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EQUITABLE REPUDIATION: TOWARD A DOCTRINE OF FALLIBLE PERFECTION IN STATUTORY INTERPRETATION

MATTHEW SCHULTZ*

I. INTRODUCTION

> [A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct . . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission . . . .[1]

Aristotle expressed this notion more than 2300 years ago. It has been echoed by Aquinas,[2] Coke,[3] Blackstone,[4] and Hamilton.[5] Yet it seems lost today in the debate over the proper role of courts in interpreting statutes. Rather, the modern debate largely assumes that

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1. ARISTOTLE, *Nicomachean Ethics*, *in* INTRODUCTION TO ARISTOTLE 300, 420-21 (Richard McKeon ed., 1947).

2. 2 SAINT THOMAS AQUINAS, THE SUMMA THEOLOGICA 235 (Fathers of the English Dominican Province trans., 20 Encyclopedia Britannica (1952)) ("[T]he lawgiver cannot have in view every single case[,] . . . [t]herefore if a case arise[s] in which the observance of that law would be hurtful to the general welfare, it should not be observed.").

3. Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610) ("[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . .").

4. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1152 (1996) ("Blackstone also believed that a court's inherent powers allowed it to weigh equitable considerations in construing statutes, especially when the legislature had failed to anticipate the case presented.").

5. THE FEDERALIST NO. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[I]t is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society . . . by unjust and partial laws.").

judges are not to depart from statutory meaning, however that meaning may be divined. Implicit in this assumption is that judges are mere congressional agents or messengers. Born of it is the myth that objective interpretation of statutes is possible. And lost in the process is the impulse to do justice.

It is impossible to do justice in every case under any or all of the interpretive models arising from the modern debate. Though each model serves certain purposes well and each has its peculiar imperfections, all share one fatal defect—the self-imposed inability to depart from a statute solely because injustice would result from its application. Under traditional interpretive models, courts use subterfuge to avoid the harsh results of statutes deemed unjust in their application, rather than practicing the open and accountable exercise of equitable judicial discretion. The traditional strictures of interpretation require that courts delve into constitutional questions unnecessarily or that they find absurdity where none exists. The judicious use of equity can avoid this, however, by honoring the meaning of statutes as derived under traditional principles of interpretation, while openly declaring a refusal to apply otherwise valid and constitutionally sound statutes in situations where their application would yield injustice.

Therefore, I propose not a separate model per se, but an equitable superstructure within which statutes may be interpreted according to the preferences of a given judge. Within this superstructure, statutes may be repudiated when extraordinary circumstances demand departure from a putative statutory directive. Because it seems every thesis must bear a label these days, I refer to this proposition as "equitable repudiation." The doctrine should serve as an extraordinary remedy because it is best suited for a relatively narrow but important range of cases. In those cases, the state unjustly bears its coercive power upon one of its citizens, but the statute is not subject to valid constitutional attack. The notion of equitable repudiation stands atop a pedigree of 600 years in equity,[6] is constitutionally and politically sound, and offers potential normative benefits for an age in which our courts are "choking on statutes."[7] Most importantly, it empowers our courts with a remedy of individualized justice that, although peculiar to the courts, is often left by the wayside in judicial discourse.

II. THE EVOLUTION AND PEDIGREE OF EQUITY

In a modern context, the term "equity" evokes notions of injunctive relief and archaic writs. Though these notions have played im-

6. *See infra* Part II.
7. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

portant roles in equity's lineage, they hardly represent the sum of equitable jurisprudence. That the term conjures these images reveals how much of equity has been lost to the present age.

