

# THE 2023 SCALIA LECTURE: BEYOND TEXTUALISM?

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Last fall I was at another law school visiting with a friend, a co-author. So of course, we started talking about legal interpretation. I went into his office, he shut the door, and then the first thing he asked me was, “Do you think textualism has sort of played itself out?” This lecture is about the answer to that question.

## I. TEXTUALISM

Let’s start with what the lecture is not about. The *reductio ad Bostock*.

You may have heard this argument made by conservatives in the past couple of years.<sup>1</sup> It goes something like this:

- Textualism brought us *Bostock*. (*Bostock* is of course the interpretation of Title VII to prohibit discrimination on the basis of sexual orientation.)<sup>2</sup>
- *Bostock*, the argument goes, is bad.
- Therefore, textualism is bad.

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1. See, e.g., Senator Josh Hawley, *Was It All For This? The Failure of the Conservative Legal Movement*, THE PUBLIC DISCOURSE (Jun. 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043/> [https://perma.cc/QWS2-J254] (“[I]f textualism and originalism give you this decision, if you can invoke textualism and originalism in order to reach such a decision—an outcome that fundamentally changes the scope and meaning and application of statutory law—then textualism and originalism and all of those phrases don’t mean much at all.”)

2. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

I have very little patience for this argument, so I'm going to dispose of it very quickly. If your complaint about a method of interpretation is that some judges failed to use that method of interpretation correctly, you are not complaining about that method of interpretation. You are complaining about some judges. If your complaint about a method of interpretation is that even properly applied, it led to a result you dislike in a particular case, you are thinking about things in the wrong order. That is not how law works.

All right, enough about *Bostock*.

I am talking about a much bigger question: Is textualism . . . missing something important? Can we answer that question, "yes," without apostasy? Can we answer that question, "yes," without giving up on all of the useful and valid things the textualism helped us see?

Now, I think the answer is indeed "yes." But let's start by acknowledging the importance and success of textualism. One could say that textualism has won, and we have Justice Scalia to thank for it. The kinds of open and notorious anti-textualist opinions that made Justice Scalia's approach seem so necessary when he was forcefully advocating for it—a lot of them are now almost unthinkable today. You can pick your favorite examples: *Tennessee Valley Authority v. Hill*<sup>3</sup> and its 20 pages of unnecessary legislative history to make the obvious point of what the statute said;<sup>4</sup> *Citizens to Preserve Overton Park v. Volpe*,<sup>5</sup> and its famously mocked claim that the ambiguity in the legislative history requires us to eventually turn

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3. 437 U.S. 153 (1978).

4. *Id.* at 174–93.

5. 401 U.S. 402 (1971).

to the text.<sup>6</sup> You can find more examples in the literature and in Justice Scalia's writings.<sup>7</sup>

As Dean John Manning has chronicled, in many ways the kind of purposivism that exists today is a "new" purposivism which is not that different from a lot of the fundamental tenets of textualism.<sup>8</sup> These days, the idea that courts might just not care what the text says at all, or take the text as a vaguely interesting policy statement, has gone by the boards.

The same thing is true in constitutional cases. For example, take the pending Supreme Court case of *Moore v. Harper*,<sup>9</sup> the so-called independent state legislature doctrine case.<sup>10</sup> The Court is considering Article I's declaration that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."<sup>11</sup> The Court faces the question whether the word "legislature" there means something or whether it is as if the Constitution just said "in each state" *without* any reference to "the legislature thereof."

I don't predict what the Court will say. But by the end of the Supreme Court oral argument, there seemed to be common ground among everybody—from the Justices to the advocates—that the word "legislature" *does* mean something.<sup>12</sup> The struggle was to figure out exactly how much it meant, how thick it was, what the

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6. *Id.* at 412 n.29. *But see* Richard Primus, *The Scalia Legacy and the Overton Park Meme*, BALKINIZATION (Sept. 22, 2016), <https://balkin.blogspot.com/2016/09/the-scalia-legacy-and-overton-park-meme.html> [<https://perma.cc/43JR-AENY>].

7. Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017); Patricia C. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983).

8. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011).

9. No. 21-1271 (U.S. argued Dec. 7, 2022).

10. *Moore*, No. 21-1271; *see also* William Baude & Michael McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, THE ATLANTIC (Oct. 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/> [<https://perma.cc/YB7H-ZF5B>]. These remarks were delivered in February 2023, while *Moore* was still pending.

11. U.S. CONST. art. 1, § 4, cl. 1.

12. *E.g.*, Transcript of Oral Argument at 77, 80, 120-24, *Moore*, No. 21-1271.

Court's role was in second-guessing the views of others, and so on. Even if we don't know why the word "legislature" is there, or don't think it serves an important policy, it is there and that is a fundamental fact of our law.

Now, it is possible that to get us to this place, Justice Scalia sometimes made textualist claims that were a *bit* overbroad. For instance, at times he came close to insisting that the use of legislative history was completely illegitimate.<sup>13</sup> In fact, it probably is okay to use legislative history so long as you're very careful and clear about how you're using it and what proposition you're using it to reflect.<sup>14</sup> But that overstatement may have been the best way to make the point, practically speaking, in the world Justice Scalia confronted.

In general, the textualist revolution was correct and salutary. But it is getting to be time to solve some problems where standard textualist teaching might lead us astray. If we think of textualism, or the phrase, "the plain text," as just *mantras*—prayers to ward off the demons of bad judging—we will not find salvation. We need to understand *why* textualism is right. If we do, then it may mean that *sometimes* in *some* cases our analysis will have to move *a little bit* beyond the text.

What do I mean?

The key insights of textualism are really two things: positivism and formalism.

The insight of textualism is positivism in the sense that judges are supposed to follow external sources of law rather than treat jurisdiction as necessarily giving them the power to make decisions in

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13. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures."); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29–37 (1997).

14. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 359–368 (2005); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI. KENT. L. REV. 441 (1990); William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539 (2017).

their own discretion.<sup>15</sup> When it comes to the question: *What does the statute mean?* or *what should we do in this case where the agency or somebody else's behavior is governed by statute?* the key question judges are supposed to be asking is, *what did the law say they should do?* The answer comes from law outside the judge.

The argument for textualism as opposed to policymaking, for text over policy, comes from this kind of positivism. It is not the judge's job to decide what is the best thing, all things considered, or what would make our legal order better rather than worse, all things considered. It is the judge's job to ask what *something else* says about those things.

The other key insight of textualism is formalism, in the sense that it recognizes that the rule does not always match the *reasons* for the rule.<sup>16</sup> Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation.

This is the argument for textualism as opposed to intentionalism. The reason to follow text rather than the imagined or even the known intent of the people who enacted the law, comes from this kind of formalism. Judges, when they're enforcing a rule that comes from outside themselves, might have to enforce a rule that isn't exactly the same as the reasons for the rule.

These two things work together. Textualism reflects an insight—central to the structure of our government and central to the fabric of our law as it has evolved in our legal system—that the job of an interpreter (let's call her a "judge") is usually to enforce rules that

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15. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 96 (2006).

16. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

come from someplace else, not to make the rules herself and not to imagine rules that were never actually made law anywhere.

Those insights are the *reasons* for textualism, but those insights don't necessarily *stop* at textualism. If we are going to continue to honor the basic structure of our government and of our own legal order, we are sometimes going to need to think more deeply about the jurisprudential insights that underlie textualism. The problem is that the text itself, even the text supplemented by something like the original meaning of the text, is incomplete. It gives incomplete or misleading answers to important questions about the law. It needs to be supplemented with attention to our entire legal framework because our legal system relies not just on written texts but also on an unwritten law. We need to supplement textualism with this unwritten law, law that governs both interpretation and background principles against which interpretation takes place.

