



REASON'S REPUBLIC

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INTRODUCTION

Judicial review matters. Although a number of scholars have endeavored over the years to demonstrate that the courts offer only a “hollow” hope to advocates of significant social change,¹ courts remain the last hope of legal redress for victims of unconstitutional government conduct. To amend Justice Robert Jackson’s oft-cited opening statement at the Nuremberg trials, judicial review can serve as a means of ensuring that power offers a tribute to reason — that particular exercises of government power are consistent with the rational principles set forth in our Constitution.² When judges fail to give effect to constitutional limits on government power, people may be deprived of their liberty, their property, and even their lives arbitrarily — for no better reason than that the holders of political power will it to be so. Given the gravity of the stakes, it is

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¹ See, e.g., ROBERT DAHL, *DECISION MAKING IN A DEMOCRACY: THE SUPREME COURT AS A NATIONAL POLICY MAKER* (1953); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1993); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007).

² TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 167 (1992).

of the utmost importance that judicial review be performed properly. And it is unsurprising that no end of accounts of how judicial review should be performed have been put forward.

Professor Tara Smith's new book, *Judicial Review in an Objective Legal System*, stands out in a crowded field because of the boldness of its central claims and the elegance and persuasiveness of the arguments she advances in support of them. Smith contends that objectivity in the performance of judicial review is both possible and necessary — that judges can and must arrive at accurate knowledge of what our Constitution means and hold government officials to its terms. Absent objectivity, Smith argues, the rule of law established by the Constitution gives way to the rule of men: Government power is put in the service of will rather than reason, and might trumps individual rights.³ Drawing upon the twin disciplines of epistemology and political philosophy, Smith synthesizes an approach to judicial review that is tailored to ensure that we live under “a government of laws, and not of men.”⁴ In this essay, I will begin by summarizing the principal features of Smith's account of judicial review; proceed to consider several potential objections to her proposed approach; and conclude by applying Smith's approach to three areas of constitutional law that are in desperate need of a dose of objectivity.

³ It is to be doubted whether anyone has improved upon Aristotle's formulation of the fundamental distinction between the rule of law and the rule of men: “He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast . . . The law is reason unaffected by desire.” ARISTOTLE, *POLITICS* 107 (Stephen Everson ed., Cambridge Univ. Press 1988).

⁴ MASS. CONST. of 1780, art. XXX, § I.

I. OBJECTIVE JUDICIAL REVIEW: GETTING THE CONSTITUTION RIGHT

In order to “say what the law is,”⁵ judges must be able to arrive at accurate knowledge of what the law is. Thus, any account of judicial review must rely – even implicitly – upon a theory of knowledge. Smith thus begins with the “characteristically difficult terrain of epistemology,”⁶ undertaking in the first chapter of her book to articulate a theory of knowledge and to set forth a method of acquiring knowledge that is applicable to every field of inquiry. In subsequent chapters, Smith applies that method to the fields of political philosophy and law, and, ultimately, to the precise question of how judicial review should be performed under the American Constitution.

A. OBJECTIVITY: WHAT IS IT?

Smith’s theory of knowledge, which is based upon the epistemological work of Ayn Rand, is essentially realist.⁷ Smith contends that physical objects, events, relationships, and ideas (including man-made rules) really exist, and that each of these “existents” has a specific nature that is independent of human beings’ “observations, attitudes, and beliefs about [their] nature.”⁸ Human beings can gain accurate knowledge of the nature of particular existents, but existents are what they are, regardless of

⁵ *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

⁶ TARA SMITH, *JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM* 7 (2015).

⁷ See generally AYN RAND, *INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY* (Harry Binswanger & Leonard Peikoff eds., 1990) (1967); LEONARD PEIKOFF, *OBJECTIVISM: THE PHILOSOPHY OF AYN RAND* 137-87 (1991). For a helpful summary of metaphysical realism, see H. PUTNAM, *REASON, TRUTH, AND HISTORY* 49 (1981), asserting that realism holds that “the world consists of some fixed totality of mind-independent objects” and “[i]ruth involves some sort of correspondence relation between words or thought-signs and external things and sets of things.”

⁸ SMITH, *supra* note 6, at 15-16.

what we believe that they are. Thus, we need to develop a method of thinking that can “sift[] true beliefs from untrue and valid inferences from invalid.”⁹

The method of thinking Smith offers is objectivity. Objectivity is a mental discipline that consists in pursuing “the actual nature of the specific object or phenomena in question,” relying solely on “relevant evidence and logical inferences therefrom.”¹⁰ Identifying the nature of existents entails identifying their essential characteristics — the fundamental common denominators that distinguish them from other existents.¹¹ Objectivity is empirical — it relies upon observational evidence rather than intuition or speculation.¹² Objectivity is hierarchical — one cannot understand complex ideas like “property” without understanding other ideas upon which they rest.¹³ Finally, objectivity is contextual — what evidence is relevant to a given inquiry depends upon the purpose of the inquiry, and what one is justified in believing about a particular object or phenomenon depends upon the facts of which one is aware.¹⁴ If we discover that our “earlier knowledge was incomplete

⁹ SMITH, *supra* note 6, at 15.

¹⁰ *Id.* at 21.

¹¹ See RAND, *supra* note 7, at 45-46 (explaining that “fundamental” characteristics are those “which make[] the greatest numbers of others possible” and “explain[] the greatest number of others.” Thus, we define “man” as “rational animal” rather than “watch-wearing animal” because rationality explains more about human beings’ characteristics than the fact that we wear watches. But for our rationality, we would not be able to construct watches in the first place).

¹² Ultimately, all knowledge can be reduced to “sensory, perceptual experience.” SMITH, *supra* note 6, at 20. See also JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. 1, § 2 (1690) [hereinafter ESSAY] (“Let us then suppose the mind to be, as we say, white paper void of all characters, without any ideas; how comes it to be furnished? . . . Whence has it all the materials of reason and knowledge? To this I answer, in one word, from experience: in that, all our knowledge is founded; and from that it ultimately derives itself.”).

¹³ In the case of property, “ownership,” “use,” and “exclusive,” to name a few. SMITH, *supra* note 6, at 34.

¹⁴ *Id.* at 36.

in certain respects,"¹⁵ we must "alter our conclusions, however objectively formed those conclusions were at the time they were first made."¹⁶

Smith takes time to address and dispel potential misconceptions concerning objectivity. First, objectivity is an active process. Existents, be they physical objects or "high-level abstractions" like legal concepts, do not simply reveal their nature to us — grasping their nature requires diligent, intellectually engaged effort.¹⁷ Second, objectivity is not determined by consensus, even informed consensus.¹⁸ Whether a person has "ground[ed] their thinking in observation of reality" and "remain[ed] faithful to what they observe through the conscientious use of logic" does not turn on who they are or who agrees with them.¹⁹ Third, objectivity is not infallible. We can come to erroneous conclusions, despite our most disciplined efforts to "get reality right."²⁰ A conclusion that is objective is not necessarily correct. It is, however, the product of a method that gives us the "firmest ground possible for our conclusions to hug the facts."²¹ To assert that a conclusion is objective is to assert that "in the state of knowledge at the relevant time," the conclusion "most fully and accurately reflects the nature of the existents in question and the relationships between them."²²

Because objectivity is hierarchical and contextual, developing an objective approach to judicial review requires an understanding

¹⁵ *Id.* at 38.

¹⁶ *Id.* at 39.

¹⁷ *See id.* at 42 n.36 ("Objectivity does not require a so-called big brain, but it demands the active, disciplined, methodological use of the brain that one has.").

¹⁸ *See id.* at 42 ("Consensus as such does not help anyone to know reality.").

¹⁹ *Id.* at 27. Certain peoples' opinions may warrant more attention than others, but only "because these people have made themselves more knowledgeable about the subject in question." *Id.* at 25 n.15.

²⁰ *Id.* at 41.

²¹ *Id.* at 17.

²² *Id.* at 39 (italics omitted).

of the function of the legal system of which judicial review is a part, which in turn requires an understanding of the function of the government that operates through that legal system. Smith turns from epistemology to political philosophy, investigating why governments that operate through legal systems are “instituted among men” and how legal systems must operate in order to enable governments to fulfill their proper function.²³

B. OBJECTIVITY IN THE LAW: THE RULE OF LAW AS THE RULE OF REASON — AND RIGHTS

Governments — and the legal systems through which they operate — are unique institutions. “To do things by law,” Smith writes, “is to do them by force.”²⁴ Ordinarily, people cannot forcibly compel other people to do things that they would rather not do.²⁵ Governments, however, not only exercise such coercive power through legal systems but claim that resisting their power would be wrong — they claim moral authority to deal with people by force and threats of force.²⁶ To use Max Weber’s formulation,

²³ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

²⁴ SMITH, *supra* note 6, at 2.

²⁵ The need for a normative justification for government is vividly illustrated by Augustine of Hippo’s memorable description of an encounter between Alexander the Great and a captured pirate. See SAINT AUGUSTINE, *THE CITY OF GOD* 139 (Henry Bettenson trans., Penguin 1971).

The king asked the fellow, “What is your idea, in infesting the sea?” And the pirate answered, with uninhibited insolence, “The same as yours, in infesting the earth! But because I do it with a tiny craft, I’m called a pirate: because you have a mighty navy, you’re called an emperor.”

²⁶ See GEORGE H. SMITH, *THE SYSTEM OF LIBERTY* 70 (2013) [hereinafter *THE SYSTEM OF LIBERTY*] (“It is obvious that the state is a coercive institution, one that deals with people by means of physical force and threats of force. But the state is also a normative, or moral institution—one that claims to use coercion as a matter of right.”).

governments claim “the monopoly of the legitimate use of physical force.”²⁷ What, if anything, justifies these claims?

As governments are distinctively human institutions and regulate human behavior, determining whether their claims of moral authority can be justified requires an inquiry into human nature. Smith begins with a premise that is “so basic and widely accepted” that she does not defend it at any length: “[E]ach man is an end in himself.”²⁸ From this premise, she derives a moral right to life — a justified claim to live for one’s own sake and to pursue one’s own happiness.²⁹ Human life and happiness depend upon the

²⁷ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1968) (1947) (emphasis added).

²⁸ SMITH, *supra* note 6, at 95. It is a foundational premise of classical liberal political theory. See, e.g., Richard Overton, *An Arrow Against All Tyrants* (1646), reprinted in *THE ENGLISH LEVELLERS* 54-55 (Andrew Sharp ed., 1998) (“To every individual in nature, is given an individual property by nature, not to be invaded or usurped by any: for every one as he is himself, so he hath a self-propriety.”); JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* § 27 (1689) [hereinafter *SECOND TREATISE*] (“[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”); MONTESQUIEU, *THE SPIRIT OF THE LAWS* 138 (Anne M. Cohler et. al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“in the case of natural defense I have the right to kill, because my life is mine.”); James Madison, *Property* (1792), reprinted in *THE MIND OF THE FOUNDER* 244 (M. Meyers ed., 1973) (“[Man] has an equal property in the free use of his faculties and free choice of the objects on which to employ them.”).

²⁹ Smith, following Rand, understands happiness to be a state of consciousness that one can achieve by leading a particular kind of life—a life guided by reason, characterized by the active pursuit and realization of rational values. Freedom is an essential prerequisite of the pursuit of happiness, but it is no guarantee of achieving it. SMITH, *supra* note 6, at 107. Smith discusses the relationship between reason, freedom, life, and happiness in greater depth in TARA SMITH, *MORAL RIGHTS AND POLITICAL FREEDOM* (1995). See also James Wilson, *Of the Natural Rights of Individuals* (1804), reprinted in *THE WORKS OF JAMES WILSON* 241-42 (Robert Green McCloskey ed., 1967) [hereinafter *THE WORKS OF JAMES WILSON*] (“Nature has implanted in man a desire of his own happiness . . . she has endowed him with intellectual and active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness . . . If all this be true, the undeniable consequence is, that he has a

use of reason. Human beings cannot live at all without “deliberate, disciplined effort to recognize factual evidence and to trace and respect the logical implications of that evidence in drawing conclusions and taking actions.”³⁰ Regardless of whether we are seeking to determine “[if] this mushroom is edible, whether copper conducts electricity, whether to join the Marines or marry Melissa, how to fix a flat tire or manage a company,” we must investigate the relevant evidence and draw logical inferences from that evidence if we want to arrive at an answer that promotes our well-being.³¹ Ultimately, all of our particular rights – to speak, to acquire, own, and use property, to travel, to listen to music, to grill a steak for dinner (or order a pizza) – are derived from a broader right to live for our own sake, and from our rational nature.³² These specific rights are uses of the freedom of action that rational beings require in order to survive and thrive.³³

The initiation of physical force – or the threat of physical force – by others can thwart our ability to think or act rationally. Smith offers the example of a voter who is threatened with violence if they do not cast their ballot for a particular political candidate: “The fact that if I fail to vote for Pearson my kneecaps will be shattered is not logical reason to conclude that Pearson is the most qualified

right to exert those powers for the accomplishment of those purposes . . . as his inclination and his judgment shall direct.”).

³⁰ SMITH, *supra* note 6, at 98.

³¹ *Id.* at 100.

³² For Smith, as for Thomas Jefferson, these rights are not “self-evident” in the sense of being immediately perceivable – they are inductions from observable facts about human existence. On the use of the term “self-evident” in the Declaration, see L. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF THOMAS JEFFERSON, BENJAMIN FRANKLIN, JOHN ADAMS & JAMES MADISON* 128-29 (1997) (“Jefferson was fully aware that the beliefs he had listed as self-evident truths were . . . not evident to everybody . . . they were valid only for those who had adopted a new viewpoint. This kind of validity was the same with respect to physical science and to human rights and potentialities.”).

³³ MORAL RIGHTS AND POLITICAL FREEDOM, *supra* note 30, at 206.

candidate.”³⁴ Even if the voter resists the threat, its presence forces them to take into account and act upon considerations that are not relevant to the question of which candidate is most qualified. As Smith puts it, the “injection of force . . . introduces a different question for the [person] to answer,” namely, “should I obey the coercer or not?”³⁵ When other people forcibly impose their will on us, they prevent us from acting as our reason would otherwise dictate.

