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**JUDICATURE**

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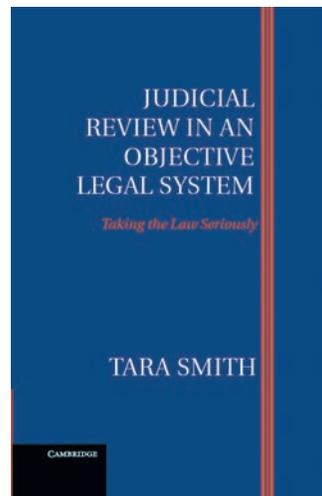
## Thinking Fundamentally about Judicial Review

by Michael J. Mazzone

### Tara Smith asks:

“How should courts interpret the law? By fidelity to the text? To the will of the people? To certain moral ideals?” In *Judicial Review in an Objective Legal System*, Tara Smith, philosopher of law and professor at the University of Texas at Austin, provides fresh new answers to these longstanding questions. By cutting straight to the core of objectivity and its place in a legal system, Smith lays fertile ground for assessing the arena’s major theories of judicial review, emerging ultimately with a theory of interpretation that solves the problems inherent in the current approaches.

Though all its components cannot be covered here, several features of Smith’s account warrant special attention: (1) She takes time to clarify why we should care about judicial review; (2) she sharpens our grasp of objectivity and its role in judicial review; (3) she succinctly surveys the major theories of review, revealing their subjectivity; (4) she presents a fresh theory of her own that embraces objectivity’s demands; and (5) she provides her uniquely philosophical approach to judicial review, which makes it more accessible, not less.



### *JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM*

by Tara Smith

Cambridge University Press, 2015

#### 1.

#### WHY WE SHOULD CARE ABOUT JUDICIAL REVIEW

Smith spotlights the high stakes of judicial review. She describes government in essential terms as that body in our society

that enjoys “exclusive authority” to “coerce compliance with its edicts” (p. 2). Its laws may compel us, “by guns, shackles, prisons” (p. 2). The reason Supreme Court vacancies draw national attention and scholars devote endless pages to debating interpretive methodology, she explains, is that judicial review is one of our legal system’s chief means of directing this coercive power. She presents judicial review in this light — not as an academic exercise, but as a “potent instrument” for protecting — or not — the rights of real, flesh-and-blood people (p. 3).

#### 2.

#### A SHARPER GRASP OF OBJECTIVITY AND ITS ROLE IN JUDICIAL REVIEW

The novelty of Smith’s approach rests on her clarifying portrait of objectivity, which she describes as “a method of using one’s mind so as to apprehend accurately the object of one’s concern” (p. 6-7). We need such a method, she explains, for three basic reasons: (1) Reality is absolute; (2) human thought is volitional; and (3) human thought is fallible (p. 16). Because rational thought does not come automatically and often takes hard work, we ▶

“IF THE WORDS OF A LEGAL TEXT ARE TO MEAN CERTAIN DEFINITE THINGS *and* NOT OTHERS (WHICH IS EXACTLY WHAT THE TEXTUALISTS PROPERLY SEEK) *and* IF THEY ARE TO STAND FOR ACTUAL PHENOMENA (THOSE ACTIVITIES THAT CONSTITUTE SPEECH OR THE ESTABLISHMENT OF RELIGION, ETC.), THEN WE MUST ALWAYS PROCEED ON THE BASIS OF THE BEST KNOWLEDGE AVAILABLE *at* THE PRESENT TIME.”

require a disciplined style of thinking to “get reality right” (p. 21).

Because reality will not simply comply with our wishes, our methods must comport with reality — if we are to achieve our goals. An objective thinker is “reality-guided and logic-anchored” (p. 22). He proceeds by all the relevant evidence, to the best of his honest knowledge, to reach accurate conclusions. While Smith points to the scientific method as perhaps the most well-recognized example of this approach (p. 19), she calls objectivity “a thoroughly familiar concept, routinely used, of which most people carry a working understanding” (p. 17).