As early as 1460, English equity shared an equal footing with the common law and afforded relief on a particularized basis according to the dictates of conscience. It served as a gap-filler of sorts that "came not to destroy the law, but to fulfill it."[8] Even before this time, English courts gave exceedingly strict interpretations of statutes in favor of equitable resolution of cases,[9] particularly when scrutinizing penal statutes and those in derogation of the common law.[10] In such cases, the chancellor interpreted the statute "according to his customary process of juridical logic,"[11] so that a statute might routinely be taken "contrary to its words," or "against the text . . . to avoid injustice."[12] In words reminiscent of those employed to this day, the English chancery had by the sixteenth century expressed the maxim that statutes should be "so understood that neither *injustice* nor absurdity ensues."[13]

These notions migrated across the Atlantic with the Puritan founders of the Massachusetts Bay Colony. Although the General Court of the colony initially was comprised of a legislative and adjudicative body in one, the right of equitable decisionmaking survived the split into legislature and judicature.[14] By act of 1642, each Deputy was required "when acting as judge in the General Court to swear 'to deale uprightly & justly, according to [his] judgement & conscience,'"[15] prompting one modern scholar to comment that "perhaps the dimensions of democratic hostility to equity were different from what we have supposed them to have been."[16] Equity remained an integral part of colonial law and was reaffirmed in a memorandum prepared by the Magistrates of the Massachusetts Bay Colony dated June 4, 1672, in which they declared: "[E]very Court is by Law invested with a chancery power, the Jury is to proceede according to Law but if there be matter of apparent equity . . . the magistrates have power to proceede accordingly and this hath beene our constant practique when ever desired . . . ."[17] This practice was recognized throughout

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8. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 87 (2d ed. 1979).
9. S.E. THORNE, ESSAYS IN ENGLISH LEGAL HISTORY 158-60 (1985).
10. *Id.* at 163.
11. *Id.* at 164.
12. *Id.* at 178.
13. *Id.* (emphasis added).
14. Mark DeWolfe Howe & Louis F. Eaton Jr., *The Supreme Judicial Power in the Colony of Massachusetts Bay*, 20 NEW ENG. Q. 291, 304-05 (1947).
15. *Id.* at 305.
16. *Id.* at 306.
17. *Id.* at 310.

the later colonies well into the eighteenth century by applying a standard of "equity and good conscience" to legal disputes.[18]

During the revolutionary era, equity suffered a brief setback as part of a larger movement in favor of popularly elected legislatures.[19] But public discourse during the constitutional period of the late 1780s reveals a pronounced anti-legislative sentiment following the national experience under the Articles of Confederation and illustrates the founders' conception of courts as a check upon legislative excesses.[20] Anti-federalists openly expressed dissatisfaction with the equitable powers they believed Article III granted to the federal judiciary.[21] Ironically, Hamilton responded not that the courts lacked equity powers, but that they would be bound by "strict rules and precedents."[22] This was a rather clever response from one who adhered to Blackstone's "modern" version of equity which, though precedent-based, nevertheless permitted equitable restriction of legislative enactments.[23] The irony becomes richer when one takes into account Hamilton's personal view that the judiciary could attack statutes on nonconstitutional grounds.[24] An ongoing scholarly debate concerning these issues exists. For our purposes, it suffices to demonstrate that the Constitution did not signal the death of equity.

Indeed, the Supreme Court's subsequent use of equity confirms the doctrine's vitality following Constitutional adoption. The early Supreme Court, staffed by Framers such as Justices Jay and Iredell, retained a "traditional approach to equity," including "the invocation of non-positive sources of law" and "the exercise of discretion."[25] Though the early Marshall Court trended away from equitable doctrines, the period from 1820 to 1835 saw a return to traditional principles of equity.[26] The law-codification movement of the mid-

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18. Perit v. Wallis, 2 U.S. (2 Dall.) 252, 255 (1796) ("Though positive law, and judicial precedents, should be totally silent on the subject, the principles of morality, equity, and good conscience, would furnish an adequate rule to influence and direct our judgment."); Lord Proprietary v. Jenings, 1 H. & McH. 92, 105 (Md. Ch. 1738); *see also* John R. Kroger, *Supreme Court Equity, 1789-1835, and The History of American Judging*, 34 HOUS. L. REV. 1425, 1438 (1998) ("By the time of the Constitutional Convention in 1787, all thirteen states had, at one time or another, granted their courts or governors equity powers.").

19. Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 646, 669 (1996).

20. *Id.* at 646-59 (regarding popular sovereignty), 676-87 (regarding separation of powers) For opposing views on this point, compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), with William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776-1806, 101 COLUM. L. REV. 990 (2001).

21. Yoo, *supra* note 4, at 1154-58.

22. *Id.* at 1156 (quoting THE FEDERALIST NO. 78, *supra* note 5, at 529).

23. *Id.*

24. THE FEDERALIST NO. 78, *supra* note 5, at 524.

25. Kroger, *supra* note 18, at 1440.

26. *Id.* at 1458.

nineteenth century has been seen as a response to the use, or abuse, of judicial discretion, as well as the ostensibly undemocratic elements inherent in the common law.[27] But the fact that statutes were viewed as the proper method of reining in the courts indicates an acceptance of the constitutional judicial power to exercise broad discretion otherwise. That is, the attack was framed politically rather than constitutionally.

Yet equity survived this attack. Harkening to Aristotle, Justice Story observed some years later that equity is "the correction of the law wherein it is defective by reason of its universality."[28] Elaborating on this point, Story explained that because "[e]very system of laws must necessarily be defective[,] . . . cases must occur to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all."[29] Equitable departure from express statutory directives has survived to this day. Of particular note is courts' willingness to toll statutes of limitations on equitable grounds despite express contrary language governing the limitations periods.[30] While equitable tolling may *further* statutory purposes, the point remains that the courts see no constitutional impediment to equitable departure from express legislative directives.

In sum, while scholarly debate concerning the proper place of equity rages on, courts continue to apply equitable principles, albeit in a limited range of issues and rarely in statutory interpretation. However, the fact that modern courts have moved away from the application of equitable principles, particularly in deference to legislative enactments, does not mean that they are constitutionally or politically prohibited from doing otherwise. Deference is a cornerstone of the theory of equitable repudiation, but modern interpretive models render courts mere congressional messengers and thus subordinate the courts to their constitutionally co-equal legislative branch. Courts must not ignore the necessity of fact-specific inquiries in each case—a judicial charge recognized at least since Aristotle's day—and must not shy away from the repudiation of statutes where extraordinary circumstances demand particularized justice. History demonstrates that a legal system can bear judicial discretion of this magnitude. It would improve ours.

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27. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 10-12 (1997).

28. JOSEPH STORY, STORY'S EQUITY JURISPRUDENCE 3 (14th ed. 1918).

29. *Id.* at 9.

30. *E.g.*, Rotella v. Wood, 528 U.S. 549, 560-61 (2000) ("[W]e do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling . . . ."); *see also* Exploration Co. v. United States, 247 U.S. 435, 447-50 (1918) (tolling express statute of limitations on equitable grounds); Sherwood v. Sutton, 21 F. Cas. 1303, 1306-07 (C.C.N.H. 1828) (Story, J.).

III. PROBLEMS WITH EXISTING INTERPRETIVE MODELS

Modern interpretive models may be categorized broadly into three genres: textualist,[31] purposivist/intentionalist,[32] and dynamic.[33] Dynamic models typically mix elements of the first two.[34] Most judges employ some hybrid of the three, with textualism as the traditional starting point in any interpretive analysis.[35] Regardless of the methods employed under these models, however, three disturbing themes emerge.

