

# UGLY AMERICAN HERMENEUTICS

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## INTRODUCTION

The 1958 best-selling novel, *The Ugly American*,<sup>1</sup> gave rise to a common epithet that gained renewed currency during the administration of President George W. Bush. The novel depicts American diplomats and officials in a series of short vignettes principally set in the fictional country of Sarkhan. Most of the Americans are loud, arrogant, ignorant, racist, and cloistered. They fail to understand that the communists are able to gain traction in Southeast Asia because they don't despise the local people and their culture. The ugliness of these Americans is a serious matter that has profound consequences, but there are some heroes. Ironically, the "ugly American" in the story of the same name is a plain-looking man who doesn't fall into the behavioral trap that snares the best and the brightest of America's diplomatic corps. He is a humble and diligent worker who is accomplishing more than all the tuxedoed charge d'affaires combined.

The epithet "ugly American" has morphed into a more general caricature of American tourists, who reportedly arrive at a foreign destination and demand that others speak English and attend to their needs, all the while making a loud and garish spectacle of themselves. The ugliness in this iteration of the phrase is more cultural and aesthetic, less political and social. Although aesthetics cannot be divorced wholly from social and political considerations, this valence of ugliness is different. It is abrasive and strange rather than wrongheaded and offensive. Despite their frustration with invading tourists from America, I expect that many foreigners find these same characteristics more palatable when they visit the United States. The same behavior is experienced as open and authentic when it occurs within the American context. The brashness and directness of New Yorkers, the friendliness of Midwesterners, and the libertarian attitude of Westerners all have a certain validity until these various Americans are uprooted and let loose in Paris or São Paulo.

This Symposium provides a forum for comparing legal hermeneutics as articulated by scholars from the United States and Brazil. I want to embrace this cross-cultural event by asking whether American legal hermeneutics is "ugly" and is practiced by "ugly Americans." The pejorative cast of this terminology is obvious and intentional, but it is also ambiguous and multi-layered. In this Essay I unfold these various dimensions of ugly American hermeneutics and suggest that—ugly though we may be—American scholars still can make some important contributions to the worldwide conversation regarding legal

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<sup>1</sup> William J. Lederer & Eugene Burdick, *The Ugly American* (1958).

hermeneutics. It is our plain-faced pragmatism, perhaps, that is the source of our contribution even as it casts us (sometimes unfairly) as the ugly Americans.

I. UGLY TO THE BONE: THE FAILURE OF HERMENEUTICAL THEORY  
IN AMERICAN LEGAL THOUGHT

American legal hermeneutics isn't just homely, it is ugly. Downright ugly. Butt ugly. Ugly to the bone. The desuetude of American hermeneutics is highlighted in high-definition technicolor every time the United States Senate undertakes to confirm a new Justice to the Supreme Court. In the recent hearings leading to the confirmation of Justice Sotomayor we had to endure innumerable idiocies as some Senators seized upon various statements by Judge Sotomayor regarding how her background as a poor, working class Latina might have informed her work as an appellate judge.

Senator Jeff Sessions, the ranking Republican on the Senate Judiciary Committee and himself a failed nominee to the federal bench,<sup>2</sup> suggested that judges may follow one of two paths, with the fate of the country riding on the choice that is made. To describe the dire situation he perceived, Sessions relied on the familiar binary of objective fidelity to pre-established law as contrasted with the subjective creation of rules under the guise of judging. This rhetorical framing responded to President Obama's statement that he would seek a nominee who displayed empathy, which conservative opponents were quick to equate with lawless favoritism. In his opening statement, Senator Sessions opined ominously that the "legal system is at a dangerous crossroads" of two very different visions of judging.

Down one path is the traditional American legal system, so admired around the world, where judges impartially apply the law to the facts without regard to personal views.

This is the compassionate system because this is the fair system. In the American legal system, courts do not make the law or set policy, because allowing unelected officials to make law would strike at the heart of our democracy.

. . . .

Indeed, our legal system is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to the truth.

Down the other path lies a Brave New World where words have no true meaning and judges are free to decide what facts they choose to see. In this world, a judge is free to push his or her own political or social agenda. I reject this view, and Americans reject that view.<sup>3</sup>

<sup>2</sup> Philip Rucker, *A Senator Who's Seen the Other Side: GOP's Lead on Judiciary Panel Was Once Rejected for Bench*, WASH. POST, June 3, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/02/AR2009060203800.html>.

<sup>3</sup> *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5-6 (2009) (statement of Sen. Jeff Sessions, member, S. Comm. on the Judiciary), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/5-8.pdf>.

Senator Sessions's courage in rejecting the latter path is more than a bit undermined by the fact that no serious person has ever endorsed such a conception of language, law, and judging.

Senator Chuck Grassley also spoke directly to the problem of having judges display "empathy" as they adjudicate cases.

President Obama said that he would nominate judges based on their ability to empathize in general and with certain groups in particular. This empathy standard is troubling to me. In fact, I am concerned that judging based on empathy is really just legislating from the bench.

The Constitution requires that judges be free from personal politics, feelings, and preferences. President Obama's empathy standard appears to encourage judges to make use of their personal politics, feelings, and preferences. This is contrary to what most of us understand to be the role of the judiciary.<sup>4</sup>

The most embarrassing part of the spectacle, though, occurs when the nominee kowtows to this absurd conception of judging and reaffirms that she will judge in accordance with the law, as if the law can be determined and understood before the adjudicative act. Judge Sotomayor was less the automaton than most, but she quickly established her bona fides in the heart of her opening statement.

In the past month, many Senators have asked me about my judicial philosophy. It is simple: fidelity to the law. The task of a judge is not to make the law – it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms; interpreting statutes according to their terms and Congress's intent; and hewing faithfully to precedents established by the Supreme Court and my Circuit Court. In each case I have heard, I have applied the law to the facts at hand.<sup>5</sup>

At moments like these, one can only echo Colonel Kurtz: "The horror! The horror!"<sup>6</sup>

This is ugly American legal hermeneutics at its most base, of course, as it occurs in a staged political forum where the substance of the slogans tossed around by the participants is less important than their symbolic resonance. I begin with the profane image of confirmation proceedings, though, because it calls forth the fantasies that gird the American legal system. Like a dream elicited on the psychoanalyst's couch, the confirmation hearings reveal the psychology that claims to justify much of everyday practice, even if most sophisticated participants—removed from the glare of the television cameras and lights—would admit that such fantastic accounts lack any descriptive integrity.

