for textual originalism insofar as results that strike the reader as sensible are described as having been reached on “textualist” grounds and if nontextual results are presented in ways that make them appear senseless.

Setting aside disputes about the cases, there is also merit to Posner’s complaint that Scalia and Garner contradict themselves by endorsing canons that are “nontextual” and even “antitextual.”<sup>65</sup> Although I am not fully certain what Posner means by this, if I understand him correctly, the charge highlights a genuine concern.

Scalia and Garner state their official position explicitly: “The interpretive approach we endorse is that of the ‘fair reading’: determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.”<sup>66</sup> In describing some canons as nontextual or antitextual, Posner means, I believe, that they do not all aim to uncover what a reasonable reader, fully competent in the language, would understand a text’s authors to have been endeavoring to communicate. Scalia and Garner appear to grant precisely this, acknowledging that “[m]any established principles of interpretation are less plausibly based on a reasonable assessment of meaning than on grounds of policy adopted by the courts.”<sup>67</sup> Then again, some of these policy-driven canons, such as the rule of lenity, are “so deeply ingrained” that knowledge of them can be attributed to the authors “so that they can be considered inseparable from the meaning of the text.”<sup>68</sup> Well,

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63. SCALIA & GARNER, *supra* note 4, at 90 (quoting *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50 (N.Y. 1989)) (internal quotation marks omitted).

64. *Id.*

65. *See* p. 209.

66. SCALIA & GARNER, *supra* note 4, at 33.

67. *Id.* at 30.

68. *Id.* at 31.

perhaps. But what about the policy-driven canons that are *not* plausibly considered “inseparable from the meaning of the text”? Scalia and Garner concede that some canons, such as the constitutional-doubt canon, “are based on judicial-policy considerations alone.”<sup>69</sup> Nonetheless, they “accept these oft-cited rules of interpretation unless they seem to us incoherent, not genuinely followed, or in plain violation of our constitutional structure.”<sup>70</sup>

That might be sensible enough. The question is whether such a (dare I say?) “pragmatic” approach is consistent with what I have called Scalia and Garner’s “official position.” It does not seem so. Furthermore, unless all the approved canons—whether “textual” or “nontextual” or “policy driven”—predate the texts to which they are applied, it is hard to see how their use can be squared with the core commitments of originalism. *Reading Law* should address these worries more explicitly.

Lastly, although, as I have said, Posner’s claim that Scalia and Garner misrepresent several cases provoked the most strenuous objections, I do not think it is Posner’s most damning charge. The most damning charge, it seems to me, is that Scalia doesn’t practice what he preaches<sup>71</sup>:

Discrediting Scalia-Garner’s entire approach is the absence of an actual commitment to textual originalism. The fifty-seven “canons of construction” that they endorse . . . provide them with all the running room needed to generate whatever case outcome conforms to Justice Scalia’s strongly felt views on such matters as abortion, homosexuality, illegal immigration, states’ rights, and the death penalty. (p. 209)

Most of *Reading Law*’s supporters left this charge un rebutted. But Whelan dismisses it out of hand. “Posner’s insinuation that Scalia has generated outcomes that match his putative views is . . . demonstrably false,” he asserts. “Someone who strongly opposes abortion or homosexuality and who indulges his policy preferences would favor a reading of the Constitution that entrenches his position on those issues, not a reading, like Scalia’s, that leaves the matter to the democratic processes to be decided either way (and to be revisited).”<sup>72</sup>

“Demonstrably false” is a strong claim, and Whelan does not come within a country mile of making good on it. Posner does not contend that Scalia generates outcomes that match his policy preferences *in every single case*. That would be a silly charge, and I am aware of no serious commentator who levels it. In fact, Posner expressly disavows such an extreme accusation, acknowledging that Scalia has joined and even authored a number of “liberal” decisions, a fact that Posner deems unsurprising given that Scalia

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69. *Id.*

70. *Id.*

71. Plainly, this charge is damning to Scalia himself. But precisely how it also damns the judicial philosophy he peddles might not be so obvious. I discuss *infra* in Section III.B why it plausibly does.

72. Ed Whelan, *Richard A. Posner’s Badly Confused Attack on Scalia/Garner—Part 5*, NAT’L REV. ONLINE (Sept. 7, 2012, 10:00 AM), <http://www.nationalreview.com/bench-memos/316221/richard-posner-s-badly-confused-attack-scaliagarner-part-5-ed-whelan>.

“must have voted in at least two thousand cases as a Justice of the Supreme Court” (p. 183). More or less, then, the charge on the table is that, in some number of cases, including cases of substantial importance, Scalia has failed to honestly apply his declared judicial philosophy in order to reach outcomes that better accord with his ideological priors. That claim could be right or wrong. I admit to believing, with Posner, that it is true. But even if we are mistaken, the notion that Whelan’s one-sentence rejoinder demonstrates its falsity is frivolous.