## II. TEXTS AND UNWRITTEN LAW

What do I mean by this?

Let's start with some simple examples. One place to start is with immunity doctrines, such as official or sovereign immunity, that bar claims against officials and governments. In the main, these doctrines are unwritten.<sup>17</sup> They are common law principles of jurisdiction and liability that say that even if the federal courts have jurisdiction under Article III, even if Congress has created a cause of action codified in 42 U.S.C § 1983, even then sometimes unwritten law operates to stop the claim from going forward. You see this in countless cases about official immunity where the court will say: yes, the text of the law supports a claim, but even so, is there some unwritten principle that says we're not supposed to hold the whole legislature liable for having enacted an unconstitutional statute,<sup>18</sup>

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17. See generally William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 611 (2021).

18. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

or that says (near and dear to the hearts of the judges, of course) that the fact that a judge ruled erroneously does not necessarily mean they owe damages for their error?<sup>19</sup> And more controversially—I think more questionably—courts will say that various officials in charge of enforcing the law might not be liable for their own mistakes based on the doctrine of qualified immunity.<sup>20</sup>

We see the same thing in sovereign immunity. While the Eleventh Amendment makes reference to *one* form of sovereign immunity—one that operates as a bar on subject matter jurisdiction—the Supreme Court’s cases mostly make reference to a *common law* immunity that exists in many more cases than are reflected in the text of the Constitution.<sup>21</sup> This common law immunity is older than the text of the Constitution; it was explicitly promised to skeptics of the Constitution at the ratification conventions in Virginia, New York and elsewhere; and the Court has recognized it as an indispensable part of unwritten common law.<sup>22</sup>

The need for unwritten law is true of the canons of construction more generally.

Just last term, at an oral argument in *Ysleta del Sur Pueblo v. Texas*,<sup>23</sup> Justice Kagan made an arresting, textualist challenge. She said to one of the arguing attorneys that she wanted to ask him about “an interesting question that I’ve been thinking about a good deal about, what these substantive canons of interpretation are, and when they exist, and when they don’t exist? They’re all over the place, of course.”<sup>24</sup>

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19. *Randall v. Brigham*, 74 U.S. 523, 537 (1868); *Stump v. Sparkman*, 435 U.S. 349 (1978).

20. *But see* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018).

21. Baude & Sachs, *supra* note 17.

22. *Id.* at 617; William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017).

23. 142 S. Ct. 1929 (2022).

24. Transcript of Oral Argument at 00:52:35, *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022).

She started to recite various aspects of the so-called substantive canons.<sup>25</sup> In that case, it was the Indian canon (which might actually be three different canons)<sup>26</sup> about the interpretation of law dealing with Indian tribes. Then she said:

Next week we're going to be thinking about the supposed major question canon. There are other canons. I mean, if you go through Justice Scalia's book, you'll find a wealth of canons of this kind, these sorts of substantive canons . . . . [H]ow do we reconcile our views of all these different kinds of canons? Maybe we should just toss them all out.<sup>27</sup>

Justice Kagan is a textualist,<sup>28</sup> and she recognized that the growth of these substantive canons was hard to reconcile with any of the conventional teachings about textualism and the Court's role in interpreting the text.

Of course, Justice Kagan's colleague, Justice Amy Coney Barrett, had written about the problem as a professor more than a decade earlier, writing that:

Substantive canons are in significant tension with textualism insofar as their application requires a judge to adopt something other than the most textually plausible meaning of a statute. Textualists cannot justify the application of substantive canons on the grounds they represent what Congress would have wanted, because the foundation of modern textualism is its insistence that

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25. *Id.* at 60.

26. Evan D. Bernick, *Are the Indian Canons Illegitimate? A Textualist-Originalist Answer for Justice Alito*, THE ORIGINALISM BLOG (Mar. 28, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/03/are-the-indian-canons-illegitimate-a-textualist-originalist-answer-for-justice-alitoevan-d-bernick.html> [<https://perma.cc/AYW9-5BSF>]; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2019).