Crucially for Smith’s account, *ends* matter (p. 21). One cannot get the relevant reality right without first knowing just what one seeks to accomplish. This applies in all spheres of life: *How* one measures a substance or grades students or prescribes medications will depend on *what* one is measuring or grading or treating, and *why* (p. 22). Smith suggests that objectivity in the law works in the same way.

A legal system is an “institutional mechanism” with an “overarching mission” (p. 47). It “has a job to do” — a function to “get right” (p. 50). Just as a hospital’s mission of getting patients healthy provides the context for evaluating whether its doctors and nurses are operating objectively or not, so too does a legal system’s mission provide the context for evaluating its judges and laws.

Respect for the law’s moral mission is one of Smith’s distinguishing contributions, and it lies at the heart of her take on objective judicial review. Courts have a particular role within a legal system: They are to uphold the Rule of Law. But “the Rule of Law warrants respect [only] insofar as the government is doing *what it is charged to do*” (p. 87) (emphasis added). Put another way, particular laws can have no authority or content — no meaning for judges objectively to interpret — beyond the bounds of the government’s chartering mission. Judges who fail to appreciate that mission — who lack a firm handle on *why* laws exist and *why* they sometimes require review — will be ill-equipped to judge objectively.

In Smith’s view, this is what makes a legal system’s foundational document —

what she calls its “bedrock legal authority” — so important (p. 112). “When properly made,” writes Smith, “a written constitution translates the mission and moral commitments of a government into legal practice by using those commitments to establish the government’s specific powers and the boundaries around those powers” (p. 113). By reducing the government’s authorizing mission and the principles of its administration to text, a constitution provides a “definitive repository of . . . ultimate law” (p. 132). It gives judges a distinct reality — the law — that objectivity can aid them in “getting right.”

### 3.

#### THE MAJOR THEORIES OF JUDICIAL REVIEW AS SUBJECTIVE

As with the other features of a legal system, what constitutes objective judicial review depends upon the part courts play in serving that system’s overarching mission. In Smith’s view, the purpose of judicial review is “to accurately render the meaning of existing law” (p. 146). Courts are to “safeguard the Rule of Law” by assuring that in any given case, it is *the law* that prevails; it is the law that they “get right” (p. 147). Unfortunately, she contends, the prevailing theories of judicial review fail objectively (try as some might) to serve their function; they are *subjective* in one way or another.

Smith focuses on the five competing accounts of judicial review that she views as dominating both scholarly and popular debate.

Acknowledging at the outset that the “proper method of judicial review *is* a difficult question” (p. 146) and that some accounts do not fall neatly into “creased compartments” (p. 145), Smith nevertheless sets out to “convey the heart of these positions and their inadequacy by the standard of objective law” (p. 147). What follows is only the barest of summaries of her analysis; readers are highly encouraged to evaluate Smith’s more comprehensive survey in the book itself.

Smith starts with Textualism, a form of Originalism championed by such jurists as Antonin Scalia and Hugo Black. She describes Originalism as “the view that the meaning of law is the meaning that its terms had at the time the law was enacted”

(p. 148), and Textualism as “the particular form of Originalism that holds that meaning resides in the plain words of the legal text” (p. 149).

“The basic problem with Textualism,” writes Smith, “is that text without context is empty” (p. 152). Meaning requires mental work to grasp and apply, because meaning “is not one and the same as words and is not contained entirely inside words,” (p. 152) but rather “a function of the words used as well as the conventions generally governing the use of those words as well as other aspects of the particular context in which they are used on a given occasion” (p. 152). Put another way, because legal texts “do not ‘whisper in our ears’ the answers to questions concerning their meaning and application,” conceptual thinking is needed to make sense of them (p. 153).