The range of legal outcomes plausibly in play at any one moment is finite. On some matters, the polar propositions *p is constitutionally required* and *p is constitutionally forbidden* are both live candidates for acceptance. This has been the case with respect to some matters concerning religious liberty. For example, some argue that a given type of accommodation is constitutionally prohibited, while others insist that it’s constitutionally mandated. More often, however, the genuine debate is only between the different set of contrasts *p is constitutionally required* and *p is not constitutionally required*.<sup>73</sup>

Take same-sex marriage. Its proponents argue that states are constitutionally required to recognize same-sex unions, while its opponents argue that they aren’t; but I have not happened upon the contention that states are constitutionally *foreclosed* from recognizing such unions. So, if we assume that Scalia personally disfavors same-sex marriage, the fact that he hasn’t insisted that single-sex marriage is constitutionally compelled tells us only that he’s not a crackpot; it goes no distance toward undermining the actual charge that Posner has placed on the table—namely, that Scalia is an ideologue and opportunist. Or consider laws criminalizing gay sex. On Whelan’s way of reasoning, Scalia’s *Lawrence* dissent, far from helping to substantiate Posner’s accusation, actually *disproves* it, for the justice did announce that he “would no more *require* a State to criminalize homosexual acts . . . than [he] would *forbid* it to do so.”<sup>74</sup> This, of course, is absurd.<sup>75</sup>

Keeping in mind the distinction I have just drawn, consider this reformulation of Whelan’s observation: “Someone who strongly opposes gun control or affirmative action or limits on campaign finance would favor readings of the Constitution that entrench his position on those issues, even in the face of ambiguous text and unclear historical support.” Yes, exactly.

Take *Heller*. To start, Scalia has utterly failed to explain, despite numerous objections on just this point,<sup>76</sup> how the restrictions on gun ownership

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73. Here’s another way to capture the difference: *p is constitutionally required* can be contrasted either with (a) *¬p is constitutionally required* or (b) *¬[p is constitutionally required]*. Proposition (a) is much stronger than proposition (b).

74. *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

75. Roughly the same point could be made about Scalia’s insistence that abortion should be left to the political process, given that very few people (although not nobody) maintain that fetuses are persons within the meaning of the Due Process Clause.

76. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356–68 (2009); Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 387 (2009);

that he deemed constitutionally permissible are consistent with the original meaning that he has ascribed to the Second Amendment's text. The most plausible way to understand his anticipatory approval of restrictions that can be supposed to enjoy overwhelming public support is as exemplifying what he had described in a 1989 article as his "faint-hearted" originalism.<sup>77</sup> But he has since repudiated that label.<sup>78</sup>

Worse, Scalia's historical investigation cannot plausibly be regarded as disinterested. I do not go so far as to say that he is wrong about the history, but contend only that his all-too-characteristic absolutism on the matter is indefensible. Two years after *Heller*, the Supreme Court held in *McDonald v. City of Chicago* that the Fourteenth Amendment incorporates against the states the *Heller*-announced Second Amendment right to keep and bear arms for self-defense.<sup>79</sup> Writing for the plurality, Justice Alito acknowledged that "there is certainly room for disagreement about *Heller*'s analysis of the history of the right to keep and bear arms."<sup>80</sup> I believe that most historians of the relevant period would deem that an understatement.<sup>81</sup> Be that as it may, Alito's concession contrasts markedly with Scalia's pronouncement in *Heller*: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms" unrelated to militia service.<sup>82</sup> "No doubt"? *No* doubt? That's not just a howler, it's a consequential one: Scalia needs it to evade the apparent force of the preamble. A "prefatory clause," he says, aids the interpretation of a provision only in cases of ambiguity.<sup>83</sup> Because the text and history of the "operative clause" establish an individual right to bear arms for self-defense unambiguously (on Scalia's reading), the preamble is thereby conveniently neutered.

Or consider Scalia on affirmative action. The story reasonably starts with Scalia's too-quick acceptance that *Brown* is reconcilable with the original meaning of the Fourteenth Amendment's text. Posner is right: it is simply unacceptable—not consistent with the standards that govern argumentation in law or academia—to announce that "[r]ecent research persuasively establishes" thus-and-such by citing a single article and failing

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J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273 (2009); Amy Hetzner, Comment, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 MARQ. L. REV. 359, 367–69 (2011).

77. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

78. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> ("I described myself as that a long time ago. I repudiate that."); see also MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013).

79. 130 S. Ct. 3020 (2010).

80. *McDonald*, 130 S. Ct. at 3048 (plurality opinion).

81. See *id.* at 3121–22 (Breyer, J., dissenting) (showing numerous scholarly articles that point out the historical inaccuracies that the Court relied on in *Heller*).

82. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

83. *Id.* at 577.

to hint that it has been criticized and found *unpersuasive* by experts in the relevant discipline.<sup>84</sup>

In any event, Scalia's blithe embrace of *Brown* is just the backstory to his votes and opinions regarding race-based affirmative action. The main story is that, although in a handful of opinions he has declared, in one form or another, that "[t]he Constitution proscribes government discrimination on the basis of race,"<sup>85</sup> he has never, as far as I have been able to discover, offered any argument to establish that this was the original meaning of any part of the constitutional text.<sup>86</sup> Moreover, McConnell's article doesn't merely fail to provide support on this point but actually undermines Scalia's

84. See *supra* note 31 and accompanying text. I say this as someone who finds McConnell's argument weightier, and Klarman's rebuttal less forceful, than many commentators.

