HAYEK AND TEXTUALISM

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When Professor Richard Epstein asked me to deliver the Hayek lecture, I knew immediately that I wanted to explore Friedrich August von Hayek’s views on law and judging from the perspective of a textualist. Although Hayek is best remembered as an Austrian economist who exposed the fallacy of central planning,¹ Hayek studied law before he studied economics, and he wrote extensively about law, legislation, and the judicial role during his career. I wanted to review those writings—especially Hayek’s The

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¹ Circuit Judge, United States Court of Appeals, Eleventh Circuit; Acting Chair, United States Sentencing Commission. I thank my law clerk, Jane Ostrager, for her helpful comments and expert research and citation assistance. I also thank Michael DeBow, Todd Zywicki, Roger Pilon, Josh Blackman, Edward Whelan, and Randy Barnett for helpful comments.

Constitution of Liberty2 and his three volumes of Law, Legislation and Liberty — and consider whether Hayek would have endorsed textualism as a methodology for a federal judge in the United States.

As an admirer of Hayek’s genius, I approached this occasion as more of an opportunity to honor and learn from him than to critique him. In 2005, Richard Posner critiqued what he called Hayek’s “passive” view of the judicial role in matters of law and economics.4 Not surprisingly, Judge Posner did not endorse, in his words, “Hayek’s position that the only thing a judge should do is enforce custom without consequences . . . [which] extinguishes any role for economic or other social-scientific analysis in adjudication.” 5 Ironically, the same Judge Posner that same year derided the Supreme Court as “a political court,”6 endorsed the view that a federal judge should be a “timid politician,”7 and lamented, “Judicial modesty is not the order of the day in the Supreme Court,”8 all of which would suggest that Judge Posner supported a passive judicial role, at least for the Supreme Court, if not for Judge Posner. I also wanted to avoid trying something as ambitious and provocative as

5 Id. at 152.
7 Id. at 55.
8 Id. at 56.
Professor Epstein did in his lecture, “Hayekian Socialism,” which drew “into public light one strand of Hayek’s thought that [Epstein argued] is inconsistent with his overall orientation.” Only Professor Epstein could pull that off. My modest goal was to gain insights and draw lessons from Hayek’s several writings about the common law, judging, legislation, a written constitution, and the separation of powers.

A few years ago, a lawyer and academic from India, Gautam Bhatia, approached this topic from the opposite vantage point. He argued that Justice Antonin Scalia’s textualist methodology was “undergirded by a particular deep idea of liberty that was originated and defended by the noted political thinker Friedrich Hayek.” Bhatia contended that Hayek’s conception of the rule of law . . . determines Justice Scalia’s concrete approach to statutory interpretation: his choice of semantic meaning over pragmatic meaning . . . , his rejection of legislative history, his adoption of original public meaning, his overriding concern with objectivity and limiting judicial (and even legislative) discretion, his reliance upon dictionaries, and his express rejection of the faithful agent theory.

Bhatia perhaps was inspired by Professor William Eskridge, a prominent critic of textualism who has commented on Justice Scalia extensively and whom Bhatia thanked for “helpful comments” about

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10 Id. at 271.
12 Id. at 526.
13 Id. at 555.
his article. In earlier articles, Professor Eskridge twice tied Justice Scalia’s approach to Hayek’s thought. For example, in an article entitled Nino’s Nightmare, Eskridge contended that Justice Scalia’s theory and practice of statutory interpretation were explained by his vision of “ordered liberty” and cited Hayek’s The Constitution of Liberty and Law, Legislation and Liberty for a description of Justice Scalia’s vision. Citing both of those works by Hayek in reference to textualism strikes me as odd. More about that later.

Bhatia’s article and Eskridge’s earlier articles offer more evidence that Eskridge influenced Bhatia than that Hayek influenced Justice Scalia. After all, Justice Scalia never cited Hayek in an opinion or in any of his published works about textualism or originalism—the lone exception is that he and Bryan Garner included Hayek’s The Road to Serfdom among more than 600 books in the bibliography for their treatise, Reading Law. Scalia never mentioned Hayek in any of his speeches. We have no substantial evidence that Hayek influenced the way Justice Scalia viewed law or judging. And the idea that liberty can and should be safeguarded through the rule of law certainly predated Hayek. In fact, in a chapter of The Constitution of

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14 Id. at 525 n.*.
16 Eskridge, Nino’s Nightmare, supra note 15 at 890-91 & n.122.
18 See, e.g., ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED (Christopher Scalia & Edward Whelan eds. 2017) (a collection of Justice Scalia’s speeches with no mention of Hayek).
Liberty entitled, “The Origins of the Rule of Law,” Hayek traced that idea about individual liberty to “the England of the seventeenth century.”19 And Hayek explained in the next chapter how Americans advanced the English idea of safeguarding individual liberty through the rule of law by adopting a written constitution to limit government.20 So Hayek’s own writings about liberty would suggest that what best explains Justice Scalia’s formalist conception of the rule of law is a devotion to the Anglo-American legal tradition, not any influence by Hayek.

