BEYOND LAW? A SOCRATIC DIALOGUE INSPIRED BY BAUDE'S "BEYOND TEXTUALISM?"

EVAN D. BERNICK*

On February 27, 2023, Will Baude delivered the annual Scalia Lecture at Harvard Law School.[1] "Beyond Textualism?" invites legal conservatives to supplement textualism with a theory of law that includes unwritten as well as written rules. As Will concludes: "We sometimes need to use other legal rules, unwritten law, and doing so is completely consistent with the reasons that we use legal texts."[2] Like all of Will's work, it is engaging, incisive, and provocative, and it is shot through with characteristically Baudean ("Baudacious?") themes.

The following is an imagined dialogue between Will and a hypothetical, reasonably well-informed textualist named John who wanders into Will's office while Will is putting the finishing touches on the speech.[3] John's function in this dialogue is to illustrate both the seriousness of Will's provocation—the force of the challenge that it presents to textualism, as traditionally understood—and to raise normative questions that are left unanswered by the speech.

I.

John: I hear you're giving the Scalia lecture at Harvard. That's awesome! What are you going to talk about?

Will: Textualism. I'm going to make the case that it's incomplete.

J: Provocative! I consider myself a textualist, but I'll try to keep an open mind. What's wrong with textualism?

W: Justice Scalia had good reasons to champion textualism, and textualism helped us to see useful and valid things. But standing alone, it doesn't tell us what the law is. Hence, "incomplete," not "wrong."[4]

J: But … don't textualists say that law just is … text?[5]

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*Assistant Professor of Law, Northern Illinois University College of Law.

[1] Harvard Law School, *2023 Scalia Lecture | William Baude: "Beyond Textualism?"*, YOUTUBE (Feb. 28, 2023), https://www.youtube.com/watch?v=RUseqPHoCII.

[2] *See* William Baude, *Beyond Textualism*, 46 HARV. J.L. PUB. POL'Y 1331, 1350 (2023).

[3] Readers might be thinking of former Scalia clerk and current Harvard Law Dean John Manning. There are, however, many textualists named John, and any resemblance is coincidental.

[4] Baude, *supra* note 2, at 1336.

[5] *See, e.g.*, Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997) ("The text is the law, and it is the text that must be observed"); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the

W: So textualists have said in their more ontologically extravagant moments. But the best reasons for textualism are positivism and formalism.[6]

J: Go on.

W: Textualism positions judges to enforce rules that they didn't make up themselves. It also helps them avoid confusing the reasons or purposes of the rules they enforce with the rules themselves. But text isn't always law and law isn't always text. There's other law out there.

J: OK, what kind of law?

W: Unwritten law.

J: And textualism helps us identify and follow the written law but not the unwritten law?

W: Yes.

J: But if we want to identify and follow *all* the law, we need something else.

W: Precisely.

J: Got it. So, textualism would still help us with the Eleventh Amendment. Which says that states are immune from suit in federal courts by citizens of other states.[7] That means the Court was wrong to hold that they're *also* immune from suit by their own citizens, right?[8] Because the text doesn't say that?

W: Well, no. Sovereign immunity is unwritten law. So even though the text of the Eleventh Amendment refers to only one kind of sovereign immunity, the Supreme Court's cases recognizing other kinds are consistent with the unwritten law. And so, they're lawful.[9]

J: Interesting. Now I'm thinking about Section 1983, which authorizes civil suits against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[10] Nothing in the statutory text about immunities. But might unwritten law support the Supreme Court's qualified immunity decisions?[11]

W: Well, in principle it might, but it doesn't. I've shown that there was no such unwritten law of qualified immunity.[12] So the text of Section 1983 means what it says—no qualified immunity—and there's nothing else that says otherwise.

'law.'"). For a general history of this ontological commitment, see Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

[6] *See* Baude, *supra* note 2, at 1334.

[7] U.S. CONST. amend. XI (providing that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.")

[8] *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Hans v. Louisiana, 134 U.S. 1 (1890). For a textualist critique of these decisions, *see* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

[9] *See* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017); William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 611 (2021).

[10] 42 U.S.C. § 1983.

[11] *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[12] *See* William Baude, *Is Qualified Immunity Unlawful?* 106 CAL. L. REV. 45 (2018).

J: Hmm. OK. Suppose we have a statute. Looking only to its ordinary meaning, it's clear. Can we stop, or do we have to think about what Justice Scalia called dice-loading[13] "substantive" canons that promote extratextual values—like the rule of lenity[14] and maybe the Indian canons[15] and the major-questions doctrine?[16] Even against the most natural reading of the statute?

W: It depends.

J: On what?

W: The law. Linguistic and substantive canons can both be law.

J: Even the one that tells judges to avoid absurd results?![17]

W: Yes, in principle.

J: Wow. What about natural law? Can we at least keep *that* out? It seems like it's just an invitation for judges to make law in accordance with their moral principles.

(2018).

[13] *See* Scalia, *supra* note 5, at 28 (stating that substantive canons create "a lot of trouble" for the "honest textualist.").