The core of the fantasy underlying American legal practice is the claimed ability to separate "the law" from "the application of law in practice." The *law* is abiding, certain, and pre-determined through democratic processes. The *application* of law in particular cases is rigorously attendant to the law such that, even if the application is not wholly deductive in character, it is still highly

<sup>4</sup> *Id.* at 17-18 (statement of Sen. Charles E. Grassley, member, S. Comm. on the Judiciary), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/16-18.pdf>.

<sup>5</sup> *Id.* at 1344 (statement of Judge Sonia Sotomayor, Supreme Court nominee), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh111-503/1343-1344.pdf>.

<sup>6</sup> APOCALYPSE NOW (Zoetrope Studios 1979) (screenplay based on JOSEPH CONRAD, HEART OF DARKNESS (1902)).

constrained by the law. This fantasy is often equated with the ideal of the “rule of law,” and so preserving this legal imaginary becomes a matter of utmost importance in preserving the legitimacy of the legal system. By repeating the fantasy and holding the United States up to the world as an exemplary legal community precisely because we embrace this fantasy, American legal hermeneutics generates puzzlement among legal scholars schooled in the continental tradition. American legal hermeneutics is ugly because it is a loud and garish proclamation of American exceptionalism, paired with an anti-intellectualism that seeks to insulate our fantastic legal imaginary from serious inquiry, never mind rigorous critique.

A recent manifestation of the fantasy in action emerged in *District of Columbia v. Heller*.<sup>7</sup> In his majority opinion, Justice Scalia casts his anchor for the stable, unchanging bedrock of historical truth to weather the storm of social change without compromising the rule of law. Scalia is a proponent of “new textualism”<sup>8</sup>—an ironic name to be sure, because his academic and judicial philosophies are reactions to the perceived limitations of legal texts, standing alone, to secure the rule of law. After the linguistic-hermeneutic turn in legal theory, no serious commentator can suggest that words in legal texts can have plain meanings that can be applied to a given case unproblematically. New textualism attempts to restore the integrity of the legal text by conceding the obvious contextual and historical nature of meaning before immediately trying to isolate the text in a given historical moment—the time of its enactment as law—to ensure that there can be a determinate meaning that persists into the future. Disregarding the equally problematic debates among historians about the nature of historical knowledge, the hermeneutics of doing history, and even the contested nature of historical datum, the new textualists find salvation in the belief that a legal text acquires determinant meaning by situating it in the historical context of its enactment.

Statutory law might fairly be conceived in simple communicative terms: the enacted law represents the work of elected representatives, and democratic legitimacy requires that judges follow this original meaning. Given the relative ease and frequency of amending statutes to adjust to changing circumstances, one might admit the theoretical desirability—without, of course, conceding the practical capability—of limiting the meaning of statutory text to the objective, public meaning of the text at the time of its enactment. And Justice Scalia has strenuously made just this argument for years.<sup>9</sup>

<sup>7</sup> *District of Columbia v. Heller*, No. 07-290 (U.S. June 26, 2008).

<sup>8</sup> See generally David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153 (1998).

<sup>9</sup> Rejecting traditional references to “intent” or “purpose,” Justice Scalia has endorsed a new textualist approach to reorient statutory interpretation. He agrees that statutes must be read within their legal context and rejects the idea that judges can refer simply to a literal reading of the specific language of a statute, but his focus is the narrow question of the ordinary meaning of the words used at the time of the enactment. He recoils from the general practice of looking to the legislative history to discern the subjective intentions of the drafters and the purpose of the statute in question, arguing that these open-ended and unreliable concepts permit judges too much leeway in deciding cases, and—even if these concepts are constraining—are not democratically and constitutionally validated. The following analysis of the case gives the example. A classic example of his approach can be seen in *Green v. Bock*

But even if one believes that legislation is a democratically-sanctioned communication of a rule that must be followed, the Constitution presents a different case. As the constituting document of the polity, it gestures toward timeless and enduring principles that can provide stability to society over time. A constitution that requires constant emendation to deal with changes in society would not constitute a polity as much as it would serve as a super-statute.<sup>10</sup> On the other hand, a written constitution must do more than serve as an invitation for judges to rule as they deem best under present circumstances.

Various interpretive approaches to the Constitution during the past forty years reflect its status as a founding document for the polity. John Hart Ely famously argued that the Constitution should be interpreted to reinforce democratic responsiveness,<sup>11</sup> Ronald Dworkin contended that moral reasoning is at the root of constitutional interpretation,<sup>12</sup> and Randy Barnett sought the “lost constitution” that instituted libertarian rights and limited government.<sup>13</sup> However, experience has shown that the complexity and diversity of constitutional litigation makes it difficult enough for courts to articulate a unified approach to the First Amendment, not to mention an overriding interpretive approach to the Constitution. The encrustation of precedent appears to be relatively resilient against the contemporary quest for a unified theory of interpretation that produces a method or approach that renders decisions more predictable and legitimate. This was shown most dramatically when the Court refused to overturn

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*Laundry Machine Co.*, 490 U.S. 504 (1989), in which the Court considered a rule of evidence that permitted the introduction of a witness’ criminal convictions so long as the probative value outweighed any prejudice to the “defendant.” The case involved a civil plaintiff who was injured while on work release, and the court below held that the prejudicial effect of introducing evidence of his criminal history was irrelevant because he was a plaintiff in the case. *Id.* at 506-07. Writing for the Court, Justice Stevens engaged in a lengthy and detailed reconstruction of the drafting history of the rule to determine that Congress was attempting to protect criminal defendants from prejudice. *Id.* at 509-24. Justice Scalia concurred, but chastised the majority for its inquiry. *Id.* at 527-28. Scalia argued that the court should consider extra-textual materials only to confirm that the literal reading of the rule was absurd, and then interpret the text by doing the least violence to it. *Id.* He insisted that the Court focus first on the words of the text as ordinarily understood, and only if that objective meaning leads to an absurdity should the Court engage in the benign fiction that the statute should be read to cohere with related areas of law. *Id.*

For additional discussion of the context of statutory interpretation, *see infra* notes 50-54 and accompanying text.

<sup>10</sup> Justice Scalia criticizes those who would treat statutes differently from the Constitution, stating: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.” ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

<sup>11</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harvard Univ. Press 1980) (1980); John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 453-54 (1978).

<sup>12</sup> RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2* (Harvard Univ. Press, 1996) (1996).

<sup>13</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (Oxford Univ. Press, 2000) (1998).