85. See *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part); see also *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring in the judgment) (citing his statement in *Grutter*); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2014) (Scalia, J., concurring) (reaffirming his view in *Grutter*); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (noting the Constitution's "rejection of dispositions based on race"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (suggesting that only issues of life or death can justify race-based action).

86. This is what passed for argument in Scalia's *Croson* concurrence:

At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); accord, *Ex parte Virginia*, 100 U.S. 339, 345 (1880); 2 J. Story, *Commentaries on the Constitution* § 1961, p. 677 (T. Cooley ed. 1873); T. Cooley, *Constitutional Limitations* 439 (2d ed. 1871).

*Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (alteration in original). I do Scalia a kindness to describe the argument as "weak."

Obviously, language favoring colorblindness from Justice Harlan's *Plessy* dissent and from Justice Strong's *Ex parte Virginia* opinion does not come close to making out the originalist case for colorblindness. Much could be said on this score, but the essential point is that such passages are paired with language that supports an antisubordination understanding of the Fourteenth Amendment that would be gratuitous if strict colorblindness were intended. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here."); *Ex parte Virginia*, 100 U.S. 339, 344–45 (1880) ("One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States."). And there is no reason to suppose that either Justice Harlan or Justice Strong was imagining a case (racial classifications designed to *advantage* racial minorities) in which the two meanings would dictate different outcomes.

But the use Scalia would make of Justice Story and Thomas Cooley is even worse. All Cooley says is that "the same securities which one citizen may demand, all others are now entitled to." THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 397 (2d ed. 1871). That supports colorblindness exactly as much as it does sexblindness or ageblindness. And the passage from Justice Story is no more helpful to Scalia. The final sentence of the section that Scalia cites reads as follows:



position. For as Scalia and Garner's summary of his conclusion—that the Equal Protection Clause was originally understood to prohibit “all laws designed to assert the separateness and superiority of the white race”<sup>87</sup>—suggests, McConnell's analysis provides much more support for the proposition that the original understanding of the clause sounded in antisubordination or antidegradation terms and not in terms of strict colorblindness. In short, Scalia has provided no reason to believe that Posner overstates matters when asserting that a categorical ban on race-based affirmative action programs is “a doctrinaire position with no basis in the equal protection clause” (p. 176). Again, my claim is not that race-based affirmative action is constitutional, nor even that it is constitutional *if* originalist premises are accepted.<sup>88</sup>

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[N]ow that it has become a settled rule of constitutional law that color or race is no badge of inferiority and no test of capacity to participate in the government, we doubt if any distinction whatever, either in right or in privilege, which has color or race for its sole basis, can either be established in the law or enforced where it had been previously established.

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 677 (Thomas Cooley ed., 4th ed. 1873). What Scalia ignores, however, is that Justice Story is giving voice to a doubt, not purporting to divine a constitutional rule of colorblindness.

Agreeing with Massachusetts Chief Justice Lemuel Shaw that all persons “are equally entitled to the paternal consideration and protection of the law,” *id.* at 676 (quoting *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849)) (internal quotation marks omitted), Justice Story observes that this equal consideration may well become manifest in “discriminations between classes of persons where reasons exist which make them necessary or advisable.” *Id.* at 676–77. What the Equal Protection Clause prohibits, he explains, are discriminations “based upon grounds purely arbitrary.” *Id.* at 677. His “doubt” that any racial classification can be established in the law is therefore based on his failure to imagine how any such classification, if *not* premised (as it must not be) on the assumption that members of the disfavored race are inferior or lack the capacity to participate in the government, could be other than arbitrary. Importantly, though, it's a doubt, not a constitutional command. Justice Story does not say that the Constitution forbids racial classifications *even if* they issue from an equality of “paternal consideration”; he says (and I should think it plain that he has in mind classifications that disadvantage blacks or racial minorities more generally) that he does not envision racial classifications that will in fact issue from such equal regard. Note precisely how Justice Story formulates the “settled rule of constitutional law.” *Id.* The rule is that “color or race is no badge of inferiority and no test of capacity to participate in the government.” *Id.* The rule is *not* “no distinction based on color or race may be established or enforced.” A distinction based on color or race may be established if—as Justice Story does not envision—it is not “purely arbitrary,” is based on reasons that make the classification advisable, and reflects an equality of paternal consideration. And whether wise or not all things considered, surely most—or at least many—race-based affirmative action programs satisfy these fairly minimal criteria and therefore would be constitutional on Justice Story's own analysis. (I am grateful to Emily Turner for profitable exchanges regarding Justice Story and Cooley.)

87. SCALIA & GARNER, *supra* note 4, at 88.

88. As the text intimates, my own view is that an originalist argument for a constitutional command of colorblindness faces an even steeper hill to climb than does a “living constitutionalist” argument (and I have not yet read a very persuasive version of the latter). For a recent argument that at least some forms of race-based affirmative action run afoul of the Fourteenth Amendment's original meaning, see Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013).