The need for government arises from the need to “safeguard the freedom that is necessary for human well-being.”³⁶ Human beings can reap countless benefits from living in society — from other people’s experience and insights, from the goods and services they create, from their friendship, from the simple pleasure of their company — but we cannot enjoy those benefits if we are not free to act on the basis of our own judgment.³⁷ By enforcing “clear ground rules” that secure individual rights to freedom of action against forceful interference by others, governments can uphold our moral right to live and seek our own happiness and thus can properly claim moral authority.³⁸ The moral authority of government is “an organic outgrowth of its reason for being,” and its authority is “conditioned on its fidelity to the purpose for which it holds [its] power.”³⁹

Securing individual rights is a complex endeavor. It is not enough to identify the correct political-philosophical principles. Implementing those principles requires a legal system: “a complex network of practical mechanisms that actually exercise government power.”⁴⁰ What the law is (its content) and how the law operates

³⁴ SMITH, *supra* note 6, at 102.

³⁵ *Id.*

³⁶ *Id.* at 108.

³⁷ *See id.* at 110 (“For men to coexist profitably, they must coexist peaceably.”).

³⁸ *Id.* at 108.

³⁹ *Id.* at 93.

⁴⁰ *Id.* at 111.

(its administration) must be informed by its function. This means that the “what” and the “how” of the law can never be truly morally “neutral” – the protection of individual rights is a moral service, and the government’s performance of that service is central to its moral authority.

And yet, the ideal of the “rule of law” – generally regarded as the “gold standard of respectability” for legal systems – has been praised precisely because it is purportedly morally neutral.⁴¹ It is not readily apparent that the formal requirements associated with the rule of law – among them, the requirements that legal rules be clearly stated, publicly available, stable, and consistently applied – are connected with the protection of individual rights.⁴² Smith thus undertakes to establish the connection between these formal requirements and the government’s substantive moral mission.

We can get a sense of the connection between the rule of law and the government’s moral function by imagining why a dictator who cares nothing for rights and desires only to maintain his power would want to establish clear rules that government officials are constrained to apply consistently. He might “like[] order and predictability”; he might think that “regularity will produce greater compliance from his subjects” because they know what is expected

⁴¹ *Id.* at 67. See JOSEPH RAZ, *AUTHORITY OF LAW* (1979) (“Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For the law this virtue is the rule of law.”). Smith critiques Raz’s view at length in Tara Smith, *Neutrality Isn’t Neutral: On the Value-Neutrality of the Rule of Law*, 4 *WASH. U. JUR. REV.* 49, 60-74 (2011).

⁴² Those requirements have been variously stated. Lon Fuller’s list remains an essential starting point for any discussion of the formal requirements of the rule of law. See LON FULLER, *MORALITY OF THE LAW* 39 (1969) (listing eight requirements: (1) generality; (2) promulgation, or public accessibility; (3) prospectivity; (4) clarity; (5) internal consistency, or noncontradiction; (6) practicability, or non-absurdity (7) constancy, or stability; (8) congruence, or consistency between the actions of officials and prescribed rules). For a comprehensive exploration of the rule of law as a political ideal, see BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS THEORY* (2004).

of them and see violators punished harshly for failing to meet those expectations; he might conclude that keeping people in line would “demand[] fewer police resources.”⁴³ But these reasons for maintaining stability are entirely contingent upon his particular beliefs and desires at any given moment.⁴⁴ If his beliefs and desires change — if he no longer desires order or concludes that irregularity will better serve to maintain his power — clarity and consistency will not long survive.

By contrast, a government dedicated to the protection of the individual rights must operate through clear rules and those rules must be applied consistently. Unclear laws effectively require people to “refrain from acting in ways that are properly prohibited as well as from acting in ways that are not,” lest they violate any one of the several meanings that could be attributed to the law.⁴⁵ Since any one of several meanings can be attributed to unclear laws, the will of government officials determines the extent of people’s freedom. If government officials are not bound to apply rules consistently and can deviate from the rules in accordance with their preferences, people can be deprived of their freedom for reasons that have nothing to do with protecting individual rights. Clear rules and consistent application of those rules are necessary to secure individual rights against force backed only by will — thus, these formal requirements provide a service that is “morally good.”⁴⁶

What Smith terms the “moral imperative” of the rule of law can best be appreciated by focusing on the fundamental alternative to the rule of law: the rule of men, characterized by “arbitrariness in

⁴³ SMITH, *supra* note 6, at 80.

⁴⁴ See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 273 (2011) (“A tyranny devoted to pernicious ends has no self-sufficient reason . . . to submit itself to the discipline of operating consistently through the demanding processes of law.”).

⁴⁵ SMITH, *supra* note 6, at 83.

⁴⁶ *Id.* at 87.

the exercise of government power.” It is difficult to define the term “arbitrary” – Smith states that “[a] conclusion or decision is arbitrary when it is reached on no particular basis and for no particular reason in a context in which reasons are called for.”⁴⁷ Given government’s distinctive character and claims, its use of coercive power must always be supported by reasons – and not just any reasons, but reasons that are consistent with government’s moral function. If limits on government power are set only by the will of particular power holders, might makes right.⁴⁸ Because governments derive their moral authority from their capacity to ensure that might does not make right, arbitrariness vitiates their moral authority.⁴⁹

How, then, to create a legal system that can maintain the rule of law? Because the rule of law depends upon “clear knowledge of what the law is,” and because disagreements concerning what the law is are inevitable, Smith contends that an “unequivocal arbiter” is needed to ensure “principled resolution” of how legal power may be used.⁵⁰ The question arises: “Where, within an objective legal system, should ultimate legal authority reside?”⁵¹

Smith contends that a written constitution that “serves as the single, overt, definitive repository of a system’s ultimate law is the

⁴⁷ *Id.* at 78 n.32. See also TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* 74 (2013) [hereinafter *CONSCIENCE OF THE CONSTITUTION*] (“Arbitrariness is to law as mere will is to reason . . . It is essentially ipse dixit – the ruler says “because I say so.”).

⁴⁸ SMITH, *supra* note 6, at 87 (“[T]he alternative between the Rule of Law and the Rule of Men is the alternative between the rule of reason and the rule of force.”).

⁴⁹ See *THE FEDERALIST* No. 51, at 271 (James Madison) (Liberty Fund, 2001) (stating that the “end of government” is to “establish justice” and that “[i]n a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature.”); *THE WORKS OF JAMES WILSON*, *supra* note 29, at 307 (government “should be formed to secure and enlarge the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”).

⁵⁰ SMITH, *supra* note 6, at 113.

⁵¹ *Id.*

best means available” for ensuring the rule of law because it can render the identity of the law “firm and fixed”⁵² and “impos[e] firm, philosophically considered limits on government power.”⁵³ She considers and rejects the possibility that the “common law” method – according to which judges who seek to identify and apply customary rules articulate the law case by case⁵⁴ – can maintain the rule of law.⁵⁵ The fundamental problem with the common law method is that the content of the law is dictated not by reason but by evolving social consensus.⁵⁶ As Smith points out, “the obvious danger is that a society’s consensus will be unjust” and will produce rules that authorize rights violations.⁵⁷ Because judges applying the common law method seek only to discover, harmonize, and apply rules that emerge through social consensus, the development of the law is “ponderous [and] piecemeal” and the common law “lacks a sufficiently deliberate, systematic means of

⁵² SMITH, *supra* note 6, at 135.

⁵³ *Id.* at 137.

⁵⁴ These customary rules are not created by judges or any particular decisionmakers—like prices, they *emerge* from countless decentralized, voluntary interactions. See Todd Zywicki, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 592 (2008) (“Although it is true that a particular salesclerk attaches a price tag to apples in a supermarket, it would be inaccurate to suggest that the salesclerk is thereby “making” or “creating” the price of apples . . . It is similarly misleading . . . to think of a particular judge ‘making’ law when she seeks to articulate the underlying legal principles that support a given decision.”).

⁵⁵ The common law is an enormously complex subject, discussions of which are complicated by the fact that the term is used to refer to a variety of “closely related but distinct phenomena.” SMITH, *supra* note 6, at 115. Smith primarily uses the term “common law” to refer to a method of reasoning, not to an historical legal system. For a helpful overview of the common law that grapples with some of the confusion surrounding the usage of the term, see John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79 (2005).

⁵⁶ See SMITH, *supra* note 6, at 126 (“[The common law] defers the determination of what constitutes law to a shifting cast of characters... which has the effect of bestowing legal authority on those people.”).

⁵⁷ See *id.* at 123.

trying to weed out error.”⁵⁸ In the meantime, “real people suffer the misuse of government power.”⁵⁹ By “crystalliz[ing] the proper guiding principles of an objective legal system and . . . translat[ing] those principles into specific rules for administering the law’s power”⁶⁰ a written constitution holds the promise of subjecting government power to “the discipline of rational restraint.”⁶¹

Fortunately, Smith finds that Americans are blessed with an “essentially sound” written Constitution that not only rests upon the correct political-philosophical premises but also provides for their implementation.⁶² The Constitution establishes “a government of limited powers authorized to serve a specific, circumscribed purpose” — the protection of individual rights — and its “design, structure, and content” are all calculated to further that purpose.⁶³ One of the primary means through which the Constitution ensures that government power is rationally restrained is its provision for an independent system of federal courts, staffed by judges who are relatively insulated from majoritarian pressures and duty-bound to give effect to the law of the land.⁶⁴ In Smith’s words, judicial review provides an “insurance mechanism against misuses of government

⁵⁸ *Id.* See also Richard A. Posner, *Hayek, Law, & Cognition*, 1 N.Y.U. J.L. & LIBERTY 147, 152 (2005) (observing that “custom, being acephalous (there is no ‘custom-giver’ analogous to a legislature, which is a lawgiver), tends to change very slowly” and that there “[t]here are many dysfunctional customs.”).

⁵⁹ *Id.*

⁶⁰ SMITH, *supra* note 6, at 137.

⁶¹ *Id.* at 87.

⁶² *Id.* at 132.

⁶³ *Id.* at 264-65.

⁶⁴ See THE FEDERALIST No. 78, at 405 (Alexander Hamilton) (Liberty Fund, 2001) (“[Constitutional] [I]mitations... can be preserved in practice no other way than courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”). For a comprehensive historical study of the duty of judicial review as a component of the judicial office (and, therefore, of “The Judicial power” authorized by Article III), see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

power.”⁶⁵ What judges must do in order to ensure that this mechanism works properly is the subject of the remainder of her book.

C. OBJECTIVITY IN JUDICIAL REVIEW: MAINTAINING THE RULE OF LAW

Smith begins her discussion of judicial review by summarizing and criticizing five dominant accounts of judicial review: Textualism, Public Understanding Originalism (or “public meaning originalism”), Democratic Deference (or “popular constitutionalism”), Perfectionism, and Minimalism. Although all of these accounts are distinctive, Smith finds that they share the same fundamental vice, and none of them equips judges to maintain the rule of law established by the Constitution. After critiquing them, Smith articulates her own approach to judicial review.⁶⁶

1. *Critique of the Dominant Accounts of Judicial Review*

The first account of judicial review Smith evaluates is textualism, as championed by the late Justice Antonin Scalia. Scalia’s textualism is succinctly captured in his assertion that “words have meaning. And their meaning doesn’t change.”⁶⁷ Of

⁶⁵ SMITH, *supra* note 6, at 219.

⁶⁶ Smith’s critiques draw upon arguments that she has made at greater length in other articles, including Tara Smith, *Originalism, Vintage or Nouveau: “He Said, She Said” Law*, 82 FORDHAM L. REV. 619 (2013); Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347 (2010); Tara Smith, *Originalism’s Misplaced Fidelity: ‘Original’ Meaning Is Not Objective*, 26 CONST. COMMENT. 1 (2009); Tara Smith, *Why Originalism Won’t Die – Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL’Y 159 (2007).

⁶⁷ See Jennifer Senior, *In Conversation with Antonin Scalia*, NEW YORK MAGAZINE, Oct. 14, 2013, at 24. Scalia’s considered approach to constitutional interpretation is set forth in several essays. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175

course, ordinary speakers of any language understand that the meaning of words is not self-evident and cannot be understood without an appreciation of the relevant context.⁶⁸ The need for context-sensitive linguistic analysis is particularly acute in constitutional law, which involves the interpretation of provisions authored hundreds of years ago by men whose beliefs, assumptions, and patterns of word usage were in many respects quite different from ours. No matter how long one stares at Article III's guarantee that "no Attainder of Treason shall work Corruption of Blood, or forfeiture during the life of the person attained," the meaning of these words will not reveal itself.⁶⁹

What context must judges consider in order to illuminate the meaning of constitutional provisions? Scalia writes that "in their full context, words mean what they conveyed to reasonable people at the time they were written."⁷⁰ On Scalia's account, words have meaning; their meaning does not change; and meaning is identical to the contemporaneous understanding of the relevant linguistic community. In the final analysis, Scalia's textualism is a form of public meaning originalism, a theory of constitutional interpretation that holds that constitutional provisions should be interpreted in accordance with their publicly understood meaning at the time of

(1989); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION 3* (Antonin Scalia & Amy Gutmann eds., 1998.)

⁶⁸ Consider "Go ahead, make my day," or "I'm dying over here," or even "I love you."

⁶⁹ U.S. CONST. art. III, § 3, cl. 2. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 243 (2005) ("Under England's feudalistic treason rules . . . the Crown could lawfully seize a traitor's homestead from the family members due to inherit it. The traitor's blood was deemed corrupt . . . Article III barred the federal government from imposing any "Corruption of Blood" in treason cases. In the New World, the black mark—the taint, the 'attainder'—of a treason conviction was to be individual, not familial."); ISABEL PATERSON, *THE GOD OF THE MACHINE* 127 (1943) ("The first restriction defined guilt as personal; and the second defined private property as belonging to individuals.").