*Roe v. Wade*<sup>14</sup> in the interest of doctrinal purity. The Court cited the need to respect the settled expectations engendered by precedents and acknowledged that constitutional interpretation requires reasoned judgment rather than recovery of a fixed and unchanging meaning.<sup>15</sup>

Justice Scalia's remarkable opinion in *Heller* thumbs its nose<sup>16</sup> at these mediative efforts by the Court to operate within a plurality of theoretical justifications for its practice. In *Heller*, the Court openly confronted the question of the interpretive principles that guide adjudication of constitutional rights because it was faced with a rare case involving an Amendment that it had yet to interpret extensively. Deciding by a 5-4 vote that a District of Columbia law effectively banning private ownership of handguns violated the Second Amendment, the Court held that the Amendment protected an individual's right to own handguns for the purpose of self-defense. The opinions in the case illustrate a sharp contrast between applying Scalia's new textualist methodology to the Constitution and more traditional inquiries into precedent, purpose and policy.

Justice Scalia's majority opinion provides the Court's first thoroughly new textualist reading of the Constitution. He begins with the central new textualist belief—that meaning precedes application in a specific case—by spending more than fifty pages analyzing the “meaning of the Second Amendment” before turning “finally to the law at issue here.”<sup>17</sup> Needless to emphasize, he uses a rhetorical device rather than provide a phenomenology of his decision-making. The entire historical discussion is oriented to the conclusion that ownership of a weapon to protect one's home was understood to be within the protections of the Amendment at the time of its adoption. Consequently, it would be utterly fantastic to assume that Justice Scalia would have written these same fifty pages describing the original meaning of the Amendment if he had no idea of the nature of the dispute before the Court! And if he would have done so, it renders the ban on advisory opinions as to the meaning of constitutional provisions utterly incomprehensible. But let us first trace the manner in which Scalia weaves what ultimately proves to be a flimsy tapestry.

Combing the historical record to determine how the public would have understood the famously ungrammatical and ambiguous Amendment<sup>18</sup> at the time of its adoption, Scalia concludes that the Amendment means that individual citizens have a right to possess handguns for their personal defense.<sup>19</sup> His opinion breaks down the single sentence of the Amendment to its constituent clauses, which he then defines by reference to dictionaries from the period.

<sup>14</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>15</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

<sup>16</sup> Justice Scalia once notoriously used a Sicilian hand gesture that might be considered a stronger version of thumbing one's nose, and so my stylistic flourish is not altogether fanciful. See Peter Lattman, *Justice Scalia's Gesture: Obscene or Not?*, WSJ BLOGS, <http://blogs.wsj.com/law/2006/03/31/justice-scalias-gesture-obscene-or-not-obscene/> (Mar. 31, 2006, 14:59 EST).

<sup>17</sup> *District of Columbia v. Heller*, No. 07-290, slip op. at 2, 56 (U.S. June 26, 2008).

<sup>18</sup> The Second Amendment provides, in full: “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.

<sup>19</sup> *Heller*, slip op. at 8-16, 64.

The Court struck down the District of Columbia's gun control legislation for violating a constitutional right, but the Court acknowledged that the rampant urban violence in Washington, D.C. might lead some to believe that a right to own guns is anachronistic. Nevertheless, Justice Scalia wrote, "it is not the role of this Court to pronounce the Second Amendment extinct."<sup>20</sup>

The contradictions raised by Scalia's attempt to provide a genuinely new textualist interpretation of the original meaning of the Second Amendment are immediately obvious. He begins by ignoring the prefatory clause regarding the Militia until after he determines the meaning of what he construes to be the operative clause, yet he provides no objective grammatical or historical justification for this approach.<sup>21</sup> He rejects the arguments of professional linguists expressed in an amicus brief even as he assumes that there can be a truth of the matter regarding historical research.<sup>22</sup> And it is only after determining the original meaning of the Amendment that Scalia asks whether any precedents foreclose the application of this meaning.<sup>23</sup> This suggests that *stare decisis* might trump the original meaning to some extent, presumably for pragmatic and institutional reasons.<sup>24</sup> He acknowledges that the right to gun ownership is not unlimited, and that there will be exceptions to restrict ownership by persons who are mentally ill or convicted felons and possession of handguns in government offices or schools. But again, the historical record provides no justification for these potential exceptions that Scalia casually tosses off in dicta.<sup>25</sup>

As one would expect, the early case law interpreting *Heller* already is drifting away from the perceived solid ground of an original understanding of the Amendment.<sup>26</sup> It takes little effort to see the cracks in Scalia's effort to hew to the original public meaning of the Amendment and nothing more, even if one grants that determining the original public meaning is justified as a matter of legal and political theory. In the context of deciding *Heller* as a case of

<sup>20</sup> *Id.* at 64.

<sup>21</sup> *Id.* at 3-22. Justice Stevens chides the majority for taking this approach, arguing that it is a legitimate move for an advocate, but not for a judge. *Id.* at 8-9 (Stevens, J., dissenting).

<sup>22</sup> *Id.* at 15-16 (majority opinion).

<sup>23</sup> *Id.* at 47.

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* at 54-55. Justice Scalia suggests that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us," *id.* at 63, but it is curious how he came up with this admittedly incomplete list in textualist fashion if he had not already consulted historical sources. It is patently clear that history is the crutch, rather than the leg, upon which Scalia's reasoning must stand. *See, e.g.,* United States v. Gieswein, 346 Fed. App'x 293, 296 n.2 (10th Cir. 2009) ("We share the concern . . . that the *Heller* dictum [regarding the ability of states to preclude gun ownership by felons] may be in tension with the basis for its own holding, as felon dispossession laws may not have the longstanding historical basis ascribed to them by the Court. [United States v. McCane, 573 F.3d 1037, 1047-48 (10th Cir. 2009) (Tymkovich, J., concurring).] The *McCane* concurrence further worries that *Heller's* dictum will stunt the development of Second Amendment jurisprudence in the lower courts. *Id.* at 1049-50.")

<sup>26</sup> *See, e.g.,* United States v. Knight, 574 F. Supp. 2d 224 (D. Me. 2008) (upholding statutory prohibition on the possession of firearms by a person under a restraining order regarding domestic violence). A prominent judge on the conservative Court of Appeals for the Fourth Circuit has chastised Justice Scalia's opinion for its activist character, going so far as to proclaim that *Heller* is guilty of the same sins as *Roe v. Wade*. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 296 (2009).