My claim is that Scalia's fervent insistence that affirmative action is unconstitutional is both uncannily consistent with his ideological priors and staggeringly devoid of the sort of argumentative support that his official judicial philosophy mandates. It doesn't prove out Posner's charge, but a disinterested observer should find it highly probative.

### III. POSNER V. SCALIA—TAKE II: BACK TO THE FOREST

Part II has examined various facets of the debate between Posner on the one side and Scalia and his supporters on the other. The Part thereby helps to satisfy what Posner elsewhere aptly describes as the reviewer's "elementary yet often neglected duty of telling readers enough about a book to enable them to make an informed decision about whether to read it."<sup>89</sup> Yet to focus too much on the details of the Posner–Scalia debate places us in danger of losing sight of the forest for the trees.

The central thesis of *Reflections on Judging*, after all, is not that Justice Scalia is either a fool or a knave (or both) but rather that he advances an approach to constitutional and statutory interpretation that introduces unnecessary "internal" complexity in an effort to allow judges to avoid having to engage with and unravel the "external" complexities that form the material of legal disputes. The root of Posner's charge is that the textual originalism that Scalia and Garner advocate is designed to enable judges to ignore the world's complexity. But the many charges and countercharges canvassed in Part II are largely orthogonal to that particular contention. It is not entirely clear how the particular type of formalism supposedly at work in *Reading Law*—textual originalism—constitutes or facilitates an avoidance of empirical reality.

Section III.A develops this observation, by offering, on Scalia's behalf, a reason to doubt that Posner's fundamental charge against textual originalism sticks, regardless of what merit, if any, there may be to the discrete charges against Scalia and Garner's book, and against Scalia's judicial performance more generally. That reason, in brief, is that the textual-originalist approach advocated in *Reading Law* is "unapologetically normative, prescribing what, in [Scalia and Garner's] view, courts *ought* to do with operative language."<sup>90</sup> Their approach is not a full-blown theory of judicial decisionmaking, and it therefore has literally nothing to say about whether or how judges should confront external complexity when it comes to applying the legal precepts that the interpretation of legal texts serves up. Section III.B then offers, on Posner's behalf, a rejoinder. The rejoinder is that a normative theory of legal interpretation must rest on arguments, and those arguments can be appraised on both evaluative and empirical grounds. Scalia appears uninterested in the empirical claims that must undergird his normative argument, and many such claims seem implausible.

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89. Richard A. Posner, *On the Alleged "Sophistication" of Academic Moralism*, 94 Nw. U. L. REV. 1017, 1017 (2000).

90. SCALIA & GARNER, *supra* note 4, at 9 (emphasis added).

### A. *Of Interpretation and Judicial Lawmaking*

To see why Posner's charge may not stick, it is useful to distinguish two aspects of Scalia's avowed judicial philosophy. The first is his textual originalism. The second is his predilection for rules rather than standards. The difference between these two commitments emerges from the fairly standard picture of judicial decisionmaking in which judges engage in three distinct activities:

1. judges must find, discover, or discern the law ("law-finding");
2. where necessary or appropriate—as when the discovered legal norm is "insolubly ambiguous" (p. 107) or "hopelessly vague" (p. 111)—judges create or formulate legal norms ("lawmaking"); and
3. whether the governing legal precept be found or made, judges must then apply that precept to the facts to produce a holding, which is to say that they must find whether the facts do or do not conform to the predicates in the legal precept ("law-applying").

Scalia's *rulism* is a position regarding the second of the three tasks. It is the view that, when judicial lawmaking is called for, judges should craft legal precepts that take the form of rules, not standards. Adopting this approach, he has argued, reduces the scope for judicial subjectivity at the third, law-applying stage.<sup>91</sup> His textual originalism, in contrast, is a position regarding the first task. It is, to a first approximation (I will complicate matters in Part IV), a view regarding how judges should go about discovering existing law. These two positions are logically independent: one can be a *rulist* without accepting textual originalism, and vice versa.<sup>92</sup>

Now, *rulism* might fairly be subjected to Posner's criticism. When judges are called on to make law, it is a plausible desideratum that the law they make be "reasonable" or "sensible" in the sense, very generally speaking, of promoting such values as welfare and justice, while respecting an appropriate division of responsibility among the branches of government. It is additionally plausible that *rulism* is not the best way to meet those goals—not because the polar alternative of "standardism" is preferable but because neither extreme is optimal. For reasons that the rules-versus-standards literature has plumbed to great depth, rules are sometimes better than standards, all things considered, and sometimes worse. But whether governance by rule or by standard is more appropriate in a given context, two points seem true. First, standards frequently call for more careful factual investigation at the application stage than do rules, especially (but not solely) when the rules turn on predicates that are more conceptual or essentialist than empirical.<sup>93</sup>

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

92. Posner remarks on Scalia's *rulism* elsewhere, see RICHARD A. POSNER, *HOW JUDGES THINK* 8–9 & n.16 (2008), but he apparently fails to recognize that *rulism* and textual originalism are logically distinct, even if they might often spring from the same set of concerns or dispositions.

93. I think it perfectly intelligible to describe a predicate as more or less conceptual or more or less empirical without presupposing any strong version of a distinction between the analytic and synthetic or the a priori and a posteriori.