⁷⁰ ANTONIN SCALIA & BRYAN GARNER, *READING LAW* 16 (2012).

their enactment.⁷¹ Thus, Smith's critique of Scalia's textualism blends into a broader critique of public meaning originalism, which claims Professors Randy Barnett, Steven Calabresi, Gary Lawson, and Lawrence Solum, among others, as adherents.⁷²

Smith observes that Scalia's reference to what "words mean" could itself mean one of at least two things: (1) the exact list of items referred to by a word that the language speakers at the time would have provided; or (2) the precise criteria that those people employed for determining which items a word referred to. The same can be said of Professor Barnett's definition of original public meaning: "[T]he public or objective meaning that a reasonable listener would place on the words used in the [relevant legal] provision at the time of its enactment."⁷³ What is clear, however, is that public meaning is always tied to public understanding. Public meaning originalists hold that words mean what they would have been understood to mean when they were written.

Recall that judicial review is a means of maintaining the rule of law established by the Constitution. In order to determine whether public meaning originalism equips judges to maintain the rule of law, we need to determine whether its account of constitutional meaning is accurate.

⁷¹ Formulations vary. See, e.g., JOHN MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) ("[H]ow the words of the document would have been understood by a reasonable speaker of the language at the time of the document's enactment."); LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE 4 (2011) ("[T]he understanding of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002) ("[H]ow a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision.").

⁷² MCGINNIS & RAPPAPORT, *supra* note 71, at 123 (noting that public meaning originalism is "the predominant originalist theory.").

⁷³ RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92 (2004) [hereinafter RESTORING THE LOST CONSTITUTION].

In Smith's view, public meaning originalism rests upon an impoverished account of language. Language, Smith argues, "is not about itself, nor about its speakers."⁷⁴ It is about reality.⁷⁵ Words denote concepts — mental groupings of existents that share a fundamental similarity. Concepts are "open-ended" — they encompass all existents of a particular kind, "be they known, unknown, or at present misidentified by many or all people."⁷⁶ While Smith regards as "perfectly sound" originalism's insistence that judges not "replace the concept[s] originally expressed in a law with a different concept,"⁷⁷ she insists that judges must not take words to mean only "those particular referents and/or the precise criteria for identifying a word's referents that some set of men once believed that a word stood for."⁷⁸ That is, judges must not conflate the meaning of the Constitution with anyone's beliefs about that meaning. Judges must be open, not only to recognizing new instances of particular concepts — say, identifying movies and video games as "speech" — but also to redefining those concepts as "the growth of our knowledge of the relevant phenomena warrants."⁷⁹ Otherwise, we will not be ruled by law but by "those

⁷⁴ SMITH, *supra* note 6, at 155.

⁷⁵ *See id.* at 168 ("The meaning of a word depends, at the most fundamental level, on the nature of the things it refers to and not on what a group of people thinks it refers to."); RAND, *supra* note 7, at 40 ("A word is merely a visual-auditory symbol used to represent a concept; a word has no meaning other than that of the concept it symbolizes, and the meaning of a concept consists of its units.").

⁷⁶ SMITH, *supra* note 6, at 154.

⁷⁷ Thus, a judge could not "read[] a law's reference to 'gay behavior' to designate a lighthearted manner of action when the context clearly indicates its reference to homosexual activity." *Id.* at 166.

⁷⁸ *Id.* at 166-67.

⁷⁹ *Id.* A definition is "a statement that identifies the nature of units subsumed within a concept" and serves to "distinguish a concept from all other concepts and thus to keep its units differentiated from all other existents." RAND, *supra* note 7, at 40. Importantly, concepts are not identical to their definitions. A concept implies all the characteristics of a given thing, "known or yet to be discovered," including those that are not part of its definition. *Id.* at 237.

particular men who installed the laws and their beliefs about laws' meaning."⁸⁰

Smith's criticisms of public meaning originalism may strike many as jarring. The rule of law requires stability, and public meaning originalism promises stability. The public's understanding of particular constitutional provisions at the date of their enactment does not, after all, change over time. But Smith contends that if the meaning of the law is identified with beliefs about the law, public meaning originalism gives us governance that is no less arbitrary, no less dependent upon mere will, than the rule of an absolute monarch, even if it may be more stable.

Is this criticism valid? Barnett – together with other originalists – distinguishes between the question of what the law means and the question whether the law has moral authority. Barnett considers, but ultimately rejects, the possibility that the Constitution's moral authority can be established on the basis of past consent or contemporary acquiescence in the regime the Framers established.⁸¹ Determining whether the Constitution has moral authority, on Barnett's account, involves determining whether the original public meaning of the text provides people with "adequate assurances that the laws it validates" are "necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted."⁸² No one's say-so can answer that question for us.

But so long as the question whether a particular exercise of government power is constitutionally permissible turns on the beliefs of men, Smith's criticism retains its bite. For public meaning originalists, the meaning of the Constitution is always reducible to the beliefs of men, and, so, too, is the question whether the use of the government's monopoly on legitimate force is consistent with

⁸⁰ SMITH, *supra* note 6, at 175.

⁸¹ See RESTORING THE LOST CONSTITUTION, *supra* note 73, at 11-32.

⁸² *Id.* at 45.

the Constitution. As Professor Gary Lawson has put it, while a public meaning originalist might not “ask for a laundry list of specific human activities that exhaust the content of [a] concept,” she would “ask what criteria the author, and derivatively the public reader, had in mind for distinguishing things.”⁸³ Public meaning originalism does not bind us to the Framers’ particular expectations of how particular concepts would be applied, but it does bind us to their definitions of those concepts. Thus, as Smith explains, public meaning originalism “surrenders us to the rule of those particular men who installed the laws and their beliefs about laws’ meaning, rather than to laws — and to laws’ actual meaning.”⁸⁴ Whether the government can bulldoze your home,⁸⁵ forcibly sterilize you,⁸⁶ imprison you for engaging in consensual sexual intimacy,⁸⁷ collect your DNA and enter it into a national database if you are arrested (rightly or wrongly),⁸⁸ or — less dramatically — fine you for having a barbecue in your front yard,⁸⁹ turns on what long-dead men

⁸³ See Gary S. Lawson, *Reflections of an Empirical Reader, (Or: Could Fleming Be Right This Time?)*, 18 (Boston Univ. Sch. of Law. Pub. Law & Legal Theory, Working Paper No. 15-46, Sept. 24, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685410 [hereinafter *Reflections*]. Interestingly, Lawson notes his disagreement with Smith but states he “suspect[s] that in the end she will oppose only some but not all forms of originalism as tools for the ascertainment of meaning.” *Id.* at 15 n.25. If there is a form of originalism that Smith would accept, I believe that it would have to be anchored in the *original concepts* set forth in our law. It would also have to distinguish between the actual nature of those concepts and the *understanding* of those concepts held by either real or hypothetical authors or readers at a particular point in time.

⁸⁴ SMITH, *supra* note 6, at 175.

⁸⁵ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁸⁶ *Buck v. Bell*, 274 U.S. 200 (1927).

⁸⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁸⁸ *Maryland v. King*, 133 S. Ct. 1958 (2013).

⁸⁹ See Institute for Justice, *Class Action Lawsuit Challenges Policing for Profit in St. Louis. Co. Municipal Court System*, <http://ij.org/case/pagedale-municipal-fines/> (last visited Mar. 17, 2016) (describing how the city of Pagedale, Missouri raises revenue by ticketing, convicting, fining and even jailing its residents for numerous harmless activities).

thought.⁹⁰ Will, rather than reason, determines what the law is, and how government power may be exercised. Such an interpretive approach is incapable of maintaining the rule of law established by the Constitution. It subjects us to arbitrary power that is “unleashed from the discipline of rational restraint.”⁹¹

Smith’s discussion of popular constitutionalism is brisker than her discussion of public meaning originalism, primarily because popular constitutionalism’s incompatibility with the rule of law is more readily apparent. Popular constitutionalism holds that the authority of the Constitution ultimately rests upon the will of the people and, thus, constitutional meaning ought to be, to a greater or lesser degree, constructed by the people.⁹² The how, what, and why of the legal system are thus, to a greater or lesser degree, dependent upon the will of contemporary majorities.

By allowing contemporary majorities to determine the meaning of the law, popular constitutionalism would compromise the Constitution’s capacity to perform its function. It would leave the law in a state of “continual flux, transformed by the winds of public opinion.”⁹³ The safeguards that the Constitution provides against the abuse of government power would be as unreliable as majorities’ concern for minorities’ rights is fickle. Even if popular constitutionalism produced stability, however, there lurks a more fundamental problem. Under popular constitutionalism, the will of the people ultimately determines whether government power may

⁹⁰ Or might have thought. Whether one identifies meaning with the understanding of *actual* authors or readers or *hypothetical* authors or readers, one makes the same fundamental mistake of “seek[ing] to ascertain earlier people’s beliefs” rather than “the actual character of the phenomena that the concepts designated by laws’ words refer to.” SMITH, *supra* note 6, at 173.

⁹¹ SMITH, *supra* note 6, at 87.

⁹² Recent contributions to the growing literature on popular constitutionalism include BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005).

⁹³ SMITH, *supra* note 6, at 181.

be exercised on any given occasion. Because mere will, whether imposed “by a large number of well-meaning people” or by “a small gang of malevolent, thuggish dictators” is not a sufficient moral justification for constraining individual freedom, popular constitutionalism is incapable of preserving the Constitution’s moral authority.⁹⁴

Smith’s critique of public meaning originalism might lead one to expect that she would be sympathetic to perfectionism, as advocated by Ronald Dworkin (and, today, by Professor James Fleming).⁹⁵ Dworkin contends that certain constitutional provisions should be understood to refer to normative concepts rather than to the specific conceptions of the Framers — for example, “cruel and unusual punishment” should be understood to refer to punishments that really are cruel and unusual, not merely to punishments that the Framers thought cruel and unusual.⁹⁶ Dworkin also argues that judges should interpret constitutional provisions in a manner that best justifies our law as a whole — though their interpretations must still “fit” with previous legal materials.⁹⁷ He deploys the analogy of a chain-novel, urging that judges “transform[] the varied links in the chain of law into a vision of government now speaking with one voice.”⁹⁸

⁹⁴ *Id.*

⁹⁵ The most systematic statement of Dworkin’s approach is RONALD DWORKIN, *LAW’S EMPIRE* (1984), upon which Smith focuses her critique. Fleming defends Dworkin’s approach in JAMES FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (2015).

⁹⁶ See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1253 (1997) (“[J]udges attempting to keep faith with the text today must sometimes ask themselves whether punishments the Framers would not themselves have considered cruel. . . nevertheless are cruel. . . [The Framers are] best understood as making a constitution out of abstract moral principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles.”).

⁹⁷ *LAW’S EMPIRE*, *supra* note 95, at 273.

⁹⁸ *Id.*

Smith accepts Dworkin's distinction between concepts and conceptions. She also agrees with him that our Constitution — indeed, any constitution — sets forth a “vision of government” and that constitutional interpretation must be informed by an understanding of the “philosophy that is in the law.”⁹⁹ The devil, alas, is in the details. As the chain-novel analogy suggests, Dworkin understood judicial review to be a creative endeavor. To be sure, his ideal judge — “Hercules” — is constrained by previous legal materials, but he also strives to make our legal system the “best” it can be, and “draw[s] on his own convictions about justice and fairness and the right relation between them” in order to do so.¹⁰⁰ Dworkin argues that “[v]ery different, even contrary, conceptions of a constitutional principle . . . will often fit language, precedent, and practice,”¹⁰¹ that judges will inevitably have to choose between available conceptions, and that they ought to do so on the basis of “their own views about political morality.”¹⁰² Thus, Smith explains, Dworkin's approach deprives the law of any “fixed identity,” and empowers judges to act as lawmakers.¹⁰³ Once again, we have the rule of men — here, the rule of perfectionist judges.

The final account of judicial review Smith examines — minimalism — is not primarily concerned with constitutional interpretation. As defined and defended by Professor Cass Sunstein, minimalism is a means by which judges of fundamentally differing views about constitutional interpretation can resolve constitutional cases without unduly interfering with democratic decision-making or unnecessarily producing social conflict. Minimalism holds that judges should “favor decisions that are narrow, in the sense that they do not want to resolve issues not

⁹⁹ SMITH, *supra* note 6, at 198.

¹⁰⁰ *Id.* at 197 (emphasis added).

¹⁰¹ RONALD DWORIN, FREEDOM'S LAW 11 (1996).

¹⁰² *Id.* at 3-4 (emphasis added).

¹⁰³ LAW'S EMPIRE, *supra* note 95, at 193.

before the Court” and “shallow, in the sense that they avoid the largest theoretical controversies and can attract support from those with diverse perspectives on the most contentious questions.”¹⁰⁴ It purports to be “neutral,” because it takes no stand on how to arrive at the right answers to constitutional questions — it seeks only to (in Smith’s phrasing) minimize the “judicial footprint.”¹⁰⁵ Minimalism also holds itself out as modest, cognizant of the fact that, as Sunstein puts it, “no one, and no court, has a monopoly on wisdom.”¹⁰⁶

Minimalism rests upon a misunderstanding of the function of judicial review. It is not the function of the judicial review to promote democratic decision-making or social harmony but to ascertain the meaning of the Constitution and hold government officials accountable to it. To prioritize narrowness and shallowness in decision-making is to thwart that function. As Smith points out, the reach of some unconstitutional laws is quite broad, and one cannot minimize the judicial footprint that results from their invalidation without compromising the rights of those burdened by them.¹⁰⁷ Thus, in practice, minimalism is not “neutral” — it invites judges to allow government officials to exercise coercive power that is not authorized by the Constitution. “The only scope that a court should be concerned with,” Smith writes, “is whether the power exercised by the government in a particular action falls within its scope of authority.”¹⁰⁸

Minimalism is no more modest than it is neutral. For all that Sunstein emphasizes the importance of “giv[ing] many minds an

¹⁰⁴ Cass Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2242 (2006).

¹⁰⁵ SMITH, *supra* note 6, at 201.