First is judicial subservience to the legislature. While deference is wise, it has been carried to counterproductive extremes. Judge Frank Easterbrook has gone so far as to describe judges as "honest agents" who are mere conduits for expressing legislative will.[36] It is difficult to imagine that the delicate fabric of checks and balances woven into our Constitution should be reduced to such an absurdly simplistic role for the judiciary.[37] Admittedly, literalists like Judge Easterbrook express by far the most slavish judicial mentality with regard to statutory interpretation, but a glimpse of the traditional models in action reveals that the remaining interpretive models have not strayed far from the plantation. I propose instead a model that defers

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31. Textualism purportedly confines itself to "ordinary (as opposed to legislative) context and word-usage" while ignoring legislative history and other extraneous matters. Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, 30 U. BALT. L.F. 4, 19 (2001). For a general defense of textualism by one of its champions, see Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

32. Purposivism and intentionalism demand attention to the legislature's ostensible purpose or intent in passing the statute under review. Judge Richard Posner's method of "imaginative reconstruction" reflects this school of thought. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-20 (1983).

33. *See* González, *supra* note 19, at 594.

34. There are more coherent and self-contained dynamic models, but these appear to be more fashionable among scholars than jurists. *See generally* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

35. *See, e.g.*, St. Charles Inv. Co. v. Comm'r of Internal Revenue, 232 F.3d 773, 776 (10th Cir. 2000) ("As in all cases requiring statutory construction, 'we begin with the plain language of the law.' In so doing, we will assume that Congress's intent is expressed correctly in the ordinary meaning of the words it employs.") (quoting United States v. Morgan, 922 F.2d 1495, 1496 (10th Cir. 1991)); Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 202 (3d Cir. 1998) ("[E]very exercise of statutory interpretation begins with plain language of the statute itself . . . [and] a court may depart from the plain language of a statute only by an extraordinary showing of a contrary congressional intent in the legislative history.").

36. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

37. Judge Easterbrook's observations run counter to the essence of judging itself, as described by Justice Cardozo: "So far as they are the mere mouthpiece of a legislature . . . [judges'] activity is in its essence administrative and not judicial[,] [but] [w]here doubt enters in, there enters the judicial function." BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 10 (1956).

to the legislature but recognizes a court's role and responsibility to mete out justice to individuals as individuals.

Second is the myth of objectivity. The mere fact that different judges perceive the plain meaning of a given statute differently irrefutably demonstrates that pure objectivity is impossible. While it is difficult to dispute this point, there remains (particularly among textualists) a sense of infallibility and a supposed air of "obviousness" to interpretations. It goes without saying that judges should strive for objectivity, but when a judge ceases to strive for objectivity and instead deems the goal achieved, interpretation takes on a fictive quality that needs to be grounded. Equitable repudiation recognizes the inescapable reality of subjectivity but holds judges publicly accountable for its exercise.

Finally, the traditional models fail to take deliberate account of justice to individuals as individuals. Ironically, while attempting to avoid the appearance of judicial legislating, courts often render policy-oriented decisions that appear more legislative in character than judicial. The rule of lenity[38] is perhaps the only remaining vestige of justice for the sake of justice among the existing interpretive models. In a sense, equitable repudiation could be seen as an amplification of this rule. However the doctrine might be characterized, the judiciary must come to terms with its role as the only branch capable of dispensing justice tailored to individual circumstances. Current models, at least in their application, fail in most instances to make even passing note of this fundamental need.

The Supreme Court's 1993 decision in *Smith v. United States*[39] exemplifies all three failings of existing interpretive models. At issue in *Smith* was a statute imposing severe criminal penalties upon one who "during and in relation to any crime of violence or drug trafficking crime . . . uses . . . a firearm."[40] The critical determination upon which a thirty-year prison sentence[41] depended was whether the defendant's barter of a weapon for drugs constituted "use" of that weapon within the meaning of the statute. The majority concluded that the defendant's behavior "surely" fell "squarely" within the plain meaning of the term "use."[42] The majority sought to buttress its opinion with statistical evidence and imputed to Congress an awareness

38. "The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1332-33 (7th ed. 1999).

39. 508 U.S. 223 (1993).

40. 18 U.S.C. § 924(c)(1)(A) (1994 & Supp. V 1999).

41. *Smith*, 508 U.S. at 227.