The better question is what Hayek would have thought of Justice Scalia’s views on law and the judicial role. We know a lot more about what Hayek thought about law and judging than we know about what Justice Scalia thought about Hayek. And what Hayek wrote about law and judging offers some insight into what he might have thought of textualism. I want to explore that topic.

I will argue that whether Hayek would have been a textualist depends on whether Hayek would have viewed a federal judge’s use of the methodology of textualism from a historical context or as a question about an ideal legal system. When Hayek wrote about the errors of socialism and about legal history, he made arguments that would appear to favor textualism, but when he later wrote about an ideal legal system, Hayek made arguments that would appear to reject textualism. Each of those arguments has to be considered in context. The early Hayek, the critic of socialism who wrote The Road to Serfdom and the legal historian who wrote The Constitution of Liberty, appreciated the case for textualism, but the later Hayek, the idealist who wrote Law, Legislation and Liberty, rejected it, at least in the context of private law. I will argue that the early Hayek offers the

19 HAYEK, THE CONSTITUTION OF LIBERTY, supra note 2 at 162.
20 Id. at 176–92.
better guide for evaluating this question, but that the case for it is open to debate.

Throughout his career, Hayek wrote about law as a comparativist. He appreciated the virtues of the common law in contrast with the civil codes of Europe. Born and educated in Austria, Hayek lived in England for many years and became a naturalized British subject. Hayek also lived for several years in the United States, he admired the Anglo-American legal tradition, and he praised the Constitution of the United States. But “he felt most at home [in Britain], both intellectually and emotionally.”  

Hayek certainly shared a commitment to the rule of law with proponents of textualism. In The Road to Serfdom, he contrasted the totalitarian nightmare of coercion under “arbitrary government” with “a free country” under “the Rule of Law.” And he described the rule of law in terms consistent with textualism: “Stripped of all technicalities,” he wrote, the rule of law “means that government in all its actions is bound by rules fixed and announced beforehand.” He explained that those rules “make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.” And Hayek complained about “the decline of the Rule of Law” in countries with central economic planning through “the

21 Chronology, in THE CAMBRIDGE COMPANION TO HAYEK xv–xvii (Edward Feser ed. 2007).
22 Id. at xvi.
24 Bruce Caldwell, Hayek and the Austrian Tradition, in THE CAMBRIDGE COMPANION TO HAYEK 13, 14 (Edward Feser ed. 2007).
25 FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 112 (Bruce Caldwell ed. 2007) [hereinafter HAYEK, THE ROAD TO SERFDOM].
26 Id.
27 Id.
progressive introduction of . . . vague formulas into legislation,” such as “by reference to what is ‘fair’ or ‘reasonable,’” which then “leave[s] the decision of the concrete case more and more to the discretion of the judge or authority in question.”

When he reviewed the historical development of the rule of law, the early Hayek praised written laws as an important means to protect liberty by limiting government. In *The Constitution of Liberty*, Hayek described “the idea of a written constitution and the principle of the separation of powers” as “two crucial conceptions” for safeguarding the rule of law. Quoting the English clergyman and political philosopher William Paley, Hayek explained,

> When the parties and interests to be affected by the laws were known, the inclination of the law makers would inevitably attach to one side or the other; and where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice.