This is why paradigms of formalism in constitutional law include separation-of-powers doctrines that turn on whether a particular power is “legislative,” “executive,” or “judicial” in character<sup>94</sup> and the *Lopez* suggestion that valid exercises of Congress’s commerce power will sometimes depend on whether the activity being regulated is “commercial” or “economic.”<sup>95</sup> Second, deciding whether to proceed by rule or by standard on a given occasion is itself an empirically sensitive decision. So a near-categorical commitment to rulism does seem, in two ways, hostile to judicial engagement with the world’s complexity.

But rulism is not the subject of *Reading Law*—textual originalism is. And that feature of Scalia’s professed commitments presents an entirely different kettle of fish. The legal precepts that textual originalism delivers might free a judge from needing to engage the world’s complexity, or they might compel precisely that. It all depends on the content of the legal precept that textual originalism delivers.

For example, it is highly plausible both that a textual-originalist interpretation of the Fourth Amendment yields, in part, the legal precept that a search is unconstitutional if unreasonable and that determining whether a given search was unreasonable requires a heavily empiricized all-things-considered judgment. The judgment will depend, that is, on such matters as the benefits that the search was likely to generate, the immediate and long-term costs of permitting searches of that type, and the availability of less intrusive means of gathering the evidence. It is therefore not at all clear that textual originalism directs judges to turn a blind eye to the world’s complexity.<sup>96</sup> Posner charges that, on the view pressed in *Reading Law*, “all that judges have to do and all they should do when faced with an issue of statutory or constitutional interpretation is apply the relevant statutory or constitutional text to the facts of the particular case. The escape from empirical reality is then complete” (pp. 178–79). But this charge wholly ignores the law-application stage, which textual originalism does nothing to obviate. Whether the judge must confront empirical reality in all its messiness or whether he may

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94. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

95. See *United States v. Lopez*, 514 U.S. 549 (1995). I examine the virtues and demerits of this component of a judicially crafted “decision rule” in Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487 (2004).

96. On the picture I am painting here, rulism should come into play only insofar as textual originalism permits: if the original meaning of a textual provision takes the form of a standard—as is likely true for the Fourth Amendment—then that’s what we are left with. In fact, though, in a recent Fourth Amendment decision concerning police use of a GPS tracking device, Posner argues that Scalia allowed his rulism to trump his originalism by holding that whether there had been a search turned on there having been a trespass. See p. 216 (discussing *United States v. Jones*, 132 S. Ct. 945 (2012)). Whether or not that is the best characterization of *Jones*, many commentators have objected that Scalia frequently subordinates his originalism to his rulism in ways inconsistent with his official position. See, e.g., Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014); Stephen M. Durden, *Law as Faith: The Personal and Unconstitutional Journey from Rule of Law to Law of Rulism*, 11 APPALACHIAN J.L. 71 (2011).

blink it away will depend entirely on the content of the legal precept that textual-originalist interpretation delivers. The notion that any method of textual interpretation licenses a complete escape from empirical reality is therefore mistaken.<sup>97</sup>

For Posner, the judge is, above all, a problem solver. The questions that appear to interest him most are how judges do and should make law when they are directed or permitted to “play a legislative role” (p. 108). And his answer to that latter, normative question is, by now, very well-known: judges should make law *pragmatically*, by paying careful attention to the likely (long-term, systemic) consequences of the rules they adopt. Scalia’s textual originalism, Posner seems to believe, is offered as an alternative and competing recommendation.<sup>98</sup> Where the pragmatist judge makes law by reference to consequences, the textual-originalist judge, Posner complains, makes law by reference only to semantics (pp. 111–12, 121). But this misunderstands what textual originalism is all about. In contrast to Posnerian pragmatism, textual originalism is not an account of what judges should do at the law-making stage; it’s an account of how judges should proceed at the law-finding stage. Textual originalism, Scalia might say, is not a competitor to Posnerian pragmatism but rather an answer to a logically prior question.

B. “Normative” Theories of Legal Interpretation and  
Their Argumentative Support

The defense I have offered on behalf of Scalia and Garner is good, I think, as far as it goes. But how far is that? Here is a reason to suppose that it is not very far and that Posner can recover simply by shifting his attack one level up, as it were. Because Posner fails to see that textual originalism leaves space for judges to engage “external” complexity in the manner that I have just suggested, he does not respond in the way that I will now propose. I advance a response, not in Posner’s voice, but in a Posnerian spirit.

Scalia and Garner are explicit that their approach is normative.<sup>99</sup> They are making, they say, an argument about how judges should interpret legal texts. But if this is so, then their normative guidance must itself be supported by reasons. *Why* should judges interpret statutory and constitutional texts as textual originalism directs? Scalia and Garner offer several reasons,

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97. In general, Posner too often indulges an unhappy tendency to paint formalism in artificially stark terms, such as when he defines “formalist approaches to law” as those “pre-mised on a belief that *all* legal issues can be resolved by logic, text, or precedent, without a judge’s personality, values, ideological leanings, background and culture, or real-world experience playing *any* role.” P. 1 (emphases added). David Levi, a distinguished former federal district court judge turned law school dean, complains that this is a strawman in an insightful review of Posner’s previous book, *How Judges Think*. See David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791 (2009).