42. *Id.* at 228-29.

of the cited statistics.[43] The majority took nine pages to explain its finding.[44] The dissent, written by Justice Scalia, spent six pages to reach the opposite and equally "obvious" conclusion that the defendant had not "used" the weapon as contemplated by the statute.[45] In conducting his textual analysis, Justice Scalia explained that the term "uses" really meant uses "as a weapon," a conclusion deemed "reasonably implicit" in the statutory text.[46] In the end, each side claimed title to the statute's plain meaning. Justice O'Connor's plain meaning prevailed by garnering six votes including her own and cleared a path for the defendant to begin a lengthy federal prison sentence.[47]

This decision typifies the reluctance of judges to unfetter themselves from congressional control. O'Connor's majority opinion employed the ostensibly plain meaning of the congressional enactment while backing up its position by resorting to congressional purpose.[48] Characteristically, Scalia's dissent eschewed congressional intent per se and relied instead upon the meaning of the law as written by Congress.[49] O'Connor was thus a willing slave to congressional text and purpose, while Scalia remained a prisoner of his own statute-bound philosophy. There was never a question whether the Court should do anything other than Congress had purportedly directed, even where different judges interpreted its directions differently. The Court's opinion creates an inescapable inference that judges have engaged in selective and discretionary interpretations, even under the strictest—i.e., most slavish—interpretive models. Courts exercise discretion through conscious or unconscious value judgments, as in the strict textualist's fictive refusal to employ discretion when mining statutory language that purportedly reveals itself free of all earthly values.

The majority's resort to purposivism did little to free its hands. Justice O'Connor claimed authoritatively that a restrictive reading of the term "uses" would "do violence" to the purpose of the statute.[50] This assertion rested not on any legislative materials but upon the recitation of murder statistics in New York City and Washington D.C. for a period of time three years after the relevant amendment of

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43. *Id.* at 240. The Court later compounded this fiction by relying upon the statistics and conjectural congressional intent described here as the settled "basic purpose" of the statute. Muscarello v. United States, 524 U.S. 125, 132 (1998).

44. *Smith*, 508 U.S. at 228-37.

45. *Id.* at 241-47.

46. *Id.* at 244.

47. *See id.* at 225-40.

48. *Id.* at 227-29, 233-36.

49. *Id.* at 241-47.

50. *Id.* at 240.

the statute at issue.[51] She saw "no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter . . . ."[52] The Court thus fashioned a legislative purpose based upon sheer speculation, with no attempt to hide that fact.

The impulse to carry out congressional will is reasonable and necessary, but in *Smith* the Court failed to inject, at least overtly, any concerns it may have had over the rule that Congress seemingly attempted to lay down. The Court's unwillingness to break congressional chains is laudable in easy cases, but it exacerbates the potential for injustice when the congressional message is garbled. This danger is magnified when an unclear message is professedly received loud and clear, which leads directly to the second and more disturbing of the problems with traditional interpretive models—the illusion of infallible objectivity.

If anything is obvious from the *Smith* decision, it is that "[e]veryday language is a part of the human organism and is no less complicated than it."[53] To claim an objective monopoly on the meaning of words betrays ignorance or insincerity. Either is dangerous in the business of interpreting statutes. Admittedly, statutes may at times be written in plain language capable of unanimous interpretation, assuming no other considerations militate against that approach. Those are the easy cases. But a divided court carries the fiction too far when it reaches irreconcilable conclusions on the basis of a statute's ostensibly "plain" meaning. Judge Hand once observed: "The duty of ascertaining [a statute's] meaning is difficult enough at best, and one certain way of missing it is by reading it literally, for words are such temperamental beings that the surest way to lose their essence is to take them at their face."[54] Courts universally begin statutory analysis with the "plain meaning"—as well they should. But the myth of objectivity often combines with this endeavor to produce an arrogance that undermines the purpose at hand.