The more specific issue, Smith argues, is that “Textualism fails to appreciate the open-endedness of concepts” (p. 154). Here she draws on an important development in epistemology. The “open-endedness of concepts” allows us to correct misunderstandings of meaning “without betraying words’ meaning or defying the law” (p. 155). This is the key quote:

Indeed, if meaning is to be objective, we must correct previous errors. If the words of a legal text are to mean certain definite things and not others (which is exactly what the Textualists properly seek) and if they are to stand for actual phenomena (those activities that constitute speech or the establishment of religion, etc.), then we must always proceed on the basis of the best knowledge available at the present time.

Smith uses the concept of “persons” to illustrate the open-endedness of concepts, noting that when a court properly puts aside the original understanding and legal precedent of “persons” to hold that blacks are indeed “actual referents” of “persons” (p. 157), the court’s correction of an earlier mistake about the meaning of “persons” is an example of the court being objective.

Under Textualism, however, “judges interpreting a legal text are simply pursuing historical facts about language use, rather than engaging in questions about language’s

meaning and the actual nature of the phenomenon that laws refer to” (p.161).

Textualism is subjective because it upholds the beliefs and desires of particular men — the “earlier speakers of the contested language” (p. 159). A word’s meaning is reduced to what some people believed was its meaning. But because meaning does not inhere in words alone, meaning must come from somewhere else. According to the Textualists, it comes from a judge’s beliefs about the historical language practices of the original lawmakers. The result is that in trying to avoid one form of subjectivism, the Textualists adopt another.

Public Understanding Originalism holds that the law’s meaning is what a reasonable listener would place as its meaning in the words used when they were used — the original public understanding. Smith argues, instead, that adherence to law is to abide by the *concept* invoked, but that refinement of the concept is possible without changing the subject or breaching our fidelity to the law.

Public Understanding’s subjectivism is shown by its interpretation of the concept “commerce” as used in the Constitution. According to Public Understanding, “commerce” means what the public at the time thought commerce meant — without any concern whatsoever for the actual nature of commerce in reality. Here is the key quote:

The Originalists (appropriately) seek to honor the original concept enacted into law but because they do not understand the nature of concepts, they date-stamp meaning to match minds’ content on a certain date rather than represent the nature of the thing that language was used to refer (the actual nature of . . . commerce . . . ) (p. 172) (emphasis in original).

Smith next tackles Democratic Deference and its various iterations and names (Popular Constitutionalism, Democratic Constitutionalism, Democracy-Reinforcing Judicial Review, Political Process Theory, and Consensualism). She writes that the essence of these approaches is that courts should defer to the will of the people. The support for these theories is “legion in the academy” (p. 175) and among politicians

and judges across the political spectrum.

Smith argues that under Democratic Deference the law cannot possibly be clear or even knowable. The law would be in continual flux based on political winds. If both Progressives and Tea Partiers favor these theories of judicial review (and they do), how is a court to even know what popular will is given that these groups have diametrically opposed views of what the law should be?

Smith argues that when a constitution may be overridden by popular will, constitutional safeguards are a mirage. Democratic Deference theories undermine the essence of constitutions — counter-majoritarian institutions protecting individual rights, which are in turn counter-majoritarian.

Smith next addresses Living Constitutionalism, which is sometimes called Perfectionism. This view rejects original meaning and popular will. It views the law as a living organism, which courts should try to make better. The law is to resolve disputes to suit current conditions and today’s morality. Regardless of the law’s original meaning, the law should be interpreted to advance ideals in current conditions, according to Living Constitutionalists.

This appears to be President Obama’s view, as indicated by a post he made to SCOTUSblog (Barack H. Obama, “A Responsibility I Take Seriously,” SCOTUSBLOG, (Feb. 24, 2016, 8 a.m.), <http://www.scotusblog.com/2016/02/a-responsibility-i-take-seriously/>) after the passing of Justice Scalia: “That’s why the third quality I seek in a judge is . . . the kind of life experience . . . that suggests he or she views the law not only as an intellectual exercise, but also grasps the way it affects the daily reality of people’s lives in a big, complicated democracy, and in rapidly changing times . . .”