In describing the American contribution to constitutionalism, Hayek wrote that Americans “regarded it as fundamental doctrine that a ‘fixed constitution’ was essential to any free government and that a constitution meant limited government.” And he explained that Americans “had become familiar with written documents which defined and circumscribed the powers of government such as the

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28 Id. at 115.
30 Id. at 173 (quoting William Paley, *The Principles of Moral and Political Philosophy* 348 (1785)).
31 Id. at 177–78.
Mayflower compact and the colonial charters”\textsuperscript{32} and with the “lesson of the period of Confederation” that a constitution must include the “machinery . . . to enforce it.”\textsuperscript{33}

The early Hayek also wrote that the written Constitution of the United States “was definitely meant . . as a constitution of liberty, a constitution that would protect the individual against all arbitrary coercion.”\textsuperscript{34} He praised the American use of the separation of powers and federalism to reduce coercion in two ways:

\begin{quote}
It is not merely that the separate authorities will, through mutual jealousy, prevent one another from exceeding their authority. More important is that fact that certain kinds of coercion may require the joint and co-ordinated use of different powers or the employments of several means, and, if these means are in separate hands, nobody can exercise those kinds of coercion.\textsuperscript{35}
\end{quote}

He also argued that “experience has shown” that Alexander Hamilton had “good reason” to oppose the inclusion of a bill of rights out of a concern that “the Constitution was intended to protect a range of individual rights much wider than any document could exhaustively enumerate and that any explicit enumeration of some was likely to be interpreted to mean that the rest were not protected.”\textsuperscript{36} But he described the Ninth Amendment as a “careful proviso” to “guard[] against” that danger.\textsuperscript{37}

\textsuperscript{32} Id. at 178.
\textsuperscript{33} Id. at 184.
\textsuperscript{34} Id. at 182.
\textsuperscript{35} Id. at 185.
\textsuperscript{36} Id. at 185–86.
\textsuperscript{37} Id. at 186.
The early Hayek saw judicial review as the “evident” method of ensuring that the Constitution would “restrain” legislative power. He wrote, “In view of the character of the movement that led to the design of a written constitution, it must indeed seem curious that the need for courts which could declare laws unconstitutional should ever have been questioned.” And he described Chief Justice John Marshall’s opinion in *Marbury v. Madison* as “justly famous . . . for the masterly manner in which it summed up the rationale of a written constitution.”

Although he did not address the issue in relation to the judicial interpretation of written texts, the early Hayek also warned about the dangers of government officials changing the meaning of language to advance an agenda that expands the power of the state. In *The Road to Serfdom*, Hayek explained that the meaning of the words “freedom” and “liberty” had been perverted “by a long line of German philosophers and, not least, by many of the theoreticians of socialism” to refer to alleged “collective freedoms” instead of individual freedoms. And he explained that totalitarian politicians used the changed meaning of these terms to advance their agendas. Hayek argued that totalitarian regimes used this technique in a wholesale fashion:

But ‘freedom’ or ‘liberty’ are by no means the only words whose meaning has been changed into their opposites to make them serve as instruments of totalitarian propaganda.

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38 Id.
39 Id. at 187.
40 5 U.S. (1 Cranch) 137 (1803).
41 HAYEK, THE CONSTITUTION OF LIBERTY, supra note 2, at 187.
42 HAYEK, THE ROAD TO SERFDOM, supra note 25, at 174.
43 Id. at 174–75.
We have seen how the same happens to ‘justice’ and ‘law,’ ‘right’ and ‘equality.’ The list could be extended until it includes almost all moral and political terms in general use.\textsuperscript{44}

And Hayek argued that it was an enduring feature of totalitarian control: “[T]his change of meaning of the words describing political ideals is not a single event but a continuous process, a technique employed consciously or unconsciously to direct the people.”\textsuperscript{45} He lamented, “Gradually, as this process continues, the whole language becomes despoiled, and words become empty shells deprived of any definite meaning, as capable of denoting one thing as its opposite and used solely for the emotional associations which still adhere to them.”\textsuperscript{46}

The problem for the argument that the early Hayek would have favored the methodology of textualism stems from his eventual criticisms of the American experience with judicial review. Hayek complained that

gradually, as the ideal of popular sovereignty grew in influence, what the opponents of an explicit enumeration of protected rights had feared happened: it became accepted doctrine that the courts are not at liberty ‘to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the constitution but not expressed in words.’\textsuperscript{47}

\textsuperscript{44} Id. at 175.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} HAYEK, THE CONSTITUTION OF LIBERTY, supra note 2, at 188 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 173 (1868) (original emphasis)).
Hayek explained, “The meaning of the Ninth Amendment was forgotten and seems to have remained forgotten ever since.” As Hayek described this history, “Thus bound to the explicit provisions of the Constitution, the judges of the Supreme Court in the second half of the [twentieth] century found themselves in a somewhat peculiar position when they encountered uses of legislative power which, they felt, it had been the intention of the Constitution to prevent but which the Constitution did not explicitly prohibit.” At first blush, Hayek’s endorsement of judicial invocation of the spirit of the Constitution instead of its text would appear to remove him from the ranks of allies of textualism, but the case is not that simple.