The *Smith* opinion compels the conclusion that the statute at issue was hopelessly ambiguous as applied to the defendant in that case. It simply could not mean what both sides declared it to mean, and such circumstances render impossible a "correct" interpretation on any grounds other than personal preference or prejudice. Disturbingly, this deterred neither side, even though each was fully aware

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51. *Id.*
52. *Id.*
53. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 4.002 (1921).
54. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1692-1942, at 59,60 (Mass. Bar Ass'n ed., 1942).

that the other reached the opposite conclusion. Each side deemed itself beholden of the objective truth, or at least the task of convincing the public that they were so. The danger posed to justice is the same in either event.

Finally, the *Smith* case begs the question of what statutory interpretation is *about*. It is, or should be, about discerning the meaning of a given statute to the extent that meaning can be applied reasonably to the facts—or more precisely, to the litigant before the court. But to what extent does the fate of a defendant matter? The majority characterized the defendant and the facts of the case primarily to garner sympathy for its interpretation. It included in its recitation gratuitous facts such as the number and type of weapons found in the defendant's van.[55] Justice Scalia's dissent added in its final three sentences the argument that the statute was at least ambiguous enough to invoke the rule of lenity—though one gets the impression he included this more as a defense of his interpretation than from any concern for the defendant.[56] In short, the opinion expresses no worries that a thirty-year prison sentence depends upon the outcome of the Court's war of words. Although this defendant, at least as painted in the opinion, might "deserve" the punishment meted out, our judiciary is the only institution capable of addressing fact-specific arguments for leniency under otherwise valid statutes. Its doctrinal refusal to do so thwarts one of the core purposes of having courts in the first place.

These three problems—the congressional "agent" mentality, the myth of objectivity, and the failure to do justice—are the core issues redressed by the doctrine of equitable repudiation. Before addressing the doctrine's specifics, however, it would be useful to briefly visit a case where the Court achieved the same level of jurisprudential culpability by committing an entirely different philosophical crime: subterfuge.

Church of the Holy Trinity v. United States[57] involved a statute banning contracts for employment of aliens within the United States.[58] The sympathetic defendant was the Church of the Holy Trinity, which hired the Reverend E. Walpole Warren from abroad to serve as its rector in New York City.[59] The Supreme Court admitted at the outset that the church's contract with Warren fell "within the letter" of the statute.[60] The Court did not dispute whether the plain

55. *Smith*, 508 U.S. at 226.

56. *See id.* at 246 (Scalia, J., dissenting) (quoting Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-85 (1978)).

57. 143 U.S. 457 (1892).

58. *Id.* at 458.

59. *Id.* at 457-58.

60. *Id.*

language of the statute included the church's contract. Rather, the Court dug beneath the plain language and unearthed a congressional intent that excluded the church from the act. The Court invoked the maxim that no statute may be construed in a manner that achieves an absurd result.[61] It visited briefly the title of the act and its legislative history, while expounding against any law that might be deemed to inhibit the exercise of the Christian faith.[62] Ultimately, the Court exonerated the church on these specious grounds.[63]

Of greatest interest in *Holy Trinity* is the Court's citation to *United States v. Kirby*.[64] After a description of the facts in *Kirby*, the Court quoted a portion of its holding: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice*, oppression or an absurd consequence."[65] This reveals a tension between the Court's desired result on the equities and the obligation it felt toward congressional deference. The Court clung awkwardly to the fiction of congressional deference while satisfying its desire for an equitable outcome. It did not, however, repudiate the statute on equitable grounds—i.e., because of "injustice"—as it might have done under *Kirby*. Rather, it deemed the statute an absurdity.[66] While the ultimate outcome is the same whether the Court invokes injustice or absurdity, the route taken is of paramount importance, as will be seen below.