(almost) first impression, the fantasy might be indulged. But in the day-to-day grind of judging, there is no time to engage in the luxury of phantasm. “Good for you, Justice Scalia,” the District Court judges might be heard saying, “but we have a docket to clear and no time to write (which is to say, create) history.”<sup>27</sup>

Let us turn to the dissenting opinions, which can be faulted most for the degree to which they defer to the historical fantasy espoused by Justice Scalia. Justice Stevens dissented based on an interpretation of the Amendment that was grounded in its text, the history of its enactment, and the *Miller*<sup>28</sup> precedent that permitted the ban on sawed-off shotguns because owning a sawed-off shotgun lacked any nexus with militia service.<sup>29</sup> His dissent centers on a historical understanding that the purpose of the Amendment was to ensure that the new federal government could not oppress the states by regulating ownership of weapons by able-bodied white males, who comprised each state’s militia.<sup>30</sup> In other words, Justice Stevens makes an argument that combines originalism and purposivism, claiming that the “proper allocation of military power in the new Nation was an issue of central concern for the Framers” that led to the enactment of the Amendment.<sup>31</sup> Although shaped by Scalia’s historical tack, Stevens’s dissent operates at a higher level of historical generality. Rather than determine how individual words and phrases would have been understood at the time of enactment, Stevens inquires into the original understanding of the purpose of the Amendment.

In contrast, Justice Breyer’s dissenting opinion more openly criticizes the new textualist methodology and the lack of definitive evidence for Justice Scalia’s claim that self-defense is a core value of the Amendment. Breyer’s analysis leads him to conclude that the new originalist project is bankrupt, even as it triumphs (by one vote) as the chosen methodology for resolving the case before the Court. He writes:

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument’s sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That

<sup>27</sup> For example, in *United States v. White*, 593 F.3d 1199 (11th Cir. 2010), the Court determined that a statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence should be deemed to fit with *Heller*’s non-exhaustive list of “presumptively lawful, longstanding-prohibition[s]” on gun ownership. The Court engages in no historical inquiry, but rather engages in a very traditional purposivist and analogical analysis to conclude that the statute is not unconstitutional. *Id.* at 1205-06.

<sup>28</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939).

In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

*Id.*

<sup>29</sup> *Heller*, slip op. at 42-43 (Stevens, J., dissenting) (discussing *Miller*).

<sup>30</sup> *Id.* at 17-41 (Stevens, J., dissenting).

<sup>31</sup> *Id.* at 17.

they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they . . . would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment – judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*.<sup>32</sup>

The need for judgment is precisely what Scalia wishes to avoid. In his world, every careful and honest judge should come to the same conclusion because the historical facts don't change, although certainly there might be debates about the historical record in some cases.

It is important to note that Scalia's opinion successfully draws the dissenting judges into its gravitational pull, and so the dissenters are equally open to criticism. They too look to history, but they do so in a manner that appears to provide greater ability to adapt the text to modern problems; however, they provide no convincing explanation as to why they don't simply operate at a general level of constitutional values and adopt the best approach to the problem at hand. If history is inconclusive, why must it play such a large role in their opinions? We might characterize the *Heller* case, then, as a battle between faint-hearted originalists and faint-hearted purposivists.<sup>33</sup>

Larry Solum is perhaps the most earnest defender of new originalism's intellectual integrity in the legal academy. We might forgive Justice Scalia for his ugly hermeneutics—writing, as he was, under time pressure in response to a specific case and with the need to hold his one-vote majority—but we do, and should, expect more from academic commentators. Solum seeks to defend the validity of the Court's turn to “what has been called ‘original public meaning originalism’—the view that the original meaning of a constitutional provision is the conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified.”<sup>34</sup> Solum's phrasing is careful and precise: new originalism defines the “original meaning” of a text, which is not to say that it necessarily defines the controlling constitutional rule. Solum separates the argument about the meaning of the text from the question of what role that meaning ought to play in constitutional adjudication, acknowledging that precedent, historical practice, and other prudential considerations may well

<sup>32</sup> *Id.* at 43 (Breyer, J., dissenting).

<sup>33</sup> Justice Scalia has been criticized for being a “faint-hearted originalist” because he doesn't follow the historical evidence strictly, but rather softens it with qualifications fostered by his sense of political, legal, and institutional principles. Randy E. Barnett, *Scalia's Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13-16 (2006); see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 297 (2007) (arguing that Justice Scalia is forced to adopt a “faint-hearted originalism” because he begins with an overly narrow conception of originalism that would lead to unacceptable results).

<sup>34</sup> Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. Rev. 923, 926 (2009). Solum provides a succinct, yet rich, overview of the varieties of theories that have marched under the banner of originalism during the past forty years and very clearly defines the new originalist approach that is at work in *Heller* to avoid confusions with this intellectual history.

factor into adjudication after the meaning of the text has been determined.<sup>35</sup> In other words, the original meaning of a text is a fact in the world that does not, without more, resolve the normative question of how the Court ought to decide constitutional cases.<sup>36</sup>

Moreover, Solum acknowledges that the “original meaning” does not exhaust all possible meanings of “meaning.”

We can inquire into the linguistic meaning of the Constitution: what is the semantic content of the words and phrases that comprise the constitutional text? We can ask about the applicative meaning of the Constitution: what are the implications of a given clause for a contemporary controversy? We can investigate the teleological meaning of the constitution: what purpose was some constitutional provision intended to serve?<sup>37</sup>

Solum has carefully established that “original meaning” should be understood to be a semantic fact that is subject to investigation and retrieval. However, he has also made clear that original meaning has a contingent relationship to constitutional practice, that resolving the character of this relationship is a normative matter, and that original meaning does not exhaust the full scope of the “meaning” of a text.

If Justice Scalia’s opinion in *Heller* is to be forgiven its theoretical sins because it is a practical exercise of authority rather than a genuine scholarly effort, what of the academic defense of new originalism by Solum and others? Solum properly notes that *Heller* makes fundamental assumptions about the role that the linguistic meaning of the constitutional text should play in constitutional practice. These assumptions can be defended only if constitutional meaning is to be equated with semantic (linguistic) meaning as it is defined by Solum. But he concedes that there are different ways to determine meaning, and with each of these various forms of meaning there are different normative justifications for a multitude of hermeneutical practices that might be pursued. Solum shows his hand by privileging a theoretical approach to meaning, and on this basis he criticizes the dissenting judges in *Heller* for not being clear about the theoretical basis for their reasoning.<sup>38</sup> But the first question is whether an academic effort to fully theorize constitutional practice is practical or desirable.

If semantic meaning is a useful concept for speaking precisely about the meaning of texts, it does not follow that this concept answers questions of con-

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<sup>35</sup> Solum argues that it is no more legitimate for critics to assume that new originalists will look only to original meaning than it is for critics to assume that nonoriginalists will never look to original meaning. *Id.* at 938-39.

<sup>36</sup> Solum explains:

What then is the relationship between *linguistic facts* and *normative constitutional theory*?

The answer to that question is that the relationship is contingent. The linguistic meaning of the Second Amendment might be important for constitutional practice—as the *Heller* majority thought it was. Or one might believe that other considerations are more important. . . .