¹⁰⁶ CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 45 (2009) [hereinafter MANY MINDS].

¹⁰⁷ SMITH, *supra* note 6, at 206.

¹⁰⁸ *Id.* at 210.

opportunity to contribute” to the resolution of contested issues, minimalism, like perfectionism, ultimately replaces the rule of law with the rule of judges.¹⁰⁹ Judges’ “projections of social harmony” take precedence over “the identity and meaning of the law,” and, thus, the rights of individuals whom the law safeguards.¹¹⁰ Under minimalism, judges become legislators, and the law itself becomes “an ongoing construction project, with the courts themselves part of the construction crew.”¹¹¹

After canvassing and critiquing the dominant accounts of judicial review, Smith identifies the fundamental vice that every one of them shares: Subjectivity.¹¹² The dominant accounts “treat[] the convergence of a number of people’s beliefs or desires about a law as if that were the law.”¹¹³ Public meaning originalism’s impoverished account of language results in the identification of the law with the beliefs and desires of long-dead individuals. Democratic deference’s misunderstanding of the Constitution’s function results in the identification of law with the beliefs and desires of living majorities. Perfectionism’s elevation of political philosophy above law makes judges’ beliefs and desires sovereign. Minimalism’s failure to grasp the function of judicial review does the same by allowing judges’ political prognostications to trump the law they are charged with interpreting and applying. All of these accounts allow mere will to determine whether government power may be unleashed. All of these accounts enable the rule of men.

¹⁰⁹ MANY MINDS, *supra* note 106, at 45.

¹¹⁰ SMITH, *supra* note 6, at 211.

¹¹¹ *Id.*

¹¹² *Id.* at 25 (defining “subjectivism” as “the belief that a thing’s nature is dependent upon the consciousness of the person(s) considering it”).

¹¹³ *Id.* at 212.

2. *Introducing Objective Review*

The implications of Smith's diagnosis are alarming. Accounts of judicial review that make the enjoyment of our rights contingent upon the will of men prevent the Constitution from fulfilling its moral function and compromise its moral authority. We need an alternative approach to judicial review that is consistent with the nature of language; the Constitution's overarching function; and the particular function of judicial review.

Smith's approach is spare by design, owing to the fact that "objective review is not, in its essence, different in kind from objectivity in any other sphere."¹¹⁴ Like all objective inquiry, it consists of a logic-guided, context-sensitive effort to identify the nature of the object – in this case, the Constitution. Because the meaning of words is not self-evident and the Framers' terminology is different from ours in important respects, judges must scrutinize relevant historical evidence concerning word usage.¹¹⁵ Because the Constitution is designed to implement a particular political philosophy, judges must draw upon an understanding of that philosophy in order to grasp the meaning of constitutional terms.¹¹⁶ They may not, however, depart from the original concepts indicated by those terms in favor of concepts that better align with their own political and moral convictions or which they believe to be more consistent with the Constitution's overarching political

¹¹⁴ *Id.* at 215.

¹¹⁵ *Id.* at 170 (although "meaning is not settled by the calendar," the calendar can "help us to ascertain word usage prevalent in a given time (for instance, to learn whether a certain population used the phrase "domestic violence" to refer to strife on the streets or to strife between family members in the home).").

¹¹⁶ *Id.* at 233 ("The Constitution did not emerge in a vacuum. It is 'backlit by the Declaration,' having been motivated by substantive aspirations and given the specific form that it has as a means of realizing those aspirations.").

philosophy.¹¹⁷ They must be guided at all points by “the objective meanings of terms, as best as [they] can discern them.”¹¹⁸

But there is more to judicial review than constitutional interpretation. In constitutional cases no less than in ordinary civil or criminal cases, courts employ procedural mechanisms that situate responsibility for coming forward with proof. One of these mechanisms is the presumption, which “imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.”¹¹⁹ The presumption comes in two forms: production and persuasion. Once the beneficiary of a production-shifting presumption demonstrates a basic fact, the opponent must produce some evidence disputing the presumed fact, or the fact is decided against the opponent. The beneficiary of a production-shifting presumption, however, continues to bear the risk of non-persuasion on the merits if the opponent produces sufficient evidence. Once the beneficiary of a persuasion-shifting production makes a threshold showing, however, the opponent bears both the burden of producing evidence to dispute that showing and the risk of non-persuasion on the merits. Presumptions serve both to regulate the adjudication of claims and to minimize the harmful consequences of error in cases of uncertainty. Thus, the presumption of innocence in criminal cases reflects the conviction that it is “better to let ten guilty men go free than to convict one innocent man.”¹²⁰

In most constitutional settings, the government receives the benefit of an effectively conclusive presumption of constitutionality

¹¹⁷ See SMITH, *supra* note 6, at 199 (“That our Constitution may not consistently uphold its own guiding philosophy, however, does not give judges the license to correct the law and subject the law to a different Constitution, as revised by them.”).

¹¹⁸ *Id.* at 223.

¹¹⁹ FED. R. OF EVID. 301.

¹²⁰ For an illuminating primer on evidentiary principles and a proposal for using them to inform constitutional adjudication, see David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641 (1994).

when its actions are challenged. Under the “rational-basis test” — the default standard of review applied to government actions that do not implicate any of a handful of rights deemed “fundamental” by the Supreme Court or involve “suspect classifications” — people challenging the government’s actions must demonstrate that the government’s actions are not “rationally related to legitimate government interests.”¹²¹ The Court has held that under rational-basis review the government need not produce any evidence at all in support of its actions and constitutional challengers must “negative every conceivable basis which might support [the government’s actions] whether or not the basis has a foundation in the record.”¹²² The Court has further stated that judges are not required to determine what ends the government is actually seeking.¹²³ Finally, the Court has made plain that it need not require an “empirical” connection between the government’s actions and a constitutionally legitimate government interest — only a “theoretical” connection.¹²⁴ Lower courts have interpreted these instructions to require them to disregard relevant evidence concerning the government’s true ends and even to assist the

¹²¹ *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). The distinction between rational-basis review and “heightened” judicial scrutiny in cases involving fundamental rights and suspect classifications can be traced back to an enormously influential footnote (“Footnote Four”) in *United States v. Carolene Products*, 304 U.S. 144 (1938). In Footnote Four, the Court explained that while regulatory legislation would generally be subject to rational-basis review, more exacting judicial scrutiny might be applied when legislation “appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments,” interferes with the political process, or targets “discrete and insular minorities.” *Id.* at 152 n.4. For an overview of the constitutional theory behind Footnote Four and the historical context in which it took shape, see Kurt Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459 (2001).

¹²² *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993).

¹²³ *Id.*

¹²⁴ *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 463 (1981).

government by articulating justifications for the government's actions that have no support in the record.¹²⁵

As Smith recognizes, modern rational-basis review is the antithesis of objective review. The Court's formulations of the rational-basis test describe a burden that is logically impossible for constitutional challengers to carry – no one could refute every conceivable justification for restricting their freedom.¹²⁶ If judges make no effort to identify the government's true ends, they cannot determine whether the government is actually pursuing a constitutionally legitimate interest. When judges rationalize the government's actions by offering justifications without support in the record, they distort reality to help government officials impose

¹²⁵ See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (“[W]e are not bound by the parties’ arguments as to what legitimate state interests the statute seeks to further.”); *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) (emphasis added) (“Even if Soto’s stated justification for enforcing Market Regulation No. 13 is insufficient . . . this Court is *obligated to seek out* other conceivable reasons.”); *Burke Mountain Acad., Inc. v. United States*, 715 F.2d 779, 783 (2d Cir. 1983) (emphasis added) (internal citations omitted) (“It is our job to try to divine what Congress left unstated [and] *we resort to our own talents and those of counsel* to discern the rationality of the classification in question.”).

¹²⁶ See Anthony De Jasay, *JUSTICE AND ITS SURROUNDINGS* 150 (2000) (arguing for a presumption of liberty on the grounds that “falsify[ing] the hypothesis that [a given act] is objectionable” is “very difficult and costly if the set of potential objections is large, and logically impossible if the set is not finite”). As Timothy Sandefur has argued (drawing upon De Jasay’s insight), the requirement that challengers in rational-basis cases negate every “conceivable basis” for restricting their freedom puts them in precisely this position. See TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 130 (2013). See also DAVID HARRIMAN, *THE LOGICAL LEAP: INDUCTION IN PHYSICS* 65-66 (describing Sir Isaac Newton’s approach to hypotheses that were unsupported by observational evidence: rejecting them out of hand. Harriman explains that “the attempt to refute an arbitrary assertion is a fundamental error,” because “such claims can always be shielded by further arbitrary assertions”). In a future article, I hope to investigate the pragmatic epistemology that undergirds the rational-basis test and how it differs from the epistemology of Newton, Locke, and the Framers. For an extended discussion of pragmatism’s influence upon American legal thought in the late 19th and early 20th century – when the rational-basis test took root – see LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 337-433 (2001).

their will. Modern rational-basis review would be a formula for arbitrary government action under any system of laws, but it is “flagrantly illogical” as a means of implementing a Constitution that “creates a government as the instrument designed to protect individuals’ rights.”¹²⁷ It “sabotages our legal system’s ability to fulfill the purpose for which it was created and that its constitution is designed to uphold.”¹²⁸

Smith calls for the wholesale abandonment of the rational-basis test, arguing that its “presumption” of constitutionality should be replaced with a presumption of liberty. Drawing from the scholarship of Professor Barnett, Smith contends that “[b]ecause ours is a government of limited powers authorized to serve a specific purpose, the fundamental presumption should be that individuals are entitled to act free of all government interference other than that which is directly required to enable the government to fulfill its mission.”¹²⁹ Smith stresses that this presumption is not only correct as a matter of political philosophy but as a matter of law: It is “the only positioning of presumptions that is consistent with the design, structure, and content of the U.S. Constitution.”¹³⁰

How should the presumption of liberty be implemented? Smith advocates “exacting judicial inspection” of the constitutionality of the government’s actions in every case involving a burden upon constitutionally protected freedom. Once a challenger makes a threshold showing that their freedom has been burdened, the government would need to offer a “clear demonstration of the Constitutional authority for its actions” and would bear the risk of non-persuasion on the merits.¹³¹ This posture is consistent with what constitutional litigator Clark Neily calls “judicial

¹²⁷ SMITH, *supra* note 6, at 229.

¹²⁸ *Id.*

¹²⁹ *Id.* at 264.

¹³⁰ *Id.* at 265.

¹³¹ *Id.*

engagement.”¹³² Judicial engagement in constitutional cases consists of an impartial, evidence-based effort to assess the constitutionality of the government’s true ends and means. Judicial engagement is not concerned with whether reasonable people could have supported the challenged actions but whether the government is actually pursuing a constitutional ends through means calculated to achieve those ends.

Smith is aware that following the course she has charted would require uprooting “long-standing, widely accepted, and deeply entrenched” practices, and she spends some time addressing the concern that adopting her proposals would carry “dramatic repercussions on ordinary life.”¹³³ First, she reminds us of the stakes: Whether the government’s “use of its unique coercive power” is grounded in reason or mere will.¹³⁴ The difference between the rule of law and the rule of men is the difference between a government that has “genuine moral authority” and a government that lacks such authority.¹³⁵ Second, Smith emphasizes that she is not advocating an immediate “radical and total reversal”¹³⁶ of longstanding legal practices but “a gradual, orderly period of transition” to a jurisprudence that reliably secures the rule of law established by the Constitution.¹³⁷ Smith emphasizes that judges seeking to facilitate such a transition must be clear, not only about what they are doing, but about why they are doing it, “directly address[ing] those factors that may make their rulings seem unjustified, due to the distortion of law’s non-objective

¹³² See generally CLARK NEILY, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT (2014) (articulating and defending the concept of judicial engagement).

¹³³ SMITH, *supra* note 6, at 265.

¹³⁴ *Id.* at 268.

¹³⁵ *Id.*

¹³⁶ *Id.* at 267.

¹³⁷ *Id.* at 269.

applications in the past.”¹³⁸ This will serve to “demonstrate the validity of their rulings and to be clear in the guidance that they provide for future applications of the law.”¹³⁹ Transitioning away from nonobjective law will require judges not only to be scrupulous in their reasoning but also to “conscientiously, sometimes courageously” assert the authority of their office.¹⁴⁰

In the concluding chapter of her book, Smith succinctly summarizes her account of judicial review. “People are right to argue about judicial review,” Smith states, for our freedom turns on whether judicial review is performed correctly.¹⁴¹ And we cannot understand how to perform judicial review unless we understand what the Constitution is designed to accomplish and what role judicial review plays in furthering that mission. Once we have done so, we can appreciate the importance of distinguishing between what the law is and what particular people believe it to be and ensuring that the government operates within legal limits. We have a Constitution that gets the what, how, and why of government fundamentally right. If we are to “enjoy [our] rights,” judges must ensure that “it is the law that actually governs.”¹⁴²

II. OBJECTIONS TO OBJECTIVITY

Smith’s approach to judicial review depends upon a conceptual theory of language, is informed by an individualist¹⁴³ political philosophy, and employs a judicial presumption of liberty. Each of these three components courts objections. One might contend that

¹³⁸ *Id.* at 270.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 271.

¹⁴¹ *Id.* at 275.

¹⁴² *Id.*

¹⁴³ That is, one that holds that the proper function of government is the protection of rights that individuals possess independently of government or any social organization, and that the mere will of other individuals not justify burdens on those rights.

even if Smith's theory of language is correct, the Constitution does not embody that theory. Similarly, one might argue that the Constitution is not designed to implement an individualist political philosophy. Finally, one might challenge Smith's claim that a judicial presumption of liberty is commanded by the Constitution.