27. Transcript of Oral Argument at 60, *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022) ("Justice Scalia's book" is a reference to ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2011)).

28. See Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:28 (Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg> [<https://perma.cc/GGA8-D9H9>].



congressional intent is unknowable. While textualists do not believe that language should be pushed for any meaning it can bear, many substantive canons require judges to do just that.<sup>29</sup>

At the end of a long article in which she tries to justify some of the substantive canons as best she can, then-Professor Barrett comes away saying that maybe, “when a substantive canon promotes constitutional values,” it could be permissible, because “the judicial power to safeguard the Constitution can be understood to qualify the duty that otherwise flows from the principle of legislative supremacy.”<sup>30</sup> The canons operate as an adjunct to judicial review. “Even so,” she says, “the obligation of faithful agency is modified, not overcome. A court cannot advance even a constitutional value at the expense of a statute’s plain language; the proposed interpretation must be plausible.”<sup>31</sup> Moreover, as she goes on to explain, the rationale of many of these substantive canons is not at all clear.<sup>32</sup>

Finally, of course, there’s Justice Scalia. As he put it: “Whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it. The rule of lenity,” he concedes, “is almost as old as the common law itself, so I suppose that it is validated by sheer antiquity. The others I am more doubtful about.”<sup>33</sup>

Now, these are not just theoretical questions, and these are not just minor questions. As Justice Kagan alluded to above, last term, in *West Virginia v. EPA*,<sup>34</sup> the Supreme Court “announce[d] the arrival” of the major questions doctrine—a new substantive canon

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29. Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010).

30. *Id.* at 181.

31. *Id.*

32. *Id.* at 137, 144, 158.

33. SCALIA, *supra* note 13, at 28.

34. 142 S. Ct. 2587 (2022).

that holds that “where [a] statute . . . confers authority upon an administrative agency” the scope of that authority “must be shaped, at least in some measure, by the nature of the question presented.”<sup>35</sup> In particular, “there are extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority.”<sup>36</sup>

Is this . . . textualism? Critics on both the right and the left have argued that it is not.<sup>37</sup> A few brave souls have tried to defend the major questions doctrine. Professor Ilan Wurman has argued that it is consistent with linguistic principles of statutory interpretation, such as the ordinary rule advanced by Professor Doerfler, that we need more evidence for certain propositions when the stakes are higher.<sup>38</sup> Justice Gorsuch has argued that this is just another example of a constitutionally inspired clear statement rule, like the rules for retroactivity and waivers of sovereign immunity.<sup>39</sup> But that just takes us back to where Justice Kagan and Justice Scalia started:

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35. *Id.* at 2633 (Kagan, J., dissenting); *id.* at 2602.

36. *Id.* at 2608 (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1291 (2000)).

37. Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1038–41 (2023); Benjamin Eidelson & Matthew Caleb Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515 (2023); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y. 463, 464–65 (2021).

38. Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. at 43 (forthcoming); Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 528 (2018); *cf.* SCALIA, *supra* note 13, at 28 (“Some of the [dice-loading] rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a ‘clear statement’ rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.”).

39. *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

Where do judges get the authority to introduce these clear statement rules that neither directly state constitutional requirements nor reflect the best interpretation of the text?

Now, it is not a coincidence that textualists have been debating the role of substantive canons, and they are right to do so. But the right way to think about these canons requires us to step beyond textualism. To repeat: *Our system relies on not just textualism but unwritten law. We need to supplement textualism with the unwritten law that governs both interpretation and background principles against which interpretation takes place.*

As I have written with Professor Stephen Sachs, “Legal canons don’t have to be recast as a form of quasi-constitutional doctrine. They don’t need to outrank the statutes to which they apply, because the canons can stand on their own authority as a form of common law.”<sup>40</sup> Now, not every clear statement will pass this test, but this is the right test to apply to them.