The early Hayek also described the judicial developments of the Progressive Era in terms that at least some textualists would endorse. For example, Randy Barnett, an avowed textualist and originalist, would agree with Hayek’s lamentation about the desuetude of the Ninth Amendment. And Hayek complained that the Supreme Court made its task of protecting liberty more difficult by ignoring the text of the privileges or immunities clause of the Fourteenth Amendment. He argued that the judges “at first deprived themselves of one weapon which the Fourteenth Amendment might have provided” by “reduc[ing]” that clause “to a practical nullity.” And he described, with skepticism, the “unforeseen importance” of the due process clause, which he said the Supreme Court initially interpreted “according to what was undoubtedly its original

48 Id.
49 Id. at 188–89.
51 HAYEK, THE CONSTITUTION OF LIBERTY supra note 2, at 189.
52 Id.
meaning.” 53 Hayek contended that the Court later “clutched at that straw and interpreted the procedural as a substantive rule.” 54 In an endnote, he punctuated with an exclamation point his complaint that Edward Corwin’s annotated edition of the Constitution devoted 215 pages to the Fourteenth Amendment but only 136 pages to the commerce clause. 55 He concluded, “Few people will regard as satisfactory the situation that has emerged.” 56

The early Hayek’s summation of the American history of judicial review in The Constitution of Liberty reads like an endorsement of, at least, original intent and perhaps textualism too. As he described it,

Under so vague an authority the Court was inevitably led to adjudicate, not on whether a particular law went beyond the specific powers conferred on the legislatures, or whether legislation infringed general principles, written or unwritten, which the Constitution had been intended to uphold, but whether the ends for which the legislature used its powers were desirable. 57

Hayek’s disillusionment with the Supreme Court of the United States was the product of the Court not adhering to what he saw as the original meaning of the Commerce Clause, the Ninth Amendment, and the privileges or immunities clause of the Fourteenth Amendment and by the Court instead interpreting the due process clause as a substantive right to liberty contrary to its original meaning.

53 Id.
54 Id.
55 Id. at 477 n.59.
56 Id. at 189.
57 Id.
I think the early Hayek used the term “spirit” to refer both to the structure of the Constitution and to the traditional Anglo-American “legal guaranties of individual liberty” the Constitution was understood to preserve—based on what he described as its “design,” “discussions of the period,” and early judicial decisions—instead of the purposivist or teleological meaning of the term “spirit” that textualists repudiate. Why else would Hayek complain about the Supreme Court discovering new substantive rights in a procedural guarantee instead of enforcing the Ninth Amendment as a limitation of federal power and adhering to the “original meaning of ‘due process for the enforcement of law’”? Hayek also understood that the federal Constitution created a government of enumerated powers where Congress could legislate only when granted the power to do so in contrast with state constitutions, which must expressly prohibit legislation that the police power would otherwise allow. Hayek praised the early state constitutions and their “restatements” of “inviolable individual rights” as showing “even more clearly than the final Constitution of the Union how much the limitation of all governmental power was the object of constitutionalism.” This kind of originalist perspective is consistent with Hayek’s assertion that his views, especially the “notion of a higher law above municipal codes,” which he considered “the supreme achievement . . . of the Anglo-Saxon countries,” were best represented by “James Madison, the ‘father of the Constitution.’”

Hayek’s disillusionment with the American experience later led him to rethink the entire project of “constitutionalism,” which he

58 Id. at 187–89.
59 Id. at 189.
60 Id. at 182.
defined as “limited government.” In 1973, he published the first volume, entitled Rules and Order, in his magnum opus on Law, Legislation and Liberty, and in the introduction he wrote that “[t]he first attempt to secure individual liberty by constitutions has failed.” He came to that conclusion because, as he saw it, “[g]overnments everywhere have obtained by constitutional means powers which [the framers] had meant to deny them.” Hayek contended that “as their means have proved inadequate, new institutional invention is needed.” So Hayek proposed a new kind of constitutionalism.