A. OBJECTION 1: THE CONSTITUTION DOES NOT ENACT MS. AYN RAND'S INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY

Smith's reliance upon a conceptual theory of language invites criticism similar to that which has been leveled at Dworkin by public meaning originalists. Thus, Professor Keith Whittington has argued, against Dworkin, that scholars cannot say that a particular term in the Constitution necessarily refers to an open-ended concept or a narrow conception without engaging in an historical inquiry. Scholars, writes Whittington, "must be guided by the intentions of the Founders on a case-by-case basis."¹⁴⁴ In a critique of Dworkin's concept-conception distinction, Whittington offers an illustration: "Suppose I yell out, 'Look out for the tiger' as a creature crouches behind you."¹⁴⁵ We would be misinterpreting these words if we were to construe them to mean, "Take notice of the true tiger the next time you visit the zoo."¹⁴⁶ In context, they are properly construed as an instruction to look out at that creature behind you,

¹⁴⁴ See Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 221 (2000). Michael McConnell and Gary Lawson have made similar arguments, against Dworkin and James Fleming, respectively. See Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Dworkin's Moral Reading of the Constitution*, 65 FORDHAM L. REV. 1269, 1281 (1997) (asserting that interpreters must "seek the level of generality at which the particular language was understood by its Framers"); Reflections, *supra* note 83, at 16 ("[I]t is an empirical question whether a particular concept is meant to function in its presumptive cognitive fashion by referring to a whole set of actual, known and unknown, entities or attributes of entities or to serve a more limited cognitive role by referring only to a specific subset of those entities or attributes").

¹⁴⁵ Whittington, *supra* note 144, at 220.

¹⁴⁶ *Id.*

even if that creature is not truly a tiger. Similarly, Whittington argues, "The Framers may have intended their words to refer to either broad concepts or specific conceptions or applications."¹⁴⁷

There is compelling evidence that the Framers embraced a conceptual theory of language.¹⁴⁸ Their writings disclose the influence of John Locke's epistemology, as set forth in his *Essay Concerning Human Understanding*. In his *Essay*, Locke contended that truths about morality and political science, no less than truths about geometry or physics, could be derived through rational investigation and that words (with the exception of proper names) stood for concepts — "not particularly for this or that single thing, but for sorts and ranks of things."¹⁴⁹ Professor Philip Hamburger notes that James Madison directly borrowed Locke's arguments concerning language from the *Essay* in *Federalist* 37.¹⁵⁰ Following Locke, Madison described language as a "vehicle for ideas" and argued that although absolute precision in language was unattainable, the Constitution's language had been made as precise as possible, given the nature of the enterprise.¹⁵¹ Surveying the evidence, Hamburger concludes: "To the extent that Americans engaged in philosophical thought about language, including constitutional language, they began with the remarkable arguments in Locke's *Essay*."¹⁵²

But if Smith's theory of language is correct, it actually does not matter whether the Framers accepted it — language is by nature

¹⁴⁷ *Id.* at 222.

¹⁴⁸ For a thorough exploration of the Framers' epistemology, see MORTON G. WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978).

¹⁴⁹ *ESSAY*, *supra* note 12, at bk. III, ch. 1, § 6.

¹⁵⁰ See Phillip Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 303-06 (1989) [hereinafter *Social Change*]. Hamburger explains that "Locke's ideas dominated eighteenth-century views on epistemology and language." *Id.* at 252.

¹⁵¹ THE FEDERALIST No. 37, at 235-36 (James Madison) (Liberty Fund, 2001).

¹⁵² *Social Change*, *supra* note 150, at 306.

conceptual. Thus, while Whittington's words are properly construed as an instruction to look out for a particular creature, the term "tiger" would encompass other creatures of the kind that Whittington (perhaps incorrectly) believed that creature to be. Indeed, unless he had previously encountered that particular creature, Whittington could not have identified it as a "tiger" at all if the word "tiger" did not refer to a broader concept. Similarly, the Framers may well have intended the term "cruel and unusual punishment" to refer to a limited set of punishments, but they would not have been able to classify those particular punishments as "cruel and unusual" without a broader concept that encompasses all punishments of a certain kind. If words necessarily refer to open-ended concepts, Whittington's claim that we must be guided by the Framers' intentions on a case-by-case basis is simply wrong.

While offering a full defense of Smith's theory of language is beyond the scope of this essay, I will offer a preliminary sketch of why I believe it to be correct. When we communicate with other people, we implicitly assume that the words we are using refer to something other than our own understanding of those words. If our words referred only to our own mental content, communication would be impossible – we cannot read other people's minds and thus cannot determine precisely how other people understand particular words. If our words refer to something other than our mental content, they must refer to things that are mind-independent. Since those things are not always immediately perceivable – I can speak about "dogs" to another English speaker in the expectation that she will understand what I am referring to, although we have both encountered different dogs – we must assume that words refer to all mind-independent things of a particular kind, regardless of whether we have personally encountered them. We have all encountered people who know more about particular subjects than we do and who correct us when we use a words improperly. Should we be under the impression that cuttlefish are "fish," for instance, a zoologist may inform us that cuttlefish are in fact mollusks, and we will generally accept the correction instead of insisting that it is a fish to us or coining a new

term.¹⁵³ Finally, we have redefined words on the basis of increased knowledge without discarding those words – “death” offers a particularly useful example, given the frequency with which we encounter it in the language of the law.¹⁵⁴ Smith’s theory of language has great explanatory power—it makes sense of the way in which we use language.

One might object at this point that I am making things too easy. Few doubt that “death” names a mind-independent reality and that any definition of death should seek to capture that reality. It is more difficult to define high-level abstractions, like “freedom . . . of the press,” that are many steps removed from direct, immediate perceptions, depend upon a number of interrelated concepts, and are fraught with controversy.¹⁵⁵

While ascertaining the nature of high-level abstractions is concededly difficult, it is not impossible. Consider the vociferous debate that broke out between Federalist supporters and Republican opponents of the Sedition Act of 1798.¹⁵⁶ The Act made it a crime, punishable by up to two years in prison and a fine of two thousand dollars, to engage in criticism of “the government of the United States, or either house of the Congress, or the President” that

¹⁵³ See cuttlefish, Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/cuttlefish> (last accessed Mar. 20, 2016).

¹⁵⁴ See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CALIF. L. REV. 277, 294 (1985) (explaining that while people once defined “death” as the cessation of heart and lung function, today it is defined as the cessation of brain function or as nonrevivability. As Moore points out, if “death” means only what a particular linguistic community understands it to mean at a given time, a community that accepted the former understanding would have to conclude that a drowned person whose heart has stopped beating is “dead.” If, however, we regard “death” as referring to a real thing, the nature of which is independent of any person or group of people’s understanding of that thing, “fact will not outrun diction.”).

¹⁵⁵ U.S. CONST. amend. I.

¹⁵⁶ The definitive account remains James Morton Smith’s *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1966).

was “false, scandalous, and malicious,” “with intent to defame.”¹⁵⁷ Following the Sedition Act’s passage, Virginia and Kentucky adopted resolutions (drafted by James Madison and Thomas Jefferson, respectively) condemning it as incompatible with (among other constitutional provisions) the First Amendment’s guarantee of freedom of the press.¹⁵⁸ Federalists, drawing upon Sir William Blackstone’s authoritative volume on the common law, *Commentaries on the Laws of England*, argued that the Press Clause barred Congress from restraining the publication of speech but did not prohibit Congress from imposing criminal punishments after the fact if the speech proved injurious.¹⁵⁹

In a report written in late 1799 and approved by the Virginia legislature in January 1800, Madison offered an illustration of how the meaning of even hotly contested abstractions can be clarified through objective analysis.¹⁶⁰ Addressing the argument that “the actual legal freedom of the press, under the common law, must determine the degree of freedom which is meant by the terms,” Madison honed in on the distinction between the fundamental “nature of the British government” and that of the United States.¹⁶¹ Blackstone was describing press freedom under a government that reposed “absolute sovereignty” in the legislature.¹⁶² Parliament was “unlimited in its power,” “omnipotent” — all protections for the

¹⁵⁷ The Sedition Act, 1 Stat. 596 (1798) (expired 1801).

¹⁵⁸ See Thomas Jefferson, *Kentucky Resolutions (1798)*, reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 131-35 (P. Kurland & R. Lerner ed., Liberty Fund 2000); James Madison, *Virginia Resolutions (1798)*, reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 135-36.

¹⁵⁹ See John Marshall, *Report of the Minority on the Virginia Resolutions (1799)*, reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 137 (“[T]he liberty of the press is a term which has a definite and appropriate signification It signifies a liberty to publish, free from previous restraint . . .”).

¹⁶⁰ James Madison, *Report on the Virginia Resolutions (1800)*, reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 141 [hereinafter Report].

¹⁶¹ *Id.* at 142.

¹⁶² *Id.*

rights of the people “[were] not rated against the parliament, but against the royal prerogative.”¹⁶³ By contrast, in the United States, “the people, not the government, possess the absolute sovereignty” and the “[t]he legislature, no less than the executive, is under limitations of power.”¹⁶⁴ It is thus “natural and necessary,” wrote Madison, that a “different degree of freedom in the use of the press should be contemplated.”¹⁶⁵

Madison also contended that narrowly defining the Press Clause as a prohibition against prior restraints would prevent the clause from performing what all sides recognized to be its function — namely, protecting some measure of preexisting freedom to put “what sentiments [one] pleases before the public.”¹⁶⁶ If prior restraints and punishments after the fact have a “similar effect” upon people’s willingness to publish their sentiments, Madison reasoned, reading the Press Clause to prohibit only prior restraints would render the Press Clause a “mockery.”¹⁶⁷

Madison’s case has long since “carried the day in the court of history.”¹⁶⁸ Yet freedom of the press is an abstract concept, the contours of which are still hotly disputed. Both Federalists and Republicans distinguished between “liberty” and “licentiousness,” and there was broad agreement that freedom of the press did not shield speech that was injurious to others.¹⁶⁹ Further, Blackstone’s

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 13 (1769), reprinted in 5 THE FOUNDERS’ CONSTITUTION 119.

¹⁶⁷ Report, *supra* note 160, at 142.

¹⁶⁸ *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

¹⁶⁹ See Phillip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 951 (1993) (noting that even the most passionate critics of the Sedition Act “accepted that the First Amendment right of speech and press . . . was limited by the obligation to avoid injury to individuals”).

views were enormously influential,¹⁷⁰ and at the time that the Constitution was ratified, no state had departed from Blackstone.¹⁷¹ Understanding why the Federalists were wrong requires an appreciation of the differences between the character of the British government and the government of the United States. It also requires distinguishing between particular ways in which the freedom of the press can be burdened and the nature of that freedom. That is to say, it requires attention to context and unwavering focus on the object of inquiry.

As Smith acknowledges, “objectivity is more difficult, and is certainly more contested” when one cannot place a particular object under a microscope.¹⁷² Nonetheless, the burden must be shouldered. If we resign ourselves to the proposition that the Constitution’s terms have no determinable meaning; or that they mean only what reasonable listeners would have understood them to mean at the date of enactment; or that they mean whatever contemporary majorities or judges think that they mean; the rule of men will be all that we have.

B. OBJECTION 2: SMITH CONFUSES THE CONSTITUTION WITH THE DECLARATION OF INDEPENDENCE

Much of Smith’s criticism of Dworkin focuses upon his endorsement of the proposition that judges should draw upon their own moral and political values in determining the meaning of law. But if the Constitution is not designed to implement an individualist political philosophy, Smith could be accused of inviting the same kind of judicial lawmaking that she condemns in

¹⁷⁰ See Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 16 (2011).

¹⁷¹ See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 93-96 (Neil H. Cogan ed., 2015).

¹⁷² SMITH, *supra* note 6, at 29.

Dworkin's account. Has Smith accurately described the Constitution's "vision of government"?

While it has often been observed that the Framers differed amongst themselves concerning various subjects, they shared the same fundamental understanding of the proper function of government. For the Framers, as for Locke, government was a means of protecting the natural rights¹⁷³ of the individual "to dispose, and order as he lists, his person, actions, possessions, and his whole property,"¹⁷⁴ the enjoyment of which is "very unsafe, very insecure" in the "state of nature" (that is, absent government).¹⁷⁵ Locke and the Framers also recognized that arbitrary government is no improvement upon the state of nature—under the rule of men, as in the state of nature, "the weaker individual is not secured against the violence of the stronger."¹⁷⁶

¹⁷³ "Natural" in the sense of being derived from observational evidence concerning human nature and the requirements of human life. The content and application of rights is dictated by a person's possession of reason and their dependence upon reasoned action to guide their conduct. See *ESSAY*, *supra* note 12, at bk. II, ch. 27, § 9 ("A person is an intelligent thinking being that can know itself as itself the same thinking thing in different times and places."); *SECOND TREATISE*, *supra* note 28, at § 63 ("The Freedom then of Man, and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.").

¹⁷⁴ *SECOND TREATISE*, *supra* note 28, at § 57.

¹⁷⁵ *Id.* at § 123. Locke counted among the deficiencies of the state of nature the lack of an "established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them"; "a known and indifferent judge, with authority to determine all differences according to the established law"; and "power to back and support the sentence when right, and to give it due execution." *Id.* at § 124.

¹⁷⁶ *THE FEDERALIST* No. 51, at 271 (James Madison) (Liberty Fund, 2001). Locke argued that rights are *less* secure under arbitrary government than they are in the state of nature because the government's monopoly on force makes rights-violations inescapable. See *SECOND TREATISE*, *supra* note 28, at § 137 (people under arbitrary government are in a "a worse condition than the state of nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man, or many in combination).

Framing-era political thought and public discourse is positively saturated with Lockean themes: the priority of natural rights, the insecurity of natural rights in the state of nature, the need for government to protect the weak against the strong, and the need to ensure that the government does not exercise arbitrary power.¹⁷⁷

The American Constitution is not a treatise in political philosophy but a plan for constituting a particular government. Nonetheless, it is designed to implement a political philosophy and that political philosophy is evident in its design, content, and structure. The Constitution's preamble announces that it is designed to "secure the blessings of liberty" – not to grant them – and even the unamended 1787 Constitution contained a number of explicit safeguards for individual rights.¹⁷⁸ The separation of

Whereas by supposing they have given up themselves to the absolute arbitrary power and will of a legislator, they have disarmed themselves, and armed him, to make a prey of them when he pleases.").