For instance, many of the so-called clear statement rules are really just applications of the rule against implied repeals. There is an unwritten doctrine of sovereign immunity, and the rule against implied repeals says that we don’t lightly assume that a statute repeals that doctrine, just as we don’t lightly assume that it repeals another statute without enough evidence that the repeal is required by the text. The same thing is probably true of the rules against retroactivity and a number of other clear statement rules the court has described. These are just applications of the canon against implied repeals to well-established doctrines of common law that apply in federal courts.

The major questions doctrine is trickier to justify, and I don’t think Justice Gorsuch’s account is satisfactory. Maybe Professor Wurman’s argument, that the doctrine is an application of the principle of high-stakes interpretation, will get us closer. Even on Professor Wurman’s account, we will need a little more than textualism

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40. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017).

because we need to know what the baseline is. *Which* is the extraordinary high-stakes claim?<sup>41</sup> Is it the agency's claim to have a broad authority that it otherwise wouldn't, so the baseline is one of limited government, state law, or private ordering? Or is it the court's decision to set aside an agency action under the APA, so the baseline is one of judicial restraint and executive action? If it is the latter, the major questions doctrine would be backwards: You would expect courts to be *more* deferential on major questions because they need to be extra cautious before displacing the policies of the executive. We need to figure out what the actual underlying legal rules are and how the APA interfaces with them, not continue to scrutinize the text of the Food and Drug Act, the environmental protection statutes, or the latest ambiguous grant of agency authority. The answers come from law, not necessarily the text.

Now, this model of statutory interpretation I'm describing has been a part of our law for a very long time. Indeed, it was criticized more than two centuries ago by Jeremy Bentham, who lamented about the interpretation of statutes that:

At present, such is the entanglement of these statutes to the rest of the Corpus Juris that when a new statute is applied, it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another. There is no saying which of these laws it repeals or qualifies, nor which one it leaves untouched. It is like water poured into the sea.<sup>42</sup>

*This, but uncritically!*

The point of Justice Scalia's textualism was to vindicate the law, which people were getting wrong because of their aversion to being bound by choices made in the text, or because of their failure to accept that the text can reflect a compromise between competing purposes, going *this far* but *no further*.

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41. For discussion, see Wurman, *supra* note 38, at 45–46.

42. Baude & Sachs, *supra* note 40, at 1098 (quoting JEREMY BENTHAM, OF LAWS IN GENERAL 236 (H.L.A. Hart ed., Univ. of London Athlone Press 1970) (1782)).

That same insight requires us to recognize that *sometimes* the legislature's choice was to stop making any choices in the text *either way* and leave the remaining questions up to the law that came before, whatever that was, whether it was written or unwritten. Hence the need to move beyond the text sometimes, but without moving beyond the law.

### III. THE (REAL) COMMON LAW

Now even these subjects are ephemeral—important ephemera, but ephemeral. The problems with pure textualism go much deeper than this.

Consider Justice Scalia's *A Matter of Interpretation*,<sup>43</sup> a published volume centered around his lecture-turned-essay, *Common-Law Courts in the Civil-Law system*. It is now given out, like a handbook, every time a 1L suddenly discovers that he or she has an interview with a federal judge and needs to be able to talk intelligently about originalist and textualist methods of interpretation. It is a great book, but it has an important blind spot.

Justice Scalia advances his powerful argument for textualism in this book based on its favorable contrast with the judge-made common law. In his telling, common law and unwritten law are judge-made law for judges to make up however they want to. He writes:

[Y]ou must appreciate that the common law is not really common law except insofar as judges can be regarded as common. That is to say it is not customary law or a reflection of people's practices, but is rather law developed by the judges . . . from an early time, as early as the yearbooks, any equivalence between custom and common law has ceased to exist, except in the sense that the doctrine of stare decisis rendered prior judicial decisions custom.<sup>44</sup>

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43. SCALIA, *supra* note 13, at 3.