The later Hayek expressed a robust view of the ideal judicial role. Hayek maintained that “the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated.” He argued that “[t]he freedom of the British which in the eighteenth century the rest of Europe came so much to admire was thus not, as the British themselves were among the first to believe and as Montesquieu later taught the world, originally a product of the separation of powers between legislative and executive.” Hayek argued that the freedom of the British instead was “a result of the fact that the law that governed the decisions of the courts was the common law,” which he described as “a law existing independently of anyone’s will and at the same time binding upon and developed by the independent courts; a law with

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62 Hayek, Rules and Order, supra note 3, at 1.
63 Id.
64 Id.
65 Id. at 2.
67 Hayek, Rules and Order, supra note 3, at 94.
68 Id. at 84.
which parliament only rarely interfered and, when it did, mainly only to clear up doubtful points within a given body of law.”69 That historical perspective shaped Hayek’s utopian vision of the ideal judicial role.

Hayek viewed the ideal judge as “an institution of a spontaneous order.”70 The ideal judge in his view must “correct disturbances of an order that has not been made by anyone and does not rest on the individuals having been told what they must do.”71 Hayek described that order as “those rules of just conduct which emerge from the efforts of judges to decide disputes and which have long provided the model which legislators have tried to emulate.”72

In his discussion of the ideal judicial role, Hayek said a lot that would appear to reject textualism. He opined, for example, that “in most instances in which judicial decisions have shocked public opinion and have run counter to general expectations, this was because the judge felt that he had to stick to the letter of the written law.”73 He argued that “judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.”74 And he rejected “the implication that by confining the judge to the application of already articulated rules we will increase the predictability of his decisions.”75

69 Id.
70 Id. at 95.
71 Id. at 94–95.
72 Id. at 94.
73 Id. at 117.
74 Id. at 116.
75 Id.
But Hayek’s rejection of judges being bound by the letter of the law must be understood in context. The spontaneous order that Hayek described involved what we would call private law. Hayek wrote in opposition to what he called ‘[t]he whole movement of codification,” by which he meant the civil codes of Europe. He acknowledged, for example, the argument for “tying the judge to the application of the written law in criminal matters, where the aim is essentially to protect the accused and let the guilty escape rather than punish the innocent.” But he argued that “there is little case for it where the judge must aim at equal justice between litigants,” by which he meant private, civil litigation.

Hayek rejected “legal positivism.” For him, “the law of liberty” or nomos predated legislation and consists of the rules of just conduct discovered and applied by judges. Legislation or thesis consists of the “distinct rules” that govern the “structure, aims, and functions” of the state.

Professor Todd Zywicki and others have argued that the later Hayek was greatly influenced by the Italian legal scholar Bruno Leoni, who revered both the English common law and Roman

76 Id.
77 Id. at 117.
78 Id.
79 Id. at 73.
80 Id. at 72, 94.
81 Id. at 124.
Leoni thought law should “essentially leave[] individuals alone, unless two private citizens seek intervention by a judge to resolve a dispute between them.” And Leoni “inculcated in [Hayek] the importance of the common law.” Leoni also believed “in the long run, a system centered on legislation is fundamentally incompatible with a free society.”

Leoni obviously influenced the later Hayek’s views about legislation in addition to Hayek’s views on the role of a judge. The later Hayek described legislation “as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gunpowder.” His view echoed the ancient concerns of the Framers, such as James Madison, who wrote, in The Federalist, “The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex... [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their resources.” In his chapter on the law of legislation, the later Hayek explained “[t]he distinction between universal rules of just conduct and the rules of organization of government,” which he acknowledged “is closely related to, and sometimes explicitly equated with, the distinction between private and public law.” But he complained that “[t]he tendency of modern developments has been increasingly to blur this distinction.” That blurring, Hayek

84 Zywicki, Bruno Leoni’s Legacy, supra note 82, at 134.
85 Id. at 133.
86 Id. at 135.
87 Hayek, Rules and Order, supra note 3, at 72.
88 The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed. 1961).
89 Hayek, Rules and Order, supra note 3, at 131–32.
90 Id. at 132.
91 Id.
argued, occurred “by, on the one hand, exempting governmental agencies from the general rules of just conduct and, on the other, subjecting the conduct of private individuals and organizations to special purpose-directed rules, or even to special commands or permissions by administrative agencies.”

Leoni also apparently influenced Hayek’s views on constitutional law. Although the later Hayek acknowledged a role for constitutional law, which he described as “a superstructure erected over a pre-existing system of law to organize the enforcement of that law,” for Hayek, that pre-existing law was the rules of just conduct determined and applied by judges. The later Hayek rejected the notion that the letter of the constitution would bind judges. Even when a constitution defined a rule of just conduct, Hayek contended that the constitutional rule “would not itself be a rule of just conduct.” Hayek contended that this kind of constitutional rule only “would provide a guide for the judge,” and because “it might prove inadequate . . . the judge might still have to go beyond (or restrict) the literal meaning of the words employed.”