¹⁷⁷ See generally SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 58-92 (2000) (canvassing evidence from the framing and ratification debates, the Federalist Papers, the Anti-Federalist Papers, and writings and speeches from leading intellectual figures during the framing era and concluding that "there was a continuity of Lockean liberal ideals between the revolutionary period and the constitutional period with regard to the fundamental purpose of the state").

¹⁷⁸ See, e.g., U.S. CONST. art. I, § 8, cl. 8 (emphasis added) ("The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by *securing* for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); U.S. CONST. art. I, § 10, cl. 1 (emphasis added) ("No State shall . . . pass any . . . Law *impairing* the Obligation of Contracts . . ."). Although Article IV, Section 2's guarantee that "[t]he citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States" is generally regarded today solely as a "comity clause" that prohibits states from discriminating against out-of-staters, Professor Richard Aynes has observed that this "is not an obvious reading of the text." See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, The Fourteenth Amendment, and the Slaughter-House Cases- Freedom: Constitutional Law*, 70 CHI.-KENT. L. REV. 627, 637 n.55 (1994). The terms "privileges" and "immunities" were used by Blackstone and by American statesmen and jurists after the American Revolution to refer to natural and customary substantive rights enjoyed by citizens. See generally Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45

legislative, executive, and judicial powers, the division of the national legislature into two houses, and the distribution of power between the federal government and the states, among other components of the Constitution's structure, serve to prevent any governmental entity from attacking individual rights unopposed.¹⁷⁹ By creating an independent judiciary that is composed of judges who are obliged to give effect to "this Constitution,"¹⁸⁰ rather than merely deferring to government officials' will, the Constitution protects the "rights of individuals."¹⁸¹ The reason that references to preexisting rights in the 1787 Constitution were few and far

SAN DIEGO L. REV. 777 (2008). The Framers of the Fourteenth Amendment averred that the Privileges and Immunities Clause "protected residents as well as migrants and protected certain absolute rights—the right of personal security, 'personal liberty,' and 'the right to acquire and enjoy property.'" See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 40 (1990).

¹⁷⁹On the separation of powers and federalism, see THE FEDERALIST No. 51, at 270 (James Madison) (Liberty Fund, 2001) (emphasis added) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the *rights of the people*."). Timothy Sandefur notes that this is "a deliberate echo of the Declaration's reference to 'securing rights.'" CONSCIENCE OF THE CONSTITUTION, *supra* note 47, at 20. On bicameralism, see THE FEDERALIST No. 63, at 328 (James Madison) (Liberty Fund, 2001) ("The people can never willfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater, where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act."). The device of an extended republic was employed to guard against the possibility that factions "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" would enact schemes of oppression. See THE FEDERALIST No. 10, at 48 (James Madison) (Liberty Fund, 2001) ("Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.").

¹⁸⁰ U.S. CONST. art VI, cl. 2 (emphasis added).

¹⁸¹ See THE FEDERALIST No. 78, at 405 (Alexander Hamilton) (Liberty Fund, 2001).

between is that the Constitution's advocates (the "Federalists") did not believe that they were creating a government that had the power to deprive people of individual rights in the first place and were concerned that enumerating rights would create a pretext for violating rights that were not enumerated.¹⁸² Opponents of the proposed Constitution (the "Anti-Federalists") were equally committed to securing individual rights, but believed that rights not expressly reserved in the Constitution would not be secure.¹⁸³

Ultimately, the Federalists promised a Bill of Rights in order to cement the Constitution's ratification, although they continued to regard it as unnecessary.¹⁸⁴ The Bill of Rights served to make the

¹⁸² See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 254 (J. Elliot ed., Cornell Univ. Library 2009) (statement of James Wilson) [hereinafter DEBATES] ("There are two kinds of government—that where general power is intended to be given to the legislature, and that where the powers are particularly enumerated. In the last case, the implied result is, that nothing more is intended to be given than what is so enumerated, unless it results from the nature of the government itself. . . in a government like the proposed one, there can be no necessity for a bill of rights, for on my principle, the people never part with their power."); THE FEDERALIST No. 84, at 445 (Alexander Hamilton) (Liberty Fund, 2001) ("[B]ills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"); DEBATES 149 (statement of James Iredell) ("A bill of rights . . . would . . . be . . . dangerous. No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution.").

¹⁸³ See Phillip Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 30-31 (1994) ("Both Federalists and Anti-Federalists agreed that the rights of Americans were innumerable. In particular, they agreed that they had countless natural rights . . . to eat, sleep, shave and do any number of other things of which human beings were capable . . . [But] Anti-Federalists assumed that only such rights as were listed would really be protected from that government.").

¹⁸⁴ As Madison put it, the inclusion of the Bill of Rights served "the double purpose of satisfying the minds of well-meaning opponents, and of providing additional guards in favor of liberty." *Letter from James Madison to Thomas Jefferson* (Dec. 8, 1788), in 11 THE PAPERS OF JAMES MADISON 384 (Robert A. Rutland & Charles F. Hobson eds., 1977).

Constitution's mission of rights-protection more explicit. The first eight provisions of the Bill of Rights addressed Anti-Federalist concerns about the failure to enumerate rights; by making plain that rights that were not enumerated were not thereby forfeited to the federal government, the Ninth Amendment addressed Federalist concerns about the dangers of enumeration.¹⁸⁵ Numerous provisions are declaratory of individual rights that precede government. The First Amendment promises that "the freedom of speech, and of the press" shall not be "abridg[ed]"; the Second Amendment promises that the "right of the people to keep and bear arms shall not be infringed"; the Fifth Amendment guarantees that people will not be "deprive[d]" of "life, liberty, or property" without "due process of law"; the Ninth Amendment refers to rights "retained" by the people.

There were, however, faults in the Constitution's structure that not only prevented it from fulfilling its mission but nearly led to its collapse. The institution of chattel slavery effectuated the wholesale deprivation of individual rights. Although the Constitution never expressly affirmed the right to hold property in slaves,¹⁸⁶ the Framers found chattel slavery among us, and the Constitution did not abolish it.¹⁸⁷ The Constitution's accommodation of an institution that contradicted its core mission and its failure to expressly

¹⁸⁵ Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 17 (2006) (emphasis in original) [hereinafter *The Ninth Amendment*] ("While the rest of the Bill of Rights was a response to Antifederalist objections to the Constitution, the Ninth Amendment was a response to Federalist objections to the Bill of Rights.").

¹⁸⁶ See DON FEHRENBACHER, THE DRED SCOTT CASE 27 (1978) ("The pattern that emerges [in the Constitution] is one of acknowledging the legitimate presence of slavery in American life while attaching a cluster of limitations to the acknowledgment.").

¹⁸⁷ See PATERSON, *supra* note 69, at 136 ("[T]he words slave and slavery are not used . . . The phrase is a 'person held to service or labor . . . Slaves then were at least persons; and are also counted as persons in apportioning of the House of Representatives. But the brute fact remained that they were slaves; and the Constitution did not pronounce them free by right.').

prohibit states from arbitrarily depriving people of their rights left not only the rights of slaves but those of free blacks and white abolitionists at the mercy of local tyranny.¹⁸⁸ And then the war came.

The Reconstruction Amendments were not designed to alter the Constitution's mission but to remove any doubt about the nature of that mission and to make possible its fulfillment. They were formulated by Republicans who believed that the Constitution was designed to implement the political philosophy set forth in the Declaration of Independence but who had come to appreciate the flaws in its design.¹⁸⁹ The precise terms of Section 1 illuminate the Declaration's influence.¹⁹⁰ As "all men" are "created equal," according to the Declaration, and possess "unalienable rights," so too "all persons born or naturalized in the United States" are

¹⁸⁸ As Paterson observes, "[t]he existence of slavery necessarily impairs the exercise of their rights by free men. If the state power makes a man a slave, of course it abridges his freedom of speech and assembly, leaves him no security of person, and no right to property; to it can hardly be forbidden to do those things to anybody." PATERSON, *supra* note 69, at 136. The truth of this insight was borne out in the years preceding the Civil War. See CURTIS, *supra* note 179, at 40 ("Beginning in the 1830s, southern states passed laws abridging freedoms of speech and the press as they applied to slavery. Advocating abolition and denying a master's right to property in slaves were made crimes. Antislavery publications were eliminated from mails in the South, and southern states sought to extradite northerners responsible for anti-slavery publications. What could not be accomplished by law was enforced by mobs.").

¹⁸⁹ See CURTIS, *supra* note 179, at 215, 218 (finding that "[b]y 1866 leading Republicans in Congress and in the country at large shared a libertarian meaning of the Constitution," according to which states had no authority to deprive people of natural rights or discriminate on the basis of race, and that "[f]or many Republicans, the [Fourteenth] amendment merely declared constitutional law properly understood."); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235-36, 242, 249 (finding that the Declaration of Independence was "the most important source of antislavery Republicanism" and contending that the Fourteenth Amendment was designed to "empower[] the national government to protect the natural rights of its citizens").

¹⁹⁰ See generally Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

citizens, according to Section 1, and possess all the “privileges” and “immunities” of citizenship.¹⁹¹ So, too, are they equally entitled to “the protection of the laws,” given that the essential purpose of government, according to the Declaration, is to “secure [natural] rights.”¹⁹² Finally, as the Declaration recognizes “life, liberty, and the pursuit of happiness” among, “unalienable rights” so, too, the Due Process of Law Clause recognizes preexisting rights to “life, liberty, [and] property” of which no “person” can be arbitrarily “deprived.”¹⁹³

Smith’s claim that the Constitution is designed to implement an individualist political philosophy is thus accurate. The essential “why” of our governing document has remained constant, even as the “what” and “how” have been altered in light of what “experience hath shewn.”¹⁹⁴

C. OBJECTION 3: THE PRESUMPTION OF LIBERTY UNCONSTITUTIONALLY AGGRANDIZES THE JUDICIARY

Smith’s account of the function of judicial review is consistent with Alexander Hamilton’s seminal argument for judicial review in Federalist 78. For Smith as for Hamilton, judicial review serves as a means of ascertaining constitutional meaning and “guard[ing] the Constitution and the rights of individuals.”¹⁹⁵ Smith and Hamilton hold that the Constitution has a determinable meaning and that judges should be guided by their independent assessment of that meaning rather than allow the political branches to be “the constitutional judges of their own powers.”¹⁹⁶

¹⁹¹ *Id.* at 390.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ DECLARATION OF INDEPENDENCE, *supra* note 23.

¹⁹⁵ THE FEDERALIST No. 78, at 405. (Alexander Hamilton) (Liberty Fund, 2001).

¹⁹⁶ *Id.* at 403.

But Hamilton's discussion of judicial review in Federalist 78 seems to contemplate that government actions would enjoy a presumption of constitutionality, and, as Professor John McGinnis has demonstrated, many Founding-era jurists extended such a presumption.¹⁹⁷ Smith, by contrast, claims that the only presumption that is consistent with the Constitution's "design, structure, and content" is a presumption of liberty. In light of this discrepancy, Smith could be accused of considerably overstating her case.

One can detect in Federalist 78 the marks of what McGinnis has termed the "duty of clarity": a judicial duty to invalidate acts of government only when a constitutional violation is sufficiently clear. Thus, Hamilton states that judges must consider government actions "void" if there is an "irreconcilable variance" between those enactments and the Constitution — the implication being that government actions with reconcilable variances should be considered valid.¹⁹⁸ McGinnis has adduced substantial evidence that Founding-era jurists considered themselves duty-bound to apply tried-and-true interpretive methods in order to determine the Constitution's precise meaning and only invalidate the government's actions if they manifestly contradicted that meaning.¹⁹⁹ In cases of uncertainty concerning constitutionality, the duty of clarity would require judges to uphold the government's actions.

According to McGinnis, the duty of clarity is a constitutional duty. McGinnis argues that "[t]he judicial Power" vested in the federal courts through Article III cannot be

¹⁹⁷See John O. McGinnis, *The Duty of Clarity*, No. 15-15 NW. U. SCH. OF L. Pub. L. & LEGAL THEORY SERIES (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578318.

¹⁹⁸THE FEDERALIST No. 78, at 402 (Alexander Hamilton) (Liberty Fund, 2001). That is, "one that cannot be reconciled by the harmonizing impulse of legal interpretation at the time." McGinnis, *supra* note 197, at 31.

¹⁹⁹McGinnis, *supra* note 197, at 20-50.

understood except in the context of “a historical background of judicial duty that is the basis of judicial review, just as the Constitution must be understood more generally as created within a legal framework and tradition rather than a wholly self-contained expression of new principles.”²⁰⁰ Because “[t]hose who framed the Constitution and rendered justice in the early Republic did understand judicial duty as requiring clarity before the judiciary was to displace other law,” McGinnis concludes that the duty of clarity is an essential component of judicial review under Article III.²⁰¹

McGinnis’ conclusion is only as persuasive as the theory of language that it rests upon. On McGinnis’ account, if “those who framed the Constitution and rendered justice in the early republic” thought that the duty of clarity was an essential component of judicial review, and if the duty of judicial review is incorporated into the Constitution through “The judicial Power,” then the duty of clarity is an essential component of judicial review, and it enters the Constitution through “The judicial Power.” Perhaps it would be better if the Framers had incorporated a different concept into the Constitution, but, as McGinnis puts it, “[f]ollowing the preexisting concept in its attributes is the best we can do to approximate the concept at the time: one has to take the bitter with the sweet”²⁰²

If Smith’s theory of language is correct, however, we must make an independent effort to ascertain the nature of “The judicial Power.” The Framers’ understanding of that concept is not identical to its meaning. We can distinguish between the judicial duty to decide “all cases . . . arising under this Constitution and Laws of the United States”²⁰³ in accordance with “the Supreme Law of the

²⁰⁰ *Id.* at 62.

²⁰¹ *Id.*

²⁰² McGinnis, *supra* note 197, at 18.

²⁰³ U.S. CONST. art. III, § 1, cl. 1.