98. Pp. 179–81; see also Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 540 (2012) (citing originalism as one of the constitutional theories used “to guide judges in performing their lawmaking role in a constitutional case”).

99. See *supra* text accompanying note 52.

but all confront substantial obstacles.<sup>100</sup> Because the reasons and the objections they encounter are largely familiar, I'll be brief.

Scalia and Garner maintain that their approach reduces judicial subjectivity—indeed, that it's the only approach that can do so. But it is precisely this rationale for textual originalism that renders Posner's ad hominem arguments against Scalia relevant to what is in dispute and not (mere) personal attacks. If the patron saint of textual originalism is as willful and result oriented in his decisionmaking as Posner's arguments suggest, we have good reason (not conclusive, of course) to doubt that the approach on offer will deliver the promised constraint. At the same time, Scalia and Garner's insistence that the only alternative to textual originalism is to authorize "every judge [to] decide for himself what [the text] should mean today,"<sup>101</sup> is a slander. Recall the rooster case. The Kansas Supreme Court departed from the plain meaning of "animal" in the animal-cruelty statute but did so to effectuate what the justices believed was the legislative intent.<sup>102</sup> Maybe that was the wrong decision, and maybe legislative intent is the wrong touchstone, but it is ridiculous to charge the justices with giving effect to what they think the text should mean rather than what they believed the legislature actually meant or intended.

Scalia and Garner insist that textual originalism best promotes predictability and certainty.<sup>103</sup> But their candid acknowledgment that the canons often point in different directions—just like clues in "any good mystery"<sup>104</sup>—undermines this claim. It is a hallmark of a good mystery that the solution is *hard* to predict. More importantly, it is very far from obvious—and probably false—that rigidly adhering to the meanings of textual provisions will produce more predictable results than would adhering to widespread contemporary understandings of what a statute aims to accomplish, especially when those understandings have generated well-settled practices.<sup>105</sup>

Above all, perhaps, Scalia and Garner ground their approach as the best way to promote and respect democracy. More than that, they maintain that "[o]riginalism is the *only* approach to text that is *compatible* with democracy."<sup>106</sup> Scalia routinely argues as though legislative outputs necessarily reflect the wishes of a majority of "the people," and he fails even to nod at the manifold reasons to problematize the relationship.<sup>107</sup> But as Posner reminds

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100. For a more extensive discussion, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 69–93 (2009).

101. SCALIA & GARNER, *supra* note 4, at 89.

102. See *supra* note 35 and accompanying text.

103. SCALIA & GARNER, *supra* note 4, at xxvii, 414.

104. See *supra* note 50 and accompanying text.

105. This is a close cousin to Friedrich Hayek's argument that common law regimes produce more predictability than do statutory regimes. 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 116 (1973).

106. SCALIA & GARNER, *supra* note 4, at 82 (second emphasis added).

107. See, e.g., *id.* at 408.

us, “[t]he U.S. Senate is malapportioned. The American political process at all levels is corrupted by money, interest groups, public ignorance and apathy, and inherent limitations of representative democracy, in which people vote for persons rather than policies” (p. 172). And this, of course, is just a partial list of features that challenge the blithe assumption that what the legislature produces is, in any but a stipulated sense, the people’s will. Yet none of these challenges registers as even a blip on Scalia’s screen—even on matters, such as partisan gerrymandering and campaign finance, that should make it pressing to engage with them. Instead, he mouths empty platitudes like this one: “A system of democratically adopted laws cannot endure—it makes no sense—without the belief that words convey discernible meanings and without the commitment of legal arbiters to abide by those meanings.”<sup>108</sup> This is quite false: to take a clear counterexample, there is nothing senseless or remotely paradoxical about a system of democratically adopted laws in which legal arbiters try to give effect to what changes in the law the drafters intended to accomplish, even at the expense of occasionally disregarding the meanings of promulgated texts.

IV. LEGAL THEORY AND THE DETERMINANTS OF LAW  
(OR, WHAT GIVES LEGAL PRECEPTS THE CONTENTS  
THAT THEY HAVE?)

At this point in the argumentative dialectic, we have reasons to doubt Scalia and Garner’s “normative” theory of legal interpretation. Those reasons are not offered by Posner in anything close to transparent terms, but they are reasons congenial to his general thrust. This final Part turns the tables once again by explaining how Scalia and Garner can meet this latest setback. Or, perhaps more accurately, I explain how their already expressed views can be charitably reinterpreted to place them on different and possibly sounder footing. In a nutshell, I suggest that Scalia and Garner, along with many originalists, should be understood not as advancing “normative” arguments about how judges should “interpret” legal texts but rather as advancing a jurisprudential claim about what the law is.

In saying this, I do not mean flatly to deny that their argument is normative but only to claim that such a characterization fails to capture what is important and controversial about their account. The crux of their argument—indeed, the center of gravity of contemporary originalism—is a claim that, setting aside judge-made law (that is, the common law), the law is the product of the operation of established legal canons on authoritatively promulgated texts.<sup>109</sup> Insofar as that is the better way to understand the grounding of contemporary originalism, then what we need in order to assess and, if appropriate, defeat it, are competing jurisprudential arguments.