Smith acknowledges that there is much to like with Living Constitutionalism. In her view, it is vibrant, not weighed down by past errors, it recognizes the role of philosophy, it has a better understanding of language and word meaning than the Originalist view, and it asserts an active role for judges.

But, Smith’s critique is that this view misunderstands the law itself, and she argues that the standards used by

“WHEN WE RESPECT THE CONTEXT OF SPECIFIC LAWS WITHIN AN OBJECTIVE LEGAL SYSTEM, WE RECOGNIZE THAT THAT SYSTEM REFLECTS PHILOSOPHICAL CONCLUSIONS *and* THAT “THE LAW” INCLUDES VALUES. IF THE LAW WERE VALUE FREE, IT WOULD CARRY NO AUTHORITY.

Perfectionists to improve the law are subjective. Living Constitutionalism, she argues, is overly philosophical and invites judges to inappropriately engage in philosophical judgment, promoting the rule of philosophy over the Rule of Law. “Rational interpretation of law requires that judges engage in philosophical thought; it does not require that they assume the role of philosopher kings” (p. 199).

Finally, Smith addresses Minimalism, which urges courts to issue narrow rulings, to steer clear of broad principles and far-reaching implications, and to avoid bright-line rules, abstract theories, and final resolutions. It purports to be neutral on political principles. It is a “jurisprudence of deference” (p. 203).

After noting its positive features, Smith observes Minimalism’s ultimate incoherence. There is no “distinctive, logically unified method of judicial reasoning” (p. 205). As a result, it is not a genuine guide for judges. Its singular instruction is, “do little.” It is hollow; it has no content.

To demonstrate Minimalism’s incoherence, Smith notes that the Minimalists view *Brown v. Board of Education* and *Lawrence v. Texas* as Minimalist decisions. Minimalism’s “incoherence in conception, in other words, necessitates its erratic governance in practice. Smith writes that:

Minimalism treats the legal systems’ authority as residing not in constitutionally enacted law, but in a court-crafted cocktail of historical precedent, contemporary consensus, the flexible, the sensible, the *not too bold*, and whatever else a court might wish to consider in a given week (p. 211) (emphasis in original).

Although Smith notes some positives in each of the schools she reviews, she finds serious problems with all five. Textualism assigns authority to words divorced from context; Original Understanding sanctions the thoughts of original speakers — valid or invalid; Democratic Deference takes the pulse of the people; Perfectionism/Living Constitutionalism treats the law as partial and provisional; and Minimalism downsizes the work of courts (and therefore

the law) and replaces it with “pragmatic devices serving disparate political ends” (p. 213).

#### 4.

##### A FRESH THEORY THAT EMBRACES OBJECTIVITY’S DEMANDS

With her critique of the dominant schools of judicial review concluded, Smith sets out her own approach, as measured by the requirements of an objective legal system she described earlier in the book.

Her proposal includes all of the positive aspects of the other methods of judicial review (transparency, consistency, fidelity to the law’s mission, etc.) while excluding all the negative aspects (subjectivism, irrelevant considerations, popular will, indeterminate and evolving law, etc.). Smith’s proposal breaks through the false dichotomies inherent in the dominant theories of judicial review.

Smith gives an example of how the current theories of judicial review create apparent conflicts, and she describes how her approach would resolve the competing considerations. Her example is the apparent clash between the First Amendment and the Fourteenth Amendment’s Equal Protection clause as applied to the Affordable Care Act:

On these conceptions of the two Amendments’ meanings, it is either the case that, in order for the legal system to enforce anti-discrimination law, it must violate a religious employers’ right to offer employee benefits that conform to his religious beliefs, or it is the case that, in order for the legal system to honor employers’ religious freedom, anti-discrimination law is not respected, as the religious are permitted to violate equal protection requirements.