Land”²⁰⁴ and any particular practices that the Framers associated with the performance of that duty – just as we can distinguish between “the freedom of the press” and the prohibition of prior restraints. We must consider what positioning of presumptions is in fact most consistent with the Constitution’s design, content, and structure, as well as the particular function of judicial review in ascertaining constitutional meaning and enforcing constitutional limitations on government power. Smith chooses her examples well: the Ninth Amendment, the Tenth Amendment, and Article I’s Necessary and Proper Clause. The Ninth Amendment refers to natural rights that precede government – rights that, as we have seen, the Constitution is designed to secure.²⁰⁵ The Tenth Amendment makes plain that the national government established by the Constitution possesses no powers that are not expressly delegated to it by “We the People.”²⁰⁶ The last indicates that Congress is a public agent, entrusted with a limited set of powers, and that Congress has a fiduciary duty to “carry[] into Execution” those powers (as Professor Robert Natelson has put it) “in good faith, with reasonable care, and with impartiality and loyalty towards its constituents.”²⁰⁷ Under the Constitution, the exercise of rights does not need to be justified – the exercise of federal power does, and that power must be wielded with care. A judicial presumption of liberty from federal power and exacting judicial scrutiny of the government’s ends and means when the government’s actions are challenged in court follow logically.

What of state power? Professor Gary Lawson has argued that a presumption of individual liberty ought to apply in the context of

²⁰⁴ U.S. CONST. art. VI, § 1, cl. 2.

²⁰⁵ See generally *The Ninth Amendment*, *supra* note 185.

²⁰⁶ See generally Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 101 (2008).

²⁰⁷ Roger G. Natelson, *The Agency Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 322 (2004).

challenges to federal power but a presumption of constitutionality ought to apply in the context of challenges to state power.²⁰⁸ He reasons that “because state governments do not draw their legal power from the Federal Constitution,” they need not (unlike the federal government) justify their actions “by reference to an affirmative grant of power in the Constitution.”²⁰⁹ Thus, he argues, “[A]n opponent of state power who is invoking a ‘thou shalt not’ contained in the Federal Constitution has the burden of proof.”²¹⁰

Although the powers of the federal government and state governments are (as James Wilson put it) “so many emanations of power from the people,” Lawson is correct that state governments need not point to “affirmative grant[s] of power” in the Constitution to justify assertions of power over individuals.²¹¹ It does not follow, however, that those assertions of power should receive the benefit of a presumption of constitutionality when they are challenged in court. The Fourteenth Amendment’s Due Process of Law Clause, which limits “State” power, indicates that individuals have rights that precede both state and federal power. No one can be “deprived” of “life, liberty, or property” that they do not possess in the first instance. Thus, any time a state seeks to effectuate such a deprivation, it seeks to take something from people that belongs to them – an unlawful act, unless it is consistent with “due process of law.” In so acting, state governments implicitly assert that their actions are consistent with due process of law, and, as Lawson observes, “He who asserts must prove” is a “basic principle of epistemology, and of rational thinking.”²¹² Smith is correct: A presumption in favor of

²⁰⁸ Gary Lawson, *No History, No Certainty, No Legitimacy, No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551 (2012).

²⁰⁹ *Id.* at 1564.

²¹⁰ *Id.* at 1565.

²¹¹ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 530 (1969) (quoting James Wilson).

²¹² *Id.*

government power, whether that power is asserted by the federal government or by a state government, is “flagrantly illogical,” not merely as a matter of political philosophy, but as a matter of constitutional law.

III. OBJECTIVE REVIEW IN ACTION

Smith’s account of judicial review is robust against theoretical objections. But because the function of judicial review is to maintain the rule of law, the fundamental question one must ask of any proposed approach to judicial review is, “Does this mode of review do that?”²¹³ In articulating the components of objective review with exceptional clarity, Smith gives us the tools to apply her approach to three questions that stand in need of resolution and which implicate the rights of countless Americans: (1) whether economic protectionism, standing alone, constitutes a “legitimate government interest” for the purposes of rational-basis review; (2) how rights that are not enumerated in the Constitution’s text should be identified and protected; and (3) whether and to what extent occupational speech — the speech of tour guides, physicians, therapists, veterinarians, interior designers, consultants and others who earn their living through vocations that consist almost entirely of speaking — is protected by the Constitution’s free speech guarantees.

A. “LEGITIMATE” GOVERNMENT INTERESTS

According to the standard formulation of the rational-basis test, government actions must be rationally related to a “legitimate government interest” to pass constitutional muster. If there are legitimate interests, there must also be illegitimate interests, and

²¹³ SMITH, *supra* note 6, at 252.

there must be some definition of legitimacy that can be used to distinguish between the two kinds of interests.²¹⁴

But the Supreme Court has never explicitly defined constitutional legitimacy.²¹⁵ The Court has held in certain contexts that government actions designed only to benefit the politically powerful or burden the politically powerless are illegitimate, but it has done so without explaining precisely why the Constitution forbids such actions.²¹⁶ Further, the Court has upheld without meaningful scrutiny economic regulations that were patently designed only to benefit the politically powerful.²¹⁷

The Court's failure to define constitutional legitimacy and its heedlessly deferential approach to economic regulations has led some lower courts to reach the remarkable conclusion that mere economic protectionism — the use of regulatory power solely to protect entrenched economic interests from competition — is constitutionally legitimate. In *Powers v. Harris*²¹⁸ and *Sensational Smiles v. Mullen*²¹⁹, the Tenth and Second Circuit Courts of Appeal determined that even if economic regulations have no relationship to protecting public health or safety, they can be upheld if they

²¹⁴ See *RIGHT TO EARN A LIVING*, *supra* note 126, at 133 (“No reasonable mind can make sense of the requirement that laws relate to a legitimate state interest unless one has some idea of what state interests are or are not legitimate.”).

²¹⁵ *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ . . .”).

²¹⁶ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

²¹⁷ See, e.g., *Racing Ass’n of Central Iowa v. Fitzgerald*, 539 U.S. 103 (2003); *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

²¹⁸ 379 F.3d 1208 (10th Cir. 2004).

²¹⁹ 793 F.3d 281, 286 (2d Cir. 2015), *cert denied*, No. 15-507 (Feb. 29, 2016).

benefit entrenched in-state economic interests. The opinions in both cases emphasized that economic regulations are often driven by sheer favoritism. In *Powers*, Chief Judge Deanell Tacha glibly observed, “While baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”²²⁰ Senior Judge Guido Calabresi, writing for himself and two other judges in *Sensational Smiles*, echoed this cynical observation: “Much of what states do is to favor certain groups over others on economic grounds. We call this politics.”²²¹

These decisions are remarkable and profoundly troubling. They are remarkable because the Supreme Court has consistently affirmed that Americans possess a constitutional right to earn an honest living in the occupation of their choice — a right that is effectively forfeit if it can be restricted simply because politically powerful economic interests resent competition.²²² They are

²²⁰ *Powers*, 379 F.3d at 1222.

²²¹ *Sensational Smiles*, 793 F.3d at 287. *But see* *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) (distinguishing between legitimate state interests and “providing a benefit to special interests”). The Sixth, Ninth, and Fifth Circuits have held that economic protectionism, standing alone, does not constitute a legitimate interest. *See* *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

²²² *See, e.g.*, *Connecticut v. Gabbert*, 526 U.S. 286 (1999) (Due Process of Law Clause protects “liberty right to choose and follow one’s calling”); *Examining Bd. of Eng’rs v. Otero*, 426 U.S. 572, 604 (1976) (Fourteenth Amendment secures right to work for a living in a common occupation (citing *Truax*, 239 U.S. at 41)); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”); *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39 (1957) (Fourteenth Amendment’s Due Process of Law and Equal Protection Clauses bar states from arbitrarily excluding people from “any occupation”); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (“liberty” protected by the Fourteenth Amendment includes right “to engage in any of the common occupations of life”); *Truax v. Raich*, 239 US 33, 41 (1915) (“[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of

profoundly troubling because regulations supported by mere protectionism constitute force backed only by the will of the politically powerful – precisely the kind of arbitrary power that the Constitution was designed to safeguard Americans against. If Judge Calabresi is correct in his assessment that mere protectionism is politics as usual, and if judges are content to accept mere protectionism as a brute fact of American political life, countless Americans are, in their pursuit of a livelihood, truly under the rule of men.

Following Smith's approach, the Court could resolve the question of mere protectionism's legitimacy in a way that is informed by the Constitution's political philosophy and its specific guarantees of due process of law. Doing so would require tracing the term "due process of law" in the Fifth and Fourteenth Amendments back to its roots in the "law of the land clause" in Magna Carta, which Revolutionary-era lawyers and the authors of the Fourteenth Amendment understood to refer to a normative concept of law.²²³ According to this concept, not every government action is binding law – to qualify as law, an act of coercive power

the [Fourteenth] Amendment to secure."); *Dent v. West Virginia*, 129 U.S. 114 (1889) ("liberty" protected by the Fourteenth Amendment's Due Process of Law Clause encompasses "the right of every citizen of the United States to follow any lawful calling.").

²²³ See, e.g., Timothy Sandefur, *In Defense of Substantive Due Process, Or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 344 (2012) (arguing that both clauses rest upon the premise that "law and arbitrary command, justice and mere force genuinely differ," and that they are properly understood to prohibit the latter); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 416 (2010) (contending that while the Fifth Amendment's guarantee of due process of law only refers to procedural rights, the drafters of the Fourteenth Amendment understood due process of law as "a guarantee of general and impartial laws"); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 668 (2009) (finding that "the colonists understood Chapter 29 [of Magna Carta] and due process as general protections against arbitrary and oppressive government," and that the Fifth Amendment embodies this understanding).

has to possess certain characteristics, public orientation being among them.²²⁴ Thus, the government could not lawfully burden people's natural rights merely to serve the interests of politically powerful individuals or groups, but only to better promote the genuine public good by securing the life, liberty, and property of all.²²⁵ The Due Process of Law Clauses directly serve the Constitution's mission by ensuring that people are not deprived of their life, liberty, or property through "mere will exerted as an act of power."²²⁶

If one keeps in mind the mission of the Constitution and the concept of due process of law, the question whether mere protectionism is legitimate is fairly straightforward. Exercises of regulatory power that are designed only to serve only the interests of the powerful rather than to serve the genuine public good are essentially arbitrary, regardless of what form that power takes, who benefits, or who is burdened. They are the product of mere will, rather than any reason that is consistent with the government's

²²⁴ CONSCIENCE OF THE CONSTITUTION, *supra* note 47, at 77. The most explicit articulation of this concept of law in a Supreme Court opinion is contained in Justice Samuel Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."). Although Justice James Iredell famously disagreed, Professor Gedicks has shown that Iredell's view was "largely rejected by state constitutional decisions of the period, which generally held that the 'law of the land' signified natural and customary rights that constrained legislative action and could not be altered by the exercise of ordinary legislative power." Gedicks, *supra* note 223, at 651.

²²⁵ Lockean liberals identified the public good with the preservation of natural rights. See THE SYSTEM OF LIBERTY, *supra* note 26, at 27 ("For these liberals, to say that a government ought to further the public good means that a government ought to protect the natural rights of its citizens in normal circumstances."). Thus, Madison recommended that a declaration be affixed to the Constitution which read, in part, "That a government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." JAMES MADISON: WRITINGS 441 (Jack N. Rakove ed., 1999) (emphasis added).

²²⁶ *Id.* at 532.

rights-protecting function. Because mere protectionism is arbitrary and because the Constitution generally and the Due Process of Law Clause in particular are designed to safeguard Americans against arbitrary power, mere protectionism is illegitimate.

B. "FUNDAMENTAL" RIGHTS

As discussed above, the Supreme Court has for more than half a century distinguished between "fundamental" rights — burdens upon which receive heightened judicial scrutiny — and all other rights, which receive rational-basis review. Among the handful of "fundamental" rights that the Supreme Court has deigned to recognize are most of the rights listed in the Constitution's first eight amendments and a smattering of unenumerated rights, including the right to bodily integrity, the right to marry, the right to travel, the right to choose whether to have children, and the right to guide the upbringing of one's children.²²⁷

There is a glaring constitutional problem with the Court's "fundamental rights" jurisprudence: it is incompatible with the Ninth Amendment.²²⁸ To relegate unenumerated rights to second-class constitutional status unless and until they are found to satisfy criteria delineated by the Court is necessarily to disparage unenumerated rights. Further, because the rational-basis test is so often not a meaningful test of anything but the judicial imagination, the conclusion that a particular government action does not burden a fundamental right frequently precipitates the denial of unenumerated rights.

To add insult to constitutional injury, the Court has articulated several tests of "fundamentality" over the years, and it is not clear

²²⁷ See *Troxel v. Granville*, 530 U.S. 57 (2000); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Rochin v. California*, 342 U.S. 165 (1952).

²²⁸ See RESTORING THE LOST CONSTITUTION, *supra* note 73, at 253.

what test is the test. For a time, the Court relied upon language from Justice John Marshall Harlan's dissent in *Poe v. Ullman*,²²⁹ in which Harlan explained that "[d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code . . . it has respected the balance which Our Nation, build upon postulates of respect for the liberty the individual, has struck between that liberty and the demands of organized society."²³⁰ Harlan's *Poe* dissent served as the foundation for a form of common law constitutionalism, which saw the Court identifying unenumerated fundamental rights by analogy to rights it had previously recognized.²³¹ The Court distinguished between unenumerated "personal" liberties (which it did recognize as "fundamental" and apply heightened scrutiny to on occasion) and unenumerated "economic" liberties (which never received heightened scrutiny) without making any considered effort to justify the distinction.²³²

More recently, the Court in *Washington v. Glucksberg*²³³ sought to fashion a more consistent approach by tethering the recognition of unenumerated fundamental rights to "history and tradition" and requiring that rights-claims be given a "careful description." This approach produced relative consistency, but at an intolerable cost.

²²⁹ 367 U.S. 497 (1961).

²³⁰ *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

²³¹ See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148-49 (2015) (discussing Harlan's—later, the Court's—"open-ended common law approach").