The key point is that the inquiry into meaning in the semantic sense is conceptually distinct from the normative inquiry about constitutional practice.

*Id.* at 943-44. And later, “[o]f course, the linguistic meaning of a text may (or may not) constrain the legal effects of the text: meaning in the semantic sense can influence meaning in the implicative sense.” *Id.* at 947.

<sup>37</sup> *Id.* at 941.

<sup>38</sup> *Id.* at 958.

stitutional hermeneutics. The dissenting opinions by Justices Stevens and Breyer gesture toward the original understanding of the operative terms at issue but their analyses are not confined to this understanding of meaning, nor do they establish a delineated hierarchy for consulting various senses of meaning and normative justifications in order to reach a decision. Justice Scalia relies on what Solum terms, apparently with no sense of irony, the “fixation thesis,” which is the idea that original public meaning is a social fact that serves as an unchanging bedrock for semantic meaning.<sup>39</sup> But if there is no bedrock that eliminates the challenge of judging—which requires a robust consideration of a variety of facts, norms and practices to reach a constitutional decision in the case at hand—then Stevens and Breyer are not confused and uncertain; they simply are judging. And there is nothing in the academic defense of new originalism that indicts those who engage in prudential judging in complex circumstances, considered against the background of a rich and variegated tradition.

Moreover, even if one embraces the new originalist approach, theorists concede that there will be significant indeterminacy in reaching the “correct” result in individual cases. The fixation thesis establishes the integrity of semantic meaning (the object of interpretation), but the application of constitutional meaning to specific cases is admittedly not fixed but rather the “construction” of constitutional meaning. The import of this terminology is clear: interpretation is retrieval of a preexisting meaning and construction is an active use of meaning to fashion a rule for the case at hand. As Solum summarizes, there is a temporal as well as a conceptual distinction: “We interpret the meaning of a text, and *then* we construct legal rules to help us apply the text to particular fact situations.”<sup>40</sup> This simplistic understanding not only rejects the lessons of contemporary hermeneutical philosophy without expressly arguing against them, it also implodes the entire new originalist project on its own terms.

Jack Balkin, in what one must assume is an extended mood of mischief, has entered the debate about new originalism by claiming that he accepts new originalism as a proper theoretical description of interpretation, but then expanding the scope of construction to defend *Roe v. Wade* as a legitimate decision under new originalist principles.<sup>41</sup> If theorists resolutely attend to the original meaning of the constitutional text at the time of its enactment, Balkin insists, they will find that original meaning originalism “is actually a form of living constitutionalism.”<sup>42</sup> This is true because the Constitution is comprised of both rules and principles. The original meaning of a principle such as “equal protection of the laws” is capacious enough to permit judicial elaboration in accordance with changing social contexts as long as we do not limit the principle by construing it in terms of how the drafters intended or anticipated that it would be applied to future cases. Balkin accepts the distinction between interpretation and construction, but argues that judges traditionally have engaged in

<sup>39</sup> *Id.* at 944-47.

<sup>40</sup> *Id.* at 973 (emphasis added).

<sup>41</sup> Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 449, 522-23 (2007).

<sup>42</sup> *Id.* at 449.

constitutional construction and so should continue to do so in the course of explicating the significance of the original meaning of constitutional provisions to particular cases.

The only plausible response to Balkin's provocative tack is to look beyond the original meaning of constitutional text in order to secure predictable and desired results. And it is precisely for this reason that Justice Scalia claims to attend to precedent, historical practice, and other experience that might constrain contemporary practice even though these factors admittedly have no legitimacy by virtue of the original meaning of constitutional text. Keith Whittington, the political scientist most closely associated with promoting new originalism, similarly argues that courts should refrain from constitutional construction on democratic grounds, enforcing the original meaning of the constitution as they find it, but leaving it to other branches of government to construct constitutional doctrine.<sup>43</sup> The fact that Whittington's answer to Balkin's reading of new originalism is external to new originalist theory brings into sharp focus the fact that new originalism is just a theoretically-clarified vocabulary for pursuing certain political and legal goals, rather than a means of specifying those goals in an objectively determinate manner. In short, what Justice Scalia assumes in *Heller* is nothing less than the justification for his decision.

The triumph of the new textualist methodology in *Heller* is interesting because it occurs in the course of constitutional litigation rather than in the self-referential world of academia. The case shows the power of hermeneutical theory, at least at the highest level of the judiciary in the hands of a former law professor, making clear that new textualism has a very real effect on legal practice and strongly influences even the dissenters. But, the stresses of a real case—and particularly the institutional constraints of the appellate process—confirm that no single theory can deliver a knockout punch that eliminates the need for judgment. New textualism is a rhetorical means for framing the issue before the court, no less and no more helpful than other hermeneutical approaches. But when it is deployed with smug self-assurance by Justice Scalia as a unitary methodology, new textualism subverts judicious reasoning and offers the fantasy that the questions have already been decided, if only we can discern the historical truth of originalist meaning and then reasonably construe the proper application to the case at hand.

The more careful scholarly attention to the concepts at work in new originalism make clear that what is at stake is a political decision to pursue a certain conception of law and government, rather than an empirical project of uncovering pre-existing law that may then be applied. In a sad way, there is not much distance between the confirmation hearings for Justice Sotomayor and the articulation of new originalism although the differences in the sophistication of the speakers and the audience in these two venues lead to apparently different conversations. The overriding ugliness of American hermeneutics is the steadfast ideological commitment to the belief that meaning exists prior to

<sup>43</sup> KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 9 (1999). On the role of democratically responsive actors to engage in constitutional construction, see generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

the need to interpret the law. From Senator Jeff Sessions, through Justice Antonin Scalia, and on to Professors Solum and Whittington, this commitment marks the activity as “American” no less than if they all clamored off the cruise ship wearing Garth Brooks t-shirts.

In contrast, if there is a single, fundamental principle of sophisticated legal hermeneutics as understood in many other countries, it surely would be the rejection of this very commitment. There is irony in this situation. The great civil codes were a product of the Enlightenment era and the desire to clarify and rationalize private law, but the intellectual climate in Europe and South America has engendered a sophisticated academic approach to legal hermeneutics. In contrast, the common law history in the United States has grown organically as part of the rapidly changing social, economic, and political environment of the new world, and yet the contemporary theoretical self-understanding of this practice is increasingly simplistic and reductionist, as if in response to the hermeneutical vertigo induced by the practices in question.

How can American hermeneutics hope for respect, not to mention emulation, by those who have joined modern constitutionalism more recently, if we embrace such a retrograde approach to legal practice? It is as if American technical experts in agricultural production have descended on a South American country to explain the freedom-fostering virtues of the global capitalist economy in foodstuffs to farmers whose lives—political, social, and economic—have been wholly controlled by multinational corporations for the past century. It is unlikely that disagreement will ensue; rather, the likely and deserved response is that the ignorance simply will be ignored.