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108. *Id.* at xxix.

109. Kevin Toh and I present and defend this claim in Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545 (2013).



There is a strong textual basis for concluding that Scalia and Garner's normative theory about what judges should do is predicated on a theory about what makes out the law. Most notably, they assert that "we are governed not by unexpressed or inadequately expressed 'legislative goals' but by *the law*";<sup>110</sup> that "the true law is" what an enacted text "state[s]";<sup>111</sup> and (agreeing with Laurence Tribe) that "[i]t is the *text's* meaning . . . that binds us as law."<sup>112</sup> To be sure, various snippets of Scalia and Garner's language, such as their repeated descriptions of their project as "normative," might be understood to point another way—that is, their project might be understood as not resting on a view of what gives the law the content it has. But neither Scalia nor Garner is a legal theorist, and many things they say that touch on theory are just confused.<sup>113</sup> So some charitable reconstruction is called for. In short, it is probably as true of Scalia and Garner as it is of a great many other originalists that they

assume or take for granted—sometimes explicitly, but much more often implicitly in varying degrees—that the law that the Constitution imposes is equivalent to the semantic contents of the inscriptions in the constitutional

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110. SCALIA & GARNER, *supra* note 4, at 383.

111. *Id.* at 397.

112. *Id.* at 398 (quoting Laurence H. Tribe, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION 65, 66 (1997)).

113. Consider a few examples. First, Scalia and Garner approve the "traditional view . . . that an enacted text is itself the law." SCALIA & GARNER, *supra* note 4, at 397; ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997). But no matter how traditional, this view is mistaken. Text is not law, for they are different sorts of things. A text is an assemblage of signs and symbols; a law is a normative entity—a prohibition, permission, power, and so on. Because nonidentical texts can correspond to the same law and because a statutory text can be amended (say, to make things clearer) without changing the law, text is not law. Second, Scalia asserts that *stare decisis* is an exception to all theories of constitutional interpretation, SCALIA & GARNER, *supra* note 4, at 414, but many pluralist nonoriginalists deny this, *see, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); DAVID STRAUSS, THE LIVING CONSTITUTION (2010), and Scalia offers no argument to support his assertion. Third, Scalia frequently emphasizes that original meaning, not intended applications, is the correct originalist touchstone, *see, e.g.*, SCALIA, *supra*, at 144, but he also occasionally insists that intended applications are binding, and not merely evidentiary. *See, e.g.*, SCALIA & GARNER, *supra* note 4, at 407 ("The open-ended provisions of our Constitution permit or forbid forever those extant phenomena that they were understood to permit or forbid when adopted."). Not only does this latter view contradict the former but it is clearly wrong. Consider a statute that bars from entering the country any person "afflicted with a highly contagious disease." Even if the statute was universally understood when adopted to forbid entry to lepers, the law does not do this if (as is now agreed to be true) leprosy is not "highly contagious." Fourth, Scalia and Garner read Lawrence Solum as a textualist who has "embraced the [interpretation–construction] distinction so as to contrast the legitimacy of constitutional interpretation with the relative illegitimacy of so-called constitutional construction," *e.g., id.* at 14–15, when, far from arguing that construction is illegitimate, Solum insists that it must, of necessity, operate in every single decision. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).



text, and, consequently, that discerning the semantic contents of the constitutional text is equivalent to discovering the constitutional law.<sup>114</sup>

Indulge, for a moment, the fantastical assumption that Scalia were to become persuaded by Posner that the canons produce needless complexity and should therefore be abandoned. What follows? The “semantic” and “contextual” canons are advertised as simply capturing good inferences even in extralegal contexts, so their formal elimination should not really make a difference. In contrast, abandoning policy-driven canons would change some outcomes. In a canonless world, Scalia’s recommendation to judges would be essentially this: “Your job, in a statutory or constitutional case, is to figure out and give effect to the law, and nothing else; and the law is whatever the texts mean.” That’s it.

What criticisms could Posner level against Scalia’s theory if reformulated in this way? The most obviously *implausible* objection would be that Scalia’s picture of law is unnecessarily *complex*; it is genuinely hard to imagine a theory of greater simplicity. Posner could say that this formulation of Scalia’s approach leads to “worse” or less “sensible” results than the approach he favors, but that is hardly the obvious standard for assessing the work product of our courts of law. As Jeremy Waldron noted in a short review of *Reflections on Judging*, “ordinary Americans . . . want a judiciary that will issue objective judgments based on what the legal materials require, not decisions based on the individual judge’s own best estimate of how to solve social problems.”<sup>115</sup>

The upshot of recasting Scalia and Garner’s core thesis from a “normative” or “prescriptive” argument to one about the determinants of legal norms is that Posner has made a fundamental mistake. It is the textual originalist (or the “formalist,” if you prefer) who believes that law is simple, and it is the nonoriginalist who must believe it is complex.