Textualists can find some common ground with the later Hayek. For example, textualists would agree with Hayek in rejecting literalism or strict constructionism because “[a]dhering to the fair meaning of the text (the textualist’s touchstone) does not limit one to the hyperliteral meaning of each word in the text.” Because textualists also agree with Hayek about the importance of

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92 Id.
93 Id. at 134.
94 Id. at 135.
95 Id.
96 See SCALIA & GARNER, supra note 17, at 356.
predictability, a textualist judge turns to dictionaries and other tools of common usage when necessary to interpret an enactment as those subject to the law would have fairly understood it to apply. Some textualists share the later Hayek’s particular anxiety about the “commands” of administrative agencies, some have echoed Hayek’s contention that legitimate law does not impose the will of any lawmaker, and many have defended textualism as a restraint on illegitimate lawmaking. But these points of common ground with Hayek also highlight the fundamental need to restrain judges with an objective methodology faithful to a system of written, public law.

The later Hayek’s ideal system, as he admitted, was utopian, and textualism is not a utopian methodology. Textualism answers the problem of the judge’s role in a system of legislation—the kind of system that Leoni and the later Hayek thought was, in the long run, incompatible with individual liberty.

97 Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1179 (1989) (explaining that “[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes” and “[p]redictability . . . is a needful characteristic of any law worthy of the name”).
102 HAYEK, RULES AND ORDER, supra note 3, at 64 (“It is not to be denied that to some extent the guiding model of the overall order will always be an Utopia, something to which the existing situation will be only a distant approximation and which many people will regard as wholly impracticable.”).
The mystery of the later Hayek’s disillusionment with the American experience in constitutionalism is why he thought that an ideal system that empowered judges to make or, as he saw it, discover law would work any better than the existing system that he had pronounced a failure. After all, Hayek made clear in *The Constitution of Liberty* that the blame for that failure should be attributed to the Supreme Court. Hayek failed to explain in *Law, Legislation and Liberty* how his ideal judge, trained in the modern legal culture, could be expected to serve as some kind of superhero of liberty by resolving disputes in a manner consistent with the ancient traditions of the Roman jurisconsult and the English common law. And let us not forget that those traditions for resolving private disputes existed alongside emperors in ancient Rome and kings, nobles, and an established church in England. Neither historical context could be called a classical liberal paradise.

I return to my question: what would Hayek have thought of textualism and originalism? I would argue that the early Hayek provides the best guide for answering that question. The early Hayek would favor the federal judiciary respecting the original meaning of the Constitution, which was designed to limit government and to protect liberty. Federal judges still operate in the system of written law that the early Hayek praised in *The Constitution of Liberty* because the later Hayek’s utopian system still does not exist and never will.

Hayek was undoubtedly right to appreciate the virtues of the common law and the judge’s role in, as he saw it, restoring the spontaneous order of private relationships in cases of breach. Richard Posner and others have long argued that the common law is

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103 See supra notes 47–60 and accompanying text.
more economically efficient than civil codes. Justice Scalia once explained that he had “no quarrel with the common law and its process,” but he argued that the approach of the common law judge was not “appropriate for most of the work” of federal judges in “an age of legislation.”

Although the later Hayek trusted his ideal judge to serve as an institution in a spontaneous order, even the later Hayek would probably hope that an American judge, working in the here and now in a system of legislation, would respect the promise of our written constitution—the Constitution that the early Hayek called a constitution of liberty. Adrian Vermeule has defended textualism as a “second-best solution” that we accept because we live in a world of imperfect judges and imperfect information. In the real world, judges do not know what would be the socially optimal way to decide every case, but they can interpret written law, especially written public law. The early Hayek—if not the later Hayek—would agree with Justice Scalia that in our system, the judicial “mindset that asks ‘what is the most desirable resolution,’” instead of how the average person would understand the words, “frustrates the whole purpose of [our] written [C]onstitution.” For that reason, Hayek would probably hope that federal judges would interpret written laws in a manner consistent with his early vision of

107 Note, Textualism as Fair Notice, 123 Harv. L. Rev. at 555.
the Rule of Law: as fixed rules announced beforehand that allow a free people to organize their affairs accordingly.

Thank you.