## II. BEAUTY IS ONLY SKIN DEEP: LOOKING PAST THE UGLINESS OF AMERICAN HERMENEUTICS

If American hermeneutics is ugly, it is not necessarily the case that this results from the fact that it is ugly Americans who are interpreting legal texts and providing a theoretical defense of that practice. In defense of my countrymen, I suggest that ugly Americans cannot so easily be caricatured. There is ugly hermeneutics at work, to be sure. But, like the ugly American in the novel who works on behalf of the local people in a straightforward and unassuming manner, American hermeneutics may provide some guidance to world scholars by developing their plain-faced pragmatism in a manner that is never entirely subordinated to their ugly theoretical fantasies. Like the well-meaning couple from Kansas who order a meal in Porto Alegre in a loud and slow voice because they assume that Portuguese speakers will understand English if they just concentrate hard enough, American legal scholars tend to be an embarrassing group. But, like that Kansas couple, American hermeneutics do not live their daily lives in this manner. The reality on the ground in Kansas is different from the fantasy life in which the couple indulges while on a guided tour of Brazilian tourist spots. And, that reality is instructive in important ways.

Brian Tamanaha argues that the great theoretical battle between formalism and realism in American jurisprudence has been a figment of the collective imagination that ignores the complexities of legal practice by employing reduc-

tionist accounts.<sup>44</sup> Formalism was a theoretical development that responded to the desire to render law into a science befitting university study,<sup>45</sup> but Tamanaha's review of the historical evidence leads him to conclude that "it is hard to find anyone other than legal academics, theorists especially, attesting to these beliefs (although academics also expressed skepticism on this), while there are plentiful indications that lawyers found these claims ill fitting or absurd."<sup>46</sup> The disconnect occurred because academic lawyers emphasized the presumed coherence of legal principles and the deductive character of reasoning from those principles to results in given cases, whereas lawyers and judges were enmeshed within an existing and dynamic legal system that didn't approximate such a clean system of principles.<sup>47</sup> Lawyers and judges also (and, to some extent, consequently) were faced with applying the legal system to specific cases in situations that could not support deductive reasoning.<sup>48</sup> Perhaps oversimplifying Tamanaha's careful historical account, we might conclude that the theoretical accounts of law that we associate with formalism never were accurate with regard to the complexity of legal practice and never were seen as such by the participants in legal practice.

Tamanaha demonstrates that the great uprising of legal realism in America between the world wars was not a dramatic rejection of a formalist ideology that had seized the legal imagination as much as a continuation of insights into the character of legal practice that had been made for decades.<sup>49</sup> Drawing from the path-breaking work of Karl Llewellyn, Tamanaha suggests that we can break the unhelpful caricature of the battle between formalists and realists by embracing a "balanced realism" that roots its theoretical inquiry in the practice at hand.<sup>50</sup> Legal practice shows us that law is Janus-faced: always open to solving unforeseen problems creatively as well as always rooted in established practices that provide certainty. The "false story" of the great battle between formalists and realists for the soul of the American legal system obscures the

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<sup>44</sup> BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

<sup>45</sup> *Id.* at 29-32.

<sup>46</sup> *Id.* at 31-32.

<sup>47</sup> *Id.* at 51.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 67.

<sup>50</sup> Tamanaha describes "balanced realism" as follows:

Balanced realism has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect). Yet it conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect). The rule-bound aspect of judging can function reliably notwithstanding the challenges presented by the skepticism-inducing aspect, although this is an achievement that must be earned, is never perfectly achieved, and is never guaranteed.

*Id.* at 6. Tamanaha is certainly correct; but, as I describe later in this article, there is much more work to be done in fleshing out his account of a balanced realism.

degree to which each theoretical orientation captures only a part of the complex reality of legal practice.<sup>51</sup>

Tamanaha is correct to identify Llewellyn as a central figure who resisted the theoretical urge of his colleagues and sought a balanced realism. Llewellyn has always appeared to many commentators to be a mysterious charlatan because he rejected the false alternatives offered at the height of the realist movement: either law is principled and deductive or it is political and indeterminate. Llewellyn was re-working the ancient conception of law and politics in an effort to overcome the sterile academic debates that raged around him. At the end of his career, Llewellyn famously called for the study of law as a liberal art, grounded in a combination of technical proficiency and broader learning.<sup>52</sup> The aim of Llewellyn's "liberal education" was to develop the rhetorical competence to deal with the situation that Tamanaha names "balanced realism."

In his supplementation of *Bramble Bush*, Llewellyn recognized that the need to bridge the practice-theory divide was at the center of his life's work. He emphasized that the craft of law "cries out for the development and teaching of its theory, as it does also for study by *doing* in the light of that theory."<sup>53</sup> He named this needed approach "Spokesmanship," deriving it from the theories first developed in ancient Greece as "Rhetoric—in essence: the effective techniques of persuasion."<sup>54</sup> Too often, Llewellyn argued, Spokesmanship has been cast too narrowly as no more than the ability to add ornament to legal argument as part of advocacy.

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<sup>51</sup> Pierre Schlag provides a jurisprudential account of the centrality of the formalism-realism debate to the form of American law, and at this level connects it to the current battle between new textualism and purposivism as played out in *Heller*. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 230-34 (2009). Schlag helpfully reminds us that casting off ugly American hermeneutics is not a simple matter, although there is room for critical moves against the grip of reigning ideological forms.

<sup>52</sup> KARL N. LLEWELLYN, *The Study of Law as a Liberal Art, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 375, 375-94 (The Lawbook Exch., Ltd. 2000) (1962). Llewellyn challenged the growing belief that preparing students to practice law was inconsistent with the research ideals of the university:

The truth, the truth which cries out, is that the good work, the most effective work, of the lawyer in practice roots in and depends on vision, range, depth, balance, and rich humanity—those things which it is the function, and frequently the fortune, of the liberal arts to introduce and indeed to induce. The truth is therefore that the best *practical* training a University can give to any lawyer who is not by choice or by unendowment doomed to be hack or shyster—the best *practical* training, along with the best human training, is the study of law, within the professional school itself, as a liberal art.

*Id.* at 376. Llewellyn also repeated his frequent insistence that law students read broadly and deeply to acquaint themselves with the context in which law operates. *Id.* at 388-89.

<sup>53</sup> KARL N. LLEWELLYN, *BRAMBLE BUSH* 171 (3d ed., Oxford Univ. Press 2008) (1930).