[14] *Id.* The rule of lenity requires that criminal laws be interpreted in favor of criminal defendants.

[15] There are arguably at least five Indian canons, all of which require that legal texts be interpreted in favor of Native Nations and people. For an overview, see Alex Tallchief Skinbine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 268-73 (2022). For textualist skepticism about the canons, see Scalia, *supra* note 5, at 28; Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 151–53 (2010); Transcript of Oral Argument at 55–56, Ysleta del Sur Pueblo v. Texas, 142 S.Ct. 1929 (2022) (No. 20-493) (Justice Alito) (stating that "[t]hose who favor the interpretation of statutes to mean what the words of the statute are generally understood to mean have some question about some of these substantive canons," particularly the Indian canon, and questioning whether "throughout history Congress has always framed statutes in a way that are favorable to Indian tribes[.]"). *But see* Evan D. Bernick, *Are the Indian Canons Illegitimate? A Textualist-Originalist Answer for Justice Alito*, THE ORIGINALISM BLOG (Mar. 28, 2022, 6:12 A.M.) https://originalismblog.typepad.com/the-originalism-blog/2022/03/are-the-indian-canons-illegitimate-a-textualist-originalist-answer-for-justice-alitoevan-dbernick.html (acknowledging that the statutory canons cannot be traced back to the Founding but defending them as second-best originalist responses to "nontextualist, nonoriginalist doctrines and decisions that legitimate federal regulation of Indian affairs" via statute (as Congress began to do in the mid-19th century) rather than by treaty (as the original Constitution requires)).

A future work will argue that the "Indian" label obscures what was going on in *Worcester v. Georgia*, 6 Pet. 515 (1832), the case in which the canon was supposedly first applied. In short, the Marshall Court interpreted treaties with Native Nations no differently than other treaties between sovereign nations. In *all* treaty cases, it applied interpretive principles from Founding-era international law that defy easy classification as "linguistic" or "substantive." In *Worcester*, it applied the principle that treaties be read to preserve each party's sovereignty. This interpretive landscape is mapped in Seth Davis, Eric Biber, & Elena Kempf, *Persisting Sovereignties*,170 U. PA. L. REV. 549 (2022).

[16] The major questions doctrine requires a clear statutory statement from Congress before agencies can decide questions of major economic and political significance. The Court's most recent words on the major-questions doctrine are *Biden v. Nebraska*, No. 22–506, 600 U. S. ____ (2023) and *West Virginia v. EPA*, 597 U.S. 697 (2022). For an overview of the MQD, see Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022). On its compatibility with textualism, *compare* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515 (2023), *and* Chad Squitieri, *Who Determines Majorness?* 44 HARV. J.L. & PUB. POL'Y 463, 464 (2021), *with* Ilan Wurman, *Importance and Interpretive Questions*, VA. L. REV. 43 (forthcoming 2023). Concurring in *Biden*, Justice Amy Comey Barrett defends the compatibility of the MQD with textualism by reframing the MQD as a linguistic rather than substantive canon. *See* slip op. at 5, 9-10 (Barrett, J., concurring) (quoting Wayman v. Southard, 10 Wheat. 1, 43 (1825)) (contending that the MQD "is a tool for discerning—not departing from—the text's most natural interpretation[]" on the ground that "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only the details.). For an argument that the reframing does not succeed, see Beau J. Baumann, *Let's talk about that Barrett concurrence (on the "contextual major questions doctrine")*, YALE J. ON REG.:: NOTICE & COMMENT (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/.

[17] For a textualist critique, *see* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2002).

W: No. Well, sort of. Our legal traditions incorporate natural-law principles via positive law, both written and unwritten. So, judges can't just rely on *their* moral principles. But it doesn't follow that our law must be moral-principle free.[18]

J: So, if we want to follow the law, that doesn't necessarily or even presumptively mean following text. And linguistic canons don't have any priority over substantive canons. And … wait, what about legislative history?[19] We can at least get rid of that, right?

W: No.[20] Well, it depends on the law.

II.

J: This is provocative indeed. But I'm with you. I have another question.

W: I may have an answer. But we seem to have gathered a crowd, and the hour is becoming late. Perhaps we should put it to them whether to continue.

Enthusiastic applause, cheers, and whistles ensue from a crowd that has gathered around WILL's *office. However, one figure, who has been staring intensely at* WILL *behind a pair of thick eyeglasses, abstains from applauding. He is clad in a robe, wears an intimidating beard, and is carrying a well-worn antitrust casebook. Unable to contain himself any longer, he steps forward. This is* FRANK.

Frank: I heard what you've been saying. I was there when textualism began. It would not be too much to say that I *began* it.[21]

J & W: For which we are grateful.

F: The claim that you call "ontologically extravagant"—that text *and only* text is law—was and is essential to textualism. It is the major premise of my argument that use of legislative history is illegitimate. To quote myself: "What the Constitution requires for legislation is concurrent, bicameral enactments by the legislature and signature by the President. Legislative history flunks the bicameralism requirement; neither house of Congress actually votes on it."[22]

W: May I ask you a question…

F: Frank.

W: Frank. Have you ever acted lawlessly?