44. *Id.* at 4.

Describing the 1L's experience with common law cases—arguing about which judge-made rule will lead to better consequences—Justice Scalia writes:

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising out of the brilliance of one's own mind those laws that ought to govern mankind. How exciting! No wonder so many law students having drunk at this intoxicating well, aspire for the rest of their lives to be judges!<sup>45</sup>

Now, according to Scalia, textualism was the way to escape “the attitude of the common law judge—the mind-set that asks, ‘What is the most desirable resolution of this case? How can any impediments to the achievement of that result be evaded?’”<sup>46</sup>

But here is the problem with Justice Scalia's account. Maybe this is how some common law courts, or at least some common law judges, function today. Maybe it is how a lot of them function. But it is not how they were *supposed to* function. Students who today are raised only on a diet of textualism and the alternatives of purposivism and policymaking lack the tools to grapple with the more foundational part of our legal system. How are judges to decide cases in cases that are not governed by statute? This art has been lost. Textualism has helped it become lost, and we need to help recover it.

For another example, consider *Erie Railroad Co. v. Tompkins*,<sup>47</sup> another staple of the first-year curriculum. *Erie*, of course, held that:

[E]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. *And whether the law of the State shall be declared by its*

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45. *Id.* at 7.

46. *Id.* at 13.

47. 304 U.S. 64 (1938).

*Legislature in a statute or by its highest court in a decision is not a matter of federal concern.*<sup>48</sup>

That is, state court decisions about the law should be treated exactly the same way as statutes enacted by legislators about the law. Courts and legislatures both make law, and the federal courts don't care which one it is.

The problem is, why does *Erie* assume that state courts make law?<sup>49</sup> Who gave state courts the power to make law? Not necessarily their state constitutions, which give legislative power to state legislators and judicial power to state courts. Indeed, *Erie* says this is just a fact about jurisprudence. *Erie* relies on the claim of Justice Holmes that it's just impossible to have courts deciding common law cases without having them be legislators and make law. But it's not impossible.<sup>50</sup> Indeed, we saw it done for a large period of history until we started to forget about it, and *Erie* helped us collectively repress the memory.

The deeper problem here is that we have forgotten that there is any other possible way to do common law than the method invented by the legal realists and then brought to fruition by law and economics scholars. Justice Scalia himself forgot. On the rare occasion he did get a federal common law case, such as the infamous military contracting case of *Boyle v. United Techs. Corp.*,<sup>51</sup> he decided to manufacture his own tort rule with little basis in law.<sup>52</sup> This was his rare chance as a federal judge to “play[] king.”<sup>53</sup> Why not be a benevolent king establishing an immunity rule that he thought was a good idea?

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48. *Id.* at 78 (emphasis added).

49. Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013).

50. Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527 (2019).

51. 487 U.S. 500 (1988).

52. See generally Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1259–60 (2017).

53. SCALIA, *supra* note 13, at 7.

Many state courts have forgotten as well. It is possible that states are *allowed*—notwithstanding the Due Process Clause and the Republican Form of Government Clause<sup>54</sup>—to confer law-making power on adjudicatory bodies called courts who make that law retroactively and then apply it to the parties before them. It is possible. But today, everybody just assumes that is the system we have without any comprehensive attempt to show that is the system that was actually enacted, or that that is the way it should work.

This forgetting runs throughout the law school curriculum, from Judge Cardozo, to Judge Traynor, to today. For instance, I teach a very recent decision by the New Mexico Supreme Court where it decided to become the first court ever to abolish the spousal communications privilege, openly adopting the role of lawmaker.<sup>55</sup> Now, to the New Mexico Supreme Court's credit, the court had second thoughts, wisely granting rehearing and referring the issue to the rulemaking process.<sup>56</sup> But both halves of that episode simply confirm that we need better legal tools and we need to move beyond textualism to understand the role that courts have in these kinds of cases.