<sup>54</sup> *Id.* Llewellyn explains:

There is a theory of advocacy, or spokesmanship, or rhetoric (which aspect lends the name is immaterial)—a theory which has formed the basis of a liberal art since classic times; a theory, moreover, which is empty and vain save as it builds on and with deep understanding of the psychological and ethical nature of cause or of client, of tribunal or other addressee, of society and of the law-governmental phase thereof.

LLEWELLYN, *supra* note 52, at 382.

But “Spokesmanship” has come to be for me a more significant focus than any of the above, including and profiting from the essence of each of them while also reaching out to cover such matters as the values of having buffers between contending principals or the differences between the rival goals of victory and reconciliation or the problems and *obligations* of leadership both in the small and in the large. In a word, Spokesmanship with special attention to work on the legal side seems to me to offer the wherewithal of a full-fledged theoretical-practical discipline with cultural value equal to its professional value. . . .<sup>55</sup>

Llewellyn regarded Spokesmanship as a rhetorical practice with both theoretical and practical dimensions that can equip lawyers for the challenges of their profession.

Llewellyn’s conception of legal rhetoric was central to his realist philosophy although many critics badly misread him as an ivory-tower relativist who believed in law’s absolute indeterminacy. In fact, Llewellyn found ample stability within the practice of law while at the same time acknowledging room for critique and reform.<sup>56</sup> Llewellyn wrote that the totality of the practice of law was one of the most “conservative and inflexible” of social phenomena, and yet every case offered the opportunity for the judge and lawyers to shift the direction of thinking.<sup>57</sup> Llewellyn anticipated the central tenet of contemporary legal hermeneutics by arguing that the meaning of a legal rule is known only in its use, and that using a rule always is a reformulation of the rule (either by expansion or contraction) even when the case feels like a simple matter of deductive reasoning.

Thus, the task of the judge is to reformulate the rule so that from then on the rule undoubtedly includes the case or undoubtedly excludes it. “To apply the rule” is thus a misnomer; rather, one *expands* a rule or *contracts* it. One can only “apply” a rule *after* first freely choosing either to include the instant case within it or to exclude the case from it.

. . .

Matters are no different, only more sharply highlighted, when a new case is such that one first must mull over whether to include it within an existing category, or must choose which existing category to include it in.

. . .

For we all, lawyer not least, are mistaken about the nature of language. We regard language as if words were things with fixed content. Precisely because we apply to a new fact situation a well-known and familiar linguistic symbol, we lose the *feeling* of newness about the case; it seems long familiar to us. The word hides its changed meaning from the speaker.<sup>58</sup>

<sup>55</sup> LLEWELLYN, *supra* note 53, at 171-72. This is his vision of a legal education in the tradition of the liberal arts: attending to the rhetoric of lawyering in its broadest sense. LLEWELLYN, *supra* note 52, at 389.

<sup>56</sup> Dennis M. Patterson, Book Review, *Law’s Practice*, 90 COLUM. L. REV. 575, 580-81, 598-99 (1990) (reviewing KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (1989)).

<sup>57</sup> KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 11-12 (Paul Gewirtz ed., Michael Ansaldi trans., The Univ. of Chi. Press 1989) (originally published as *Präjudizienrecht und Rechtsprechung in Amerika* (1933), based on lectures delivered in Germany in 1928-29).

<sup>58</sup> *Id.* at 74-75.

His message was philosophically radical, but he was no linguistic skeptic, cultural nihilist, or political revolutionary. Llewellyn firmly believed that lawyers can and should be educated to move within the rhetorically-rich narratives of law that are at once open situations and constrained fields of meaning.

Tamanaha wonders how legal scholars and political scientists could have bought so completely into the false story of the great theoretical battle between formalists and realists. I would rephrase his question by asking how Llewellyn could have been misconstrued and ignored for so long. Ugly American hermeneutics is a product of this dysfunctional situation, in which theory arises as grossly simplified and reductionist accounts in an effort to contain a practice that has long been underway without need for such theoretical underwriting. The latest skirmish between new textualism and purposivism is an ugly distraction from serious theoretical and empirical investigation of how plain-faced judges and lawyers practice law. In short, ugly American hermeneutics conceals the good work of ugly (plain, pragmatic) American hermeneuts.

The stultifying effects of new textualism as seen from the broader view that I am advancing can best be explored in the context of statutory interpretation, where the theory first gained resonance. The interpretation of statutes in the United States has a long history that is shaped by the English common law legacy and the peculiarities of American legal history.<sup>59</sup> In the common law era, English courts viewed statutes as isolated efforts to articulate the principles of the common law, and so they construed statutes narrowly against established common law doctrines. In the democratic ethos of nineteenth-century America, judges were regarded with suspicion and accused of undermining legislation with their exercise of “equitable interpretation,” but courts generally continued to interpret statutes narrowly even without a guiding theoretical dogma that the common law was supreme. In the twentieth century, judges more readily acknowledged the primacy of legislation, but they focused on effectuating the purpose of statutes rather than pretending that there was a “plain meaning” to apply as ministerial and bureaucratic matter. At times during this history, there were theoretical claims regarding the proper approach to statutory interpretation, but judges generally assumed a partnership with legislatures to seek pragmatic solutions by employing an eclectic mix of interpretive strategies that acknowledged their comparative institutional competencies.<sup>60</sup> The relatively recent focus on securing adjudicative certainty through theoretical purity represents a lack of faith in this long tradition of what William Popkin has termed “ordinary judging.”<sup>61</sup>

Against the modern efforts of intentionalists, textualists, and new textualists to identify the holy grail of objective statutory interpretation, Bill Eskridge has argued in favor of a “dynamic” approach to statutory interpretation that is

<sup>59</sup> The brief historical overview in this paragraph is drawn from WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* (1999).

<sup>60</sup> Bill Eskridge persuasively argues in similar fashion that courts used an eclectic blend of text, history, purpose, context, and norms to interpret statutes in the early years of the new Republic, underscoring the extent to which theory-driven approaches are a relatively new phenomenon. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 *COLUM. L. REV.* 990 (2001).

<sup>61</sup> POPKIN, *supra* note 59, at 151-255.

theoretically rigorous without being dogmatic or reductionist. Drawing on contemporary philosophical hermeneutics, Eskridge contends that judges generally use practical reasoning and a variety of interpretive strategies to determine the meaning of statute for the case at hand.<sup>62</sup> He summarizes, with co-author Philip Frickey, how his central theoretical conclusions arise from the practices involved.

First, statutory interpretation involves creative policymaking by judges and is not just the Court's figuring out the answer that was put "in" the statute by the enacting legislature. An essential insight of hermeneutics is that interpretation is a dynamic process, and that the interpreter is inescapably situated historically.