F: No.

W: Never?

F: Never.

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[18] Baude, *supra* note 2, at 1346–47.

[19] *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures."); Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 91 (2017) (describing legislative history as "illegitimate" in the specific sense of being ""insufficient to constitute legislation under our system of governance.").

[20] Baude, *supra* note 2, at 1334.

[21] *See, e.g.,* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); Frank H. Easterbrook, *What Does Legislative History Tell Us?* 66 CHI. KENT L. REV. 441, 445 (1990); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

[22] Easterbrook, *supra* note 19, at 91.

W: Have you not gone beyond the statutory text in interpreting, say, the Sherman Antitrust Act? Which, by its terms, prohibits vertical agreements "in restraint of trade,"[23] but which you have interpreted to prohibit… less than that?[24]

F: That is not the "gotcha" that you think it is. I have not. "The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of law."[25]

W: Does the text say that? Does it have a "delegation to judges to develop new law" clause?

F: Well, no.

W: Have you used canons of construction that don't appear in any text?

F: I use those canons to *determine the meaning* of the law—which is to say, the text, at least if we're talking about legislation. And many of them—the linguistic canons—are just applications of ordinary English grammar and syntax.[26] I don't really need a text to tell me to give words their ordinary, conventional meaning or to interpret words in a list as if they have something in common.

W: But some canons don't even arguably do that. The rule of lenity, for instance. It tells you to depart from the ordinary meaning of statutory text for the benefit of criminal defendants.

F: And the rule of lenity applies only when the text is ambiguous.[27] I do not use the rule of lenity to overcome clear text.[28]

W: But do you consider the use of the rule lawless?

F: Not as such.

W: Is it in any text?

F: It is not.

W: And you are a textualist.

F: By Zeus, yes.

W: And you have never acted lawlessly.

F: By Zeus, no.

W: Then it is not essential to textualism that law consist only in text.

FRANK *does not agree to this easily. But he sees the point, nods, and steps back into the crowd.*

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[23] 5 U.S.C. § 1.

[24] *See, e.g.*, Frank E. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136 (1984) (reasoning that "this language, taken at its broadest, prohibited ordinary bilateral contracts, partnership agreements, corporations and joint ventures" and approving of the Supreme Court's decisions "fashion[ing] rules for discriminating between ordinary restraints and anticompetitive ones").

[25] *See* Easterbrook, *Statutes' Domains*, *supra* note 21, at 544.

[26] *See* Scalia, *supra* note 5, at 26–27 (describing the linguistic canons as "commonsensical"); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 526 (1988) (asserting that "some number of linguistic conventions, or rules of language, are known and shared by all people having competence in the English language").

[27] *Id*. at 90.

[28] *See* U.S. v. Marshall, 908 F. 2d 1312, 1318 (7th Cir. 1990) (stating that "[c]anons are doubt-resolvers, useful when the language is ambiguous" and declining to apply the rule of lenity to unambiguous statutory text).

III.

J: That was pretty cool. Frank seems… well, not pleased, but satisfied.

W: Thanks. We're both Chicago guys.

J: Of course. You talk about law a lot.

W: Yes.[29]

J: I understand that you're a positivist. Can you say more about that?

W: Yes. Positivists hold that law is grounded in facts about a particular society.[30] As I put it in the speech, "[J]udges are supposed to follow external sources of law rather than treat jurisdiction as necessarily giving them the power to make decisions in their own discretion."[31]

J: I agree. But I know some non-positivists.

W: Me, too.[32]

J: They criticize textualism as a form of positivism and criticize positivism because it's mistaken about the nature of law. They say that you can't determine what the law is without moral reasoning.[33]

W: Yes.

J: And they also say that it can't support any moral obligation to follow the law. If the law is what positivists say it is, very unjust law is possible.[34]

W: Yes.

J: Would you say that it would be good to go beyond textualism? That we ought to do it?

W: I'm very careful with my language. "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."[35]

J: If.

W: Then: "[Textualism] 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."[36]

J: I have one more question.

W: Please.

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[29] *See, e.g.*, William Baude, *Is Originalism Our Law?* 115 COLUM L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *The Official Story of the Law*, 20 OXFORD. J. LEGAL STUDIES. 1 (2022); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019); William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103 (2016).

[30] Baude & Sachs, *Official Story*, *supra* note 29, at 109.

[31] Baude, *supra* note 2, at 1334–35.

[32] *Compare* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) *with* William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861 (2023) (book review).

[33] See Adrian Vermeule, *The Bourbons of Jurisprudence*, IUS & IUSTITIUM (Aug. 15, 2022), https://iusetiustitium.com/the-bourbons-of-jurisprudence.

[34] *See* Kevin Walsh & Jeffrey Pojanowski, *Enduring Originalism*, 105 GEO. L.J. 97, 114-15 (2016).

[35] Baude, *supra* note 2, at 1336.

[36] *Id*.

J: Why should we honor the basic structure of our government and our own legal order?

W: That's a good question. Maybe I should write another speech.

J: Can I suggest a title?

W: By all means.

J: "Beyond Law?"