Or even more broadly, consider natural law. I know that may be a dangerous invitation, but the role of natural law principles and positive legal adjudication is one of the oldest legal debates in the Republic.<sup>57</sup> They were a backdrop of our legal tradition for a long time, even when they are not enacted into law in American courts. We need to know what to make of that. I'm not going to solve the entire problem here, but I am going to say that if textualism has no

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54. U.S. CONST. art. IV, § 4.

55. *State v. Gutierrez*, 482 P.3d 700 (N.M. 2019) (retracted on rehearing, Nov 5, 2020).

56. *Id.* at 724–25. For a critical analysis of the original majority opinion, see Edward J. Imwinkelried, *State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States*, 53 N.M. L. REV. 71 (2023).

57. R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL HISTORY IN PRACTICE* (2015).



way to grapple with those problems at all, then it is missing something important. Indeed, to some, natural law is so foundational that textualism's inability to deal with it might be cause for discarding textualism entirely. But in our tradition, natural law principles, to the extent they functioned as positive law, functioned through unwritten law. You can go back to the foundational debate between Justice Chase and Justice Iredell about how to understand these principles and whether they provide a clear statement rule, if you will, for interpreting constitutional text.<sup>58</sup> But to think clearly about these problems, to make use of the insights behind textualism, we must move slightly beyond textualism itself.

In the current regime, courts assume that when the statutes really run out, there must be nothing to do but some kind of judge-made law. Maybe it is somewhat restrained, Burkean judge-made law,<sup>59</sup> or maybe it is a more aggressive judge-made law. But those are not the choices that lawyers thought about when our constitutional system was created or when it grew to maturity in the nineteenth century. They had a view that law could be, that law was supposed to be, found and not made.<sup>60</sup> It might be found in custom. It might be found in first principles that were customary only in some baser sense. But it involved the same underlying jurisprudential insight behind textualism. The judge is supposed to enforce rules that come from someplace else, not to make the rules herself and not to imagine rules that were never actually made law anywhere.

Justice Scalia begins *Common-Law Courts in the Civil-Law System* by lamenting "the current neglected state of the science of constru-

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58. William Baude & Stephen E. Sachs, Book Review, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 893 (2023) (citing *Calder v. Bull*, 3 U.S. 386 (1798)).

59. Cf. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

60. Sachs, *supra* note 50; Micah Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279 (2022).

ing legal texts and offering a few suggestions for [their] improvement.”<sup>61</sup> Today, that same neglect is true of the science of expounding the common law, and the same suggestions for improvement are very much needed.

Now, I will say that I am open to the critique that these old ways of thinking are *dead*—an unfortunate casualty of the success of *Erie* and legal realism, and of the destruction of the legal culture that made it possible to talk about general law principles. That is different from what *Erie* said, and from the kind of unthinking acceptance we see today. I am open to accepting this, but I am not yet convinced. I am not sure that the old ways of legal culture are entirely destroyed. And even if they were, might it not be our obligation to try to help bring them back?

#### IV. THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

Once we unlock the secrets behind textualism, even the text of the Constitution itself becomes more comprehensible to us. Consider, just briefly, Section One of the Fourteenth Amendment,<sup>62</sup> perhaps the most important single clause to modern constitutional litigation. In particular, consider the Privileges or Immunities Clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>63</sup> In 1873, the Supreme Court told us that this provision was basically meaningless.<sup>64</sup> And many decades later, Justice Scalia urged us not to look too closely under the hood. At oral argument in *McDonald v. City of Chicago*,<sup>65</sup> he famously mocked the petitioner’s lawyer for suggesting that the Court might want to look at that part of the Constitution that actually was *supposed to* guarantee individual

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61. SCALIA, *supra* note 13, at 2.