....

Second, because this creation of statutory meaning is not a mechanical operation, it often involves the interpreter's choice among several competing answers. Although the interpreter's range of choices is somewhat constrained by the text, the statute's history, and the circumstances of its application, the actual choice will not be 'objectively' determinable; interpretation will often depend upon political and other assumptions held by judges.

....

Third, when statutory interpreters make these choices, they are normally not driven by any single value . . . The pragmatistic idea that captures this concept is the "web of beliefs" metaphor. . . . [They then argue that another helpful metaphor is Charles Peirce's contrast of a chain of arguments no stronger than the weakest link and a cable woven from various threads.]

....

In many cases of statutory interpretation, of course, the threads will not all run in the same direction. The cable metaphor suggests that in these cases the result will depend upon the strongest overall combination of threads.

....

Our model holds that an interpreter will look at a broad range of evidence—text, historical evidence, and the text's evolution—and thus form a preliminary view of the statute. The interpreter then develops that preliminary view by testing various possible interpretations against the multiple criteria of fidelity to text, historical accuracy, and conformity to contemporary circumstances and values. Each criterion is relevant, yet none necessarily trumps the others.<sup>63</sup>

Eskridge contends that dynamic statutory interpretation is a descriptive account of how judges resolve interpretive problems, but also that it is normative to the extent that it cautions against unrealistic efforts to reduce statutory interpretation to a single valence. Courts rarely endorse Eskridge's dynamic approach expressly, but he argues that the great weight of legal practice supports the hermeneutic understanding of statutory interpretation as practical reasoning.

In an autobiographical essay, Karl Jaspers once explained that he rejected a career in law because it struck him as an unproductive mental juggling with fictions, whereas he sought to understand reality.<sup>64</sup> The current efforts to theo-

<sup>62</sup> WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 55-57 (1994). See also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321-22 (1990).

<sup>63</sup> Eskridge & Frickey, *supra* note 61, at 345, 347-48, 351-52.

<sup>64</sup> "The study of law left me unsatisfied, because I did not know the aspects of life which it serves. I perceived only the intricate mental juggling with fictions that did not interest me. What I sought was perception of reality." Karl Jaspers, *On My Philosophy*, in EXISTENTIAL-

rise American law through the simplistic bifurcation of “interpretation” and “construction” epitomize the characteristics that Jaspers criticized. And this is not a new story in American legal theory. Francis Lieber was one of the most important theorists of legal hermeneutics in America in the nineteenth century, bringing the romantic and idealist traditions of German hermeneutical philosophy to bear in the American setting. In *Legal and Political Hermeneutics*,<sup>65</sup> he argued that preserving the rule of law required the identification and clarification of the “immutable principles and fixed rules for interpreting and construing” the law.<sup>66</sup> Adopting the intentionalist approach of romantic hermeneutics against crude “plain meaning” ideology, Lieber emphasized the distinction between interpretation (discovering the speaker’s intended meaning) and construction (determining the proper application of the intended meaning to the case at hand) in precisely the terms that contemporary proponents of new textualism deploy these terms.

Lieber’s approach has more nuance and pragmatism, though, inasmuch as he concluded that the art of legal hermeneutics requires both interpretation and construction, and that the latter cannot be cabined by theoretical limits or methodology.<sup>67</sup> Consequently, as Lieber was articulating the philosophical bases for intentionalism, his honesty and attention to pragmatic considerations simultaneously undermined the theoretical utility of intentionalism. If construction is inevitable and always premised on judgment, then the intended meaning of the text can provide only a veneer of determinacy and objectivity for the legal system. Deciding when to construe a legal text in a manner that departs from its intended meaning is not something that is controlled by the text itself, and so Lieber recognized that every construction has the potential to undermine the rule of law. Because no rule can prevent this excess, Lieber’s pragmatic response was simply to caution interpreters to be good judges when they constructed the legal rule.<sup>68</sup> One hundred and fifty years later, the same debate ensues with “new textualism” replacing “intentionalism,” but with less acknowledgment that the necessity of construction overtakes efforts to shrink the scope of interpretation to a point where it can be determinate. Like the movies in the Star Wars franchise, each iteration of mainstream American hermeneutical legal theory apparently will be worse than the predecessor.

#### CONCLUSION

If beauty is only skin-deep, so is ugliness. The redemptive features of American hermeneutics are found in legal practice, which is never successfully subjugated by the fantastic—in the full sense of that word—accounts provided by theorists. Looking past the superficial theoretical dressing, American legal

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ISM FROM DOSTOEVSKY TO SARTRE 158, 159 (Walter Kaufmann, ed., New Am. Library 1975) (1956).

<sup>65</sup> FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS WITH REMARKS ON PRECEDENTS AND AUTHORITIES* (enlarged ed., The Lawbook Exch., Ltd. 2002) (1839).

<sup>66</sup> *Id.* at viii.

<sup>67</sup> *Id.* at 64.

<sup>68</sup> *Id.* at 121-22, 136.

hermeneutics is vibrant and sophisticated. Although American hermeneutical scholars generally are untutored in, and dismissive of, the relevance of Heidegger, Gadamer, Ricoeur, or Derrida to legal hermeneutics, this situation does not amount to a complete embarrassment. Ugly American hermeneutics provides a healthy dose of skepticism about the utility of embracing sophisticated philosophies simply for the sake of the sophistication; Parisian fashion, after all, is not designed for everyday wear. The theoretical simplicity of American hermeneutics is a bracing corrective to the tendencies toward the mystical, baroque, and paranoid that often lurk within the European traditions. Ugliness has its virtues.

At the same time, there is a possibility of drawing from more sophisticated hermeneutical traditions without sacrificing the pragmatism and practice-oriented perspective that defines the American legacy of written constitutionalism and common law adjudication. In my work I have read Gadamer's philosophical hermeneutics as radicalizing Heidegger's fundamental ontology by taking a "turn" toward dialogue rather than following Heidegger's "turn" to poetry and the ineffable language of the Gods.<sup>69</sup> This jurisprudential framework is also used by Bill Eskridge in his work on statutory interpretation, and provides a sophisticated extension of Francis Lieber's pathbreaking efforts in the early years of the American Republic. There is no need to choose between plain-faced pragmatic practices and sophisticated theorizing. Rooting sophisticated hermeneutical theory in the practices at hand is itself a hermeneutical theory, and it is precisely at this juncture that the conversation between scholars from Brazil and the United States might be most productive.

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<sup>69</sup> FRANCIS J. MOOTZ III, *LAW, HERMENEUTICS AND RHETORIC* (2010); FRANCIS J. MOOTZ III, *RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY* (2006).