Under current methods of judicial review not only does this apparent clash exist, but it also forces courts to make a subjective decision of which Amendment is to be respected.

While the full case for objective judicial review is in her book, Smith makes a few specific recommendations that are worth mentioning here: (1) Courts should employ uniform standards of scrutiny (she makes a strong case for rejecting the current

three-tiered scrutiny); (2) courts should restore proper presumptions (she rejects the presumption of constitutionality applied to legislation and makes the case for a presumption of liberty); and (3) courts should have the courage of constitutional convictions and not defer regardless of popular will or the repercussions of correct legal determinations.

About rational basis scrutiny she writes that:

“Some” rational basis is a rather mild condition to require, in any context . . . . In the context of the U.S. Constitution, however, given the philosophy behind [it] as well as numerous indicators that directly call for fidelity to the government’s possession of solely those enumerated powers that the Constitution expressly bestows, it is astonishing. It is flagrantly illogical (p. 228-29).

Under a rational basis test, if “it’s not lunatic . . . it’s lawful” (p. 230). She argues that different levels of scrutiny treat some laws as more binding than others. And, she argues that presumptions of constitutionality sabotage a legal systems’ ability to fulfill its purpose.

In contrasting her view to the Living Constitutionists, she argues that courts must adhere to the values that inhere in the legal system, but not adopt other values. But values cannot be avoided. Objective interpretation of a constitution reflects the moral judgments that the constitution makes, but it does not sanction making other moral judgments. Courts should aspire to an “accurate, objective interpretation of the Constitution and the specific moral judgments it finds therein; nothing more, nothing less” (p. 237).

Judges are to draw on the philosophy in the law, but not inject their own. It is a mistake, Smith argues, for the interpretation of law to “shed background suppositions” (p. 239).

In sum, when we respect the context of specific laws within an objective legal system, we recognize that that system reflects philosophical conclusions and that “the law” includes values. If the law were value free, it would carry no authority.

Consequently, objective judicial review must honor those values that a legal system embeds and interpret its constituent law in light of them (p. 239).

## 5.

### A PHILOSOPHICAL APPROACH THAT MAKES JUDICIAL REVIEW MORE ACCESSIBLE, NOT LESS

The foregoing discussion might have some worrying that Smith’s philosophical approach to judicial review brings further complexity to an already difficult topic. Indeed, where does her approach leave philosophically lay readers and even legal practitioners who just want to grasp whether the Supreme Court’s latest opinion was out-of-line or on-the-money? Can this highly technical debate truly benefit from the injection of such abstract considerations as the “open-endedness of concepts” and the “moral authority” of law itself?

Smith shows that it can, and she does it with a clarifying approach — that cuts directly to fundamentals and cuts out much of the noise. By directing readers straight to the crux of the debate — the *moral mission* of the law — Smith opens the dialogue up to a broader audience and provides a tool for how even lay readers can direct their thinking on what it means to be objective in judicial review.

Of course, identifying a legal system’s authorizing mission is difficult work, and it takes an understanding of moral philosophy to do it. Reading the often highly conceptual language of the law properly is no less easy, and it takes a solid grasp of episte-

mology to do it. Each of these is essential to Smith’s take on objective judicial review. Fortunately, this is where Smith’s niche expertise comes in handy. While readers might worry about the accessibility of a work written in “philosophy of law,” her style is, refreshingly, crystal clear. Smith has a way of presenting even highly abstract, complex ideas in everyday, common-sense language. Smith’s book is quite palatable, even to lay readers.

Ultimately, the clarity that Smith brings to this discussion and to readers is one of method. By directing our attention to the salient features of judicial review, she aids us in filtering out the irrelevant. While she readily admits that her book cannot provide all the answers (and indeed, that often questions of judicial review are only answerable by experts possessed with an intimate knowledge of the legal corpus), Smith nevertheless offers readers a sense of how to direct their thinking, at a *fundamental* level, on even complex questions of legal interpretation. And what an empowering gift that is.



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