²³² See Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1473 (2015) (finding "no successful sustained defense of the bifurcated standard of review [distinguishing between "personal" and "economic" rights] that has served as the framework for our constitutional jurisprudence for the past seventy-five years."). See also *United States v. Carlton*, 512 U.S. 26, 41-42 (Scalia and Thomas, J.J., concurring) ("[T]he [Court's] picking and choosing among various rights," together with the "categorical and inexplicable exclusion of so-called 'economic rights'... unquestionably involves policymaking rather than neutral legal analysis").

²³³ 521 U.S. 702, 721 (1997).

The Court's requirement that rights-claims be given a "careful description" was interpreted as a requirement to describe rights claims narrowly.²³⁴ This, in turn, made it more difficult to argue that rights were grounded in "history and tradition" and led to the rejection of meritorious rights claims.

Perhaps no case more vividly illustrates the deep flaws in the Glucksberg framework better than *Abigail Alliance v. Eisenbach*.²³⁵ *Abigail Alliance* arose from a suit by an organization of terminally ill patients and their supporters — an organization founded by Frank Burroughs, whose daughter, Abigail, died of cancer before the Food and Drug Administration approved a drug that might have saved her life. In *Abigail Alliance*, the U.S. Circuit Court of Appeals for the District of Columbia held that terminally ill cancer patients have no fundamental right to try potentially life-saving experimental drugs that have passed basic safety tests but have not yet been fully approved by the FDA. Judge Thomas Griffith, writing for the court, defined the claimed right narrowly: "[A] right of access to experimental drugs that have passed limited safety trials but have not been proven safe and effective."²³⁶ Thus narrowly defined, the claimed right was obviously not "deeply rooted" in the nation's "history and traditions." Yet Judge Griffith's definition — justified by a perceived mandate from the Supreme Court to avoid "expanding the substantive rights protected by the Due Process Clause" — failed to capture the nature of the right at stake.²³⁷ Preventing terminally ill patients who are suffering from diseases for which no government-approved treatment is available from procuring an unapproved medicine effectively deprives them of the right to preserve their life. The right to self-preservation is "deeply

²³⁴ See Randy Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (discussing this problem in the context of *Raich v. Gonzales*, 500 F.3d 850 (2007)).

²³⁵ 495 F.3d 695 (2007).

²³⁶ *Abigail Alliance*, 495 F.3d at 697.

²³⁷ *Id.* at 702.

rooted,” not only in our nation’s history and traditions but in the political-philosophical foundation upon which the Constitution rests.²³⁸ The Abigail Alliance court’s failure to recognize and enforce the right to self-preservation is enough to damn *Glucksberg*.²³⁹

Smith’s approach would enable the Court to extricate our jurisprudence from this morass. The phrase “due process of law” has a fixed, determinable meaning – as do the terms “life,” “liberty,” and “property.” Identifying the nature and referents of the concepts indicated by these terms must begin with examination of the historical usage of the terms, but it must not stop there. As the Court has done in the context of cases construing “the freedom of speech,” which it has held to encompass far more activities of a particular kind than the Framers could have imagined, the Court must also do so in interpreting other constitutional provisions. It must consider the broader context in which those words were

²³⁸ See Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self Preservation*, 39 ALA. L. REV. 103, 117 (1987). (“[I]n liberal theory, the right to self-defense is the most fundamental of all rights”). For Locke, the duty of self-preservation was the source of all other rights. See SECOND TREATISE, *supra* note 28, at § 6 (“Every one . . . is bound to preserve himself, and not to quit his Station willfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.”). See also Alexander Hamilton, *A Full Vindication*, in 1 THE WORKS OF ALEXANDER HAMILTON 3, 12 (H. Lodge ed., 1903) (describing self-preservation as “the first principle of our nature.”).

²³⁹ In the wake of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the continued strength of *Glucksberg* is very much in question. In *Obergefell*, the Court pointedly declined to apply the *Glucksberg* framework in determining that the Fourteenth Amendment’s Due Process of Law and Equal Protection Clauses require states to recognize marriages between people of the same sex. Some scholars have interpreted *Obergefell* as a return to the common-law approach associated with Justice Harlan’s *Poe* dissent. See, e.g., Yoshino, *supra* note 231, at 179 (arguing that *Obergefell* “reinvigorate[ed] the analysis of Justice Harlan’s dissent in *Poe*.”); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015) (“*Obergefell* has definitively replaced [the *Glucksberg* framework] with the more holistic inquiry [of Harlan’s *Poe* dissent]”).

written into our law – specifically, the Declaration-infused reading of the Constitution that animated Section 1 of the Fourteenth Amendment. The Due Process of Law Clause, like the Declaration of Independence, speaks only of “liberty,” not of “economic” liberty and “personal” liberty – thus did jurists interpreting the Fourteenth Amendment’s Due Process of Law Clause in the years following the Civil War properly consider the right to speak freely, the right to worship, and the right to earn a living to be instances of the same concept.²⁴⁰ The essence of this “liberty” is freedom of action – as Smith puts it, the freedom “to act by [one’s] own judgment, free from others’ use of force” – and it is broad enough to capture the innumerable activities we choose to engage in that do not violate the rights of others.²⁴¹ Smith’s approach offers a principled means of identifying and protecting unenumerated rights that is faithful to the Constitution’s commands.

C. OCCUPATIONAL SPEECH

For decades, the Supreme Court has left the constitutional status of “occupational speech” unresolved.²⁴² The Court has long insisted that regulations that are triggered by the communicative content of speech are always subject to strict scrutiny.²⁴³ But the

²⁴⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience,” among other activities “essential to the orderly pursuit of happiness by free men”).

²⁴¹ SMITH, *supra* note 6, at 106.

²⁴² See generally Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 194 (2014).

²⁴³ See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010) (strict scrutiny required

most explicit guidance that the Court has given concerning occupational speech is still a three-Justice concurrence from 1985 that suggests that occupational speech does not implicate the First Amendment.²⁴⁴ In evaluating licensing laws for speaking professions and regulations of professional speech that target speech about particular subjects – restrictions that are certainly content-based – lower courts have split on which standard of review to apply. Some federal courts of appeals have subjected restrictions on occupational speech to heightened scrutiny, on the grounds that “speech is speech, and it must be analyzed as such for purposes of the First Amendment”²⁴⁵; others have concluded that such restrictions only burden professional “conduct” and have applied rational-basis review.²⁴⁶

The truth is that occupational speech is both speech and professional conduct. The conduct for which those in speaking professions are compensated is, well, speech – speaking professionals are paid to personally communicate information, ideas, or advice to other people. The decision to choose between characterizing occupational speech as speech or conduct is necessarily arbitrary – and this arbitrary decision can mean the difference between meaningful and meaningless judicial review.

Consider the case of Ron Hines, a licensed Texas veterinarian who has provided care for animals since 1966, and has since 2002 provided individualized veterinary advice through his website to

where “the conduct triggering coverage under the statute consists of communicating a message.”).

²⁴⁴ See *Lowe v. S.E.C.*, 472 U.S. 181, 211 (1985) (White, J., concurring in the result). The concurrence, written by Justice Byron White, has never been cited by a Supreme Court majority.

²⁴⁵ See *Wollschlaeger v. Governor of Florida*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert denied*, 135 S. Ct. 2048 (2015).

²⁴⁶ See *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015), *cert denied*, No. 12-1543 (November 30, 2015); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

hundreds of people. Dr. Hines, who launched his website after age and disabilities made it difficult to remain in practice, has never been accused of incompetence. Nonetheless, in 2012 the Texas Board of Veterinary Medical Examiners fined him \$500, suspended his veterinary license for a year, and forced him to retake the jurisprudence portion of the veterinarian-licensing exam, relying upon a law that prohibits veterinarian-client-patient relationships from arising solely via electronic means. Hines challenged the law under the First and Fourteenth Amendments, claiming that it violated both his right to speak freely and his right to earn an honest living.

The Fifth Circuit Court of Appeals applied rational-basis review and upheld the law. Judge Patrick Higginbotham, writing for a three-judge panel, treated the law as a “content-neutral regulation of the practice of a profession” that did not implicate the First Amendment.²⁴⁷ The court concluded that the Texas law was rational because “it is reasonable to conclude that the quality of care will be higher, and the risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it.”²⁴⁸ It cited no record evidence that online veterinary advice harms (or threatens to harm) animals in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar setting. Notwithstanding this lack of evidentiary support, the court failed to even consider the possibility that the law was not designed to protect Texans’ pets at all, but, rather, the financial interests of brick-and-mortar veterinary practices.²⁴⁹

²⁴⁷ *Hines*, 783 F.3d at 201.

²⁴⁸ *Id.* at 203.

²⁴⁹ A strong possibility, given the poor fit between the government’s stated end of protecting animals’ health and the manner in which the act operated. Texas’s law adopted a 2003 amendment to the American Veterinary Medical Association’s Model Veterinary Practice Act. The AVMA is the largest professional umbrella group for veterinarians in the United States. See Paul Spradley, *Telemedicine: The Law is the Limit*, 14 TUL. J. TECH. & INTELL. PROP. 307 (2011) (predicting that as the use of

Were Smith's approach followed, judges would not be forced to make arbitrary classifications with potentially devastating consequences. Because all burdens on constitutionally protected freedom would be subjected to exacting judicial scrutiny, judges would in every case seek to determine whether the government's actions were calculated to protect the public from force or fraud, or simply to impose the aesthetic, ideological, or economic preferences of the politically powerful upon others.

By way of a gradual transition to this status quo, the Court could extend the logic of its decision in *Reed v. Town of Gilbert*²⁵⁰ to restrictions on occupational speech. In *Reed*, the Court clarified that a law restricting speech is content-based – and therefore subject to strict scrutiny – if it either facially classifies speech based on its communicative content or if its true purpose is to target communicative content.²⁵¹ Licensing restrictions that require speakers to seek the government's permission before they can talk about particular subjects and regulations that control what licensed professionals may say about particular subjects are necessarily content-based – whether people may speak depends upon what they say.²⁵² Thus, they should be subjected to the same level of scrutiny that speech restrictions targeting any other kind of peaceful expression receive. Extending *Reed* to occupational speech would ensure consistent protection for speaking professionals' right to speak freely and to earn a living.

telemedicine – the use of telecommunication and information technology to evaluate, diagnose, and treat patients (in *Hines*' case, animals) – grows, it will “aggravate the selfish interests of those who support trade protectionism.”).

²⁵⁰ 135 S. Ct. 2218 (2015).

²⁵¹ See *Reed*, 135 U.S. at 2228 (“Because strict scrutiny applies either when a law is content-based on its face or when the purpose and justification for the law are content based, a court must evaluate each question.”).

²⁵² Licensing schemes that require people to secure the government's permission to speak about specified subjects for pay are also prior restraints on speech. See *Nebraska Press Ass'n v. Stuart*, 472 U.S. 539, 559 (1976) (describing prior restraints as the “the most serious and least tolerable infringement of First Amendment rights”).

CONCLUSION

Judges, like the rest of us, do not have a choice about whether they rely upon a philosophy to guide them in their work — a framework for acquiring, organizing, and integrating observations, experience, and knowledge.²⁵³ It is impossible for human beings to function on a moment-to-moment basis, and judges cannot proceed “one case at a time,” treating each case or controversy as if it were utterly unlike any other. But a philosophy that is not grounded in reality leaves one unequipped to accomplish one’s goals in the real world. We should not be surprised, then, that the Supreme Court’s failure to articulate and apply a judicial philosophy that is firmly grounded in the reality of what language is and what the Constitution is designed to accomplish has produced a jurisprudence that cannot maintain the rule of law and thus protect our freedom.

Smith’s efforts to build her account of judicial review on a strong philosophical foundation yields an approach of tremendous practical value. That approach can bring coherence and consistency to jurisprudence that is in a state of disarray and neglect and which leaves the enjoyment of Americans’ most cherished rights “very unsafe, very insecure.” Objectivity in constitutional interpretation equips judges to gain accurate knowledge of what the law is. Judicial engagement in resolving particular disputes can ensure that government officials demonstrate that their actions are consistent with the law of the land when they burden Americans’ freedom.²⁵⁴ In a word, objective review works.

²⁵³ See Ayn Rand, *Philosophy: Who Needs It?* (1974), reprinted in PHILOSOPHY: WHO NEEDS IT (1982) (“[W]ithout abstract ideas you would not be able to deal with concrete, particular, real-life problems . . . You would be in the position of a newborn infant, to whom every object is a unique, unprecedented phenomenon.”).

²⁵⁴ See NEILY, *supra* note 132, at 157-58 (“Any time you seek to bend another person to your will, you owe that person a reasoned explanation. Judicial review — or, more precisely, judicial engagement — is the process by which we ensure that every person

Smith has accomplished the remarkable feat of providing an account of judicial review that is novel, theoretically sound, and useful. Americans have believed since the Revolutionary era that, on these shores, "THE LAW IS KING."²⁵⁵ The rule of law has been called our "political religion"²⁵⁶ – but its value is not a matter of faith but a "provable, rational conviction."²⁵⁷ Our Constitution has an unparalleled, all too often untapped capacity to ensure that government operates through "reflection and choice" rather than "accident and force," and to secure and enlarge individual freedom.²⁵⁸ Smith's book is both a reminder that our law is on the side of freedom and a blueprint for constructing a rights-protective jurisprudence today. We have it in our power to ensure that freedom reigns.

receives the reasoned explanation to which they are entitled before they are required to obey a law they may not agree with.").

²⁵⁵ Thomas Paine, *Common Sense* (1776), reprinted in THOMAS PAINE: COLLECTED WRITINGS 34 (Eric Foner ed., 1995).

²⁵⁶ Address to the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), reprinted in THE PORTABLE ABRAHAM LINCOLN 17 (Andrew Delbanco ed., 1992).

²⁵⁷ Ayn Rand, *Censorship: Local and Express* (1973), reprinted in PHILOSOPHY: WHO NEEDS IT 184 (1982).

²⁵⁸ THE FEDERALIST No. 1, at 1 (Alexander Hamilton) (Liberty Fund, 2001).