62. U.S. CONST. amend. XIV, § 1.

63. *Id.*

64. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

65. 561 U.S. 742 (2010).

rights. He asked “Why are you asking us to overrule . . . 140 years of prior law when you can reach your result under substantive due [process]? . . . I mean, unless you’re bucking for a place on some law school faculty . . . . [W]hat you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence.”<sup>66</sup>

Justice Scalia’s reticence comes in part from a long-standing mystery about what on earth the Constitution is referring to here, especially in light of the seemingly contradictory debates about its meaning.<sup>67</sup> Proponents of the Privileges or Immunities Clause simultaneously argued that it granted no new rights, but that its passage would have important consequences for the civil rights of newly-freed slaves and Black Americans more generally.<sup>68</sup> How could it be that the Clause was simultaneously revolutionary and yet redundant?

The answer, I argue, in a new article with Jud Campbell and Stephen Sachs, lies once again in unwritten law.<sup>69</sup> Under our argument, the Fourteenth Amendment’s Privileges or Immunities Clause is referring to the body of unwritten general law that was familiar to the amendment’s drafters, even if many of us have forgotten about it in the post-*Erie* world.<sup>70</sup> General law, the unwritten law that in the nineteenth century was taken to be common throughout the nation rather than produced by any particular state,

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66. Transcript of Oral Argument at 04:54, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

67. Compare, e.g., KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014), with Randy Barnett and Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499 (2019); and Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93 (2015)

68. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (remarks of Sen. Poland) (declaring that the proposed amendment “secures nothing beyond what was intended by the original provision in the Constitution”).

69. William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024).

70. *Id.*

was legal orthodoxy when the Fourteenth Amendment was written.<sup>71</sup>

In the eyes of the Republicans who created the Fourteenth Amendment, we argue, general law supplied the rights secured in Section One. That is why the Fourteenth Amendment was not thought to confirm new rights of citizenship. It secured preexisting rights found in unwritten law, rights that were already thought to circumscribe state power. But it was thought to do something important because it shifted the enforcement of those rights from state courts and state legislatures to federal courts and to Congress. This kind of approach to the Fourteenth Amendment would help us figure out the unenumerated rights that the Amendment really is supposed to protect without necessarily opening Pandora's Box to judges being able to decide to include any unenumerated rights they want. Once more, we need to learn to read unwritten law.

#### V. THE RISKS

Now before I gave this lecture, Dean Manning confessed to me that he was very nervous about it. Frankly, I am too. I am sure that this lecture will be misunderstood, miscited, and misquoted by people who did not hear or read it and who miss the basic point I am trying to make here. I won't give them any ideas, but you can probably imagine.

So let me try to state it clearly one more time before we finish.

Textualism, to a first approximation, is central to the rule of law.

But to a second approximation, we sometimes need to use other legal rules, unwritten law, and doing so is completely consistent with the reasons that we use legal texts.

- We need unwritten law as a backdrop against which to read legal texts.
- We need unwritten law to understand the common law system—the real common law system, not the system of judge-made law that has usurped it.

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71. *Id.*

- We need unwritten law because our legal texts sometimes point us toward it. We need to know how to accept the invitation.

Admitting these things has risks, but denying these things has risks too.

- Denying them risks sending us in statutory interpretation circles, unable to explain how we can avoid being literalists and also avoid being opportunists.
- Denying them risks leading people to abandon textualism, and positivism, and formalism, and even the rule of law itself because they mistakenly think that we have no other way to make sense of the central legal traditions such as natural rights.<sup>72</sup>
- And it risks leading us to close our eyes to the meaning of the constitutional text itself, because sometimes the text requires us to engage with unwritten law. The text requires us to go beyond the text.

If we do not teach our students how to do these things, if we do not revive the more fundamental pre-realist tenets of our legal tradition, then our students will be misled into thinking that the only choices are the plain text and judicial policymaking. That is not true, and I will take my chances in saying so.

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72. Baude & Sachs, "Common-Good", *supra* note 58.