Understand that Posner does not believe that there is no law. He is not what he elsewhere calls a “nihilist.”<sup>116</sup> He accepts that there is law that courts are called on to apply and that they are to engage in lawmaking only when there is no law on a particular point (or when they are unable to discover what the law is) (pp. 120–23). But his puzzling belief that law, of all things, can be excepted from the complexity that characterizes most of the world’s other systems blinds him to the need to explain how statutory and constitutional texts give rise to law if *not* in the simple way that originalists imagine. In lieu of a theory of the determinants of legal content, all Posner has is a mantra: judicial lawmaking legitimately begins in the “open area” (p. 106) where “orthodox [legal] materials . . . run out.”<sup>117</sup>

114. Berman & Toh, *supra* note 109, at 547. Notice that this construal of their project goes significantly greater distance than does the “normative” construal toward blunting the relevance of Posner’s ad hominem arguments regarding Scalia’s judicial performance.

115. Jeremy Waldron, *Unfettered Judge Posner*, N.Y. REV. BOOKS, Mar. 20, 2014, at 34, available at <http://www.nybooks.com/articles/archives/2014/mar/20/unfettered-judge-posner/>.

116. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* ix (1999).

117. P. 168; see also, e.g., POSNER, *supra* note 92, at 9, 15.

This will not do. A comparison might help show why. Posner critiques the “civil recourse theory” of tort law developed and defended by Professors Goldberg and Zipursky<sup>118</sup> on the ground, among others, that it focuses only on the need for a remedy and fails to provide an account of wrongs. “It’s not enough to say that we all know a wrong when we see one and so we don’t have to get analytical about it,” Posner complains. “Often there is no agreement about what is wrongful conduct, conduct that law ought to redress” (p. 364). I think this criticism of Goldberg and Zipursky’s project has some merit. My point is that exactly the same criticism applies, in spades, to law. It’s not enough to say that law is determined by the interplay of “orthodox legal materials” and that the judge becomes legislator when those materials “run out.” What *are* the orthodox materials? Enacted texts and judicial decisions at a minimum, of course. Also the semantic contents of those texts? Legislative intents and purposes? Long-standing practices of the political branches? And how and when do they run out? When they do not all “point in the same direction”? When each of the materials is independently underdeterminate? When the consensus among legal officials does not yield a lexically ordered hierarchy of the materials sufficient to dictate a unique result? Obviously, participants to the theoretical disputes do not agree on what those materials are, how they combine, or when they run out. Figuring these things out is a central task of legal and constitutional theory.

To forestall a possible misconception that Posner seems to harbor,<sup>119</sup> I do not claim that judges need a theory of legal content in order to decide cases. No, a good theory will, I think, leave good judges pretty much where they are now.<sup>120</sup> A theory is needed only insofar as our attention turns toward a critical assessment of our practices. Originalists, or many of them, do not understand how law could arise from promulgated texts if not in the simple way that textual originalists maintain. They suspect that the contention that the relationship between law and text is “complex” is just a mask

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118. *E.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917 (2010).

119. *See, e.g.*, pp. 166–71. Posner’s view that a constitutional theory must be designed to instruct judges how to decide cases ignores the well-settled distinction between theories of law and of adjudication. But it fits fairly naturally with another erroneous belief of his—namely, that a constitutional theory that supports the position that there are many more “correct” answers of constitutional law than Posner envisions, and that the “open area” is significantly smaller, must also maintain that the correct answers are “demonstrably right” and can deliver “certitude.” P. 166. That is a mistake (think, for example, of Dworkin, who famously argued both that all legal questions have right answers and that discovering what all those answers are would require an imagined judge of supernatural ability), *see generally* RONALD DWORKIN, *LAW’S EMPIRE* (1986), and one that Larry Kramer has cautioned Posner against. *See* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 *CALIF. L. REV.* 621, 624–25 (2012). Posner should stop trying to discredit the claim that there are correct legal answers to many seemingly hard questions of constitutional law by saddling that claim’s proponents with the implausible view (belonging to legal epistemology) that the correctness of those answers can be conclusively established or known with certainty.

120. That is largely true of the account that Kevin Toh and I are developing. *See*, for a preliminary statement and some ground clearing, Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *TEX. L. REV.* 1739 (2013).

for the view that judges should simply make things up. They are entitled to an answer. They are entitled to hear more about how law *could be* any more complex than the simple textual-originalist model makes it, and they are entitled to be given some reasons for thinking that a more complex account describes our law. Now, they might not be entitled to a *complete* account—it's *complex*, after all!—but they are due more than Posner has offered.

#### CONCLUSION

*Reflections on Judging* is an interesting book. Readers of Posner's previous books, however, are unlikely to find much here that will strike them as particularly new or arresting. The book is nonetheless remarkable, at a minimum, for the vehemence of the attack that a sitting appellate judge (the most influential of our time) levels against a sitting Supreme Court justice (possibly the most controversial of our time). And if a large number of Posner's shots miss their target, as many, or more, inflict real damage. But the root problem is not so much that Justice Scalia is unsophisticated about, or indifferent to, the world's complexity. It is that he is unsophisticated about, and indifferent to, jurisprudence. Regrettably, that is one thing that he and Judge Posner have in common.