Holy Trinity is the Hyde to *Smith*'s Jekyll. While *Smith* committed the three cardinal sins of traditional interpretation discussed above,[67] *Holy Trinity* only pretended to commit them. Though the Court in *Holy Trinity* relied on *Kirby* to avoid the statute as absurd, it could have relied just as easily on *Kirby* to find the statute unjust in its application.[68] Instead, it feigned deference to Congress through an analysis of legislative intent.[69] While the Court made no attempt to disguise the favor with which it viewed the defendant and the Christian faith, it nevertheless framed this matter not as an equitable one favoring the church but as an indication of legislative intent.[70]

This brings a critical point to light. Under traditional modes of interpretation, a court can freely reach virtually any result it wishes. This is an important response to the inherent skepticism of the equi-

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61. *Id.* at 459-61.
62. *Id.* at 462-72.
63. *Id.* at 470-72.
64. *Id.* at 460 (citing United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868)).
65. *Id.* at 461 (emphasis added).
66. *Id.* at 470-72.
67. *See supra* pp. 308-09.
68. *Holy Trinity*, 143 U.S. at 461.
69. *Id.* at 463-65.
70. *Id.* at 465-72.

table discretion proposed under my theory of equitable repudiation. Whereas *Smith* resorted to exaggerated notions of accuracy and *Holy Trinity* engaged in crass pretense, the equitable repudiation model demands explanation and accountability for any departure from apparent legislative directives. In contrast, *Holy Trinity* and *Smith* reflect a mere mirage of jurisprudence. The Court in *Holy Trinity* imposed its will by specious reasoning based upon a thumbnail sketch of ostensible congressional intent. In *Smith*, the majority handed down a belabored "plain" meaning of a statute that was patently ambiguous in its application. The dissent in *Smith*, though less freewheeling, suffered instead from a hidebound approach brought on by a myopic and delusional interpretive philosophy.

While traditional interpretive models may be useful in determining the proper and consistent meaning of positive law in easy cases, the easy cases are just that—easy. A fundamental problem persists with respect to all other cases. If a court deems itself incapable of departing from congressional will, however that may be determined, yet it wishes consciously or unconsciously, for personal or philosophical reasons, to reach a result contrary to the statute's "meaning," it will produce a schizophrenic opinion. Worse, it may simply engage in subterfuge ranging from specious reasoning to constitutional attacks upon the statute. Equitable repudiation faces these issues squarely with the ability to repudiate statutes if the situation demands such an extraordinary remedy. To the extent this might be deemed judicial legislation, consider the observations of Justice Holmes on this point:

> The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . . [I]f the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.[71]

Though Holmes would hardly agree with the assertion that personal notions of justice should guide judges in the application of statutes, his point supports it in that judges abdicate their responsibility by taking refuge in the fiction that they are not actively involved in the shaping or making of law. I take this observation a step further by embracing its inevitability and attempting to make some just le-

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71. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 184 (Harold J. Laski comp., 1920).

gal use of it. The question, then, is how to formulate a corresponding doctrine.

IV. THE PARADIGM OF EQUITABLE REPUDIATION AND ITS JUSTIFICATIONS

A. The Model Doctrine of Equitable Repudiation

As demonstrated in Part III, three fundamental problems inhere in the traditional models of statutory interpretation: the congressional "agent" mentality,[72] the myth of objectivity,[73] and the resulting failure to do justice on a particularized basis.[74] To embrace the notion of equitable repudiation, a judge must come to terms with all three. An outline of this necessarily inchoate doctrine will help reveal the need for and the manner of doing so. Five principles may be enumerated:

> 1. A court owes deference to any popularly elected legislature and should, wherever possible, apply a statute as written to the facts before it.
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> 2. A court may not strike down a statute for reasons other than unconstitutionality; it may merely refuse to apply a statute where application would render a gross injustice, with the aim of preserving justice generally and the statute as applied to other facts.
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> 3. A court should generally refuse to apply any statute that is ambiguous as to the facts before the court if that statute: (i) imposes a serious criminal penalty; (ii) imposes any sanction for the exercise of a right deemed fundamental under the U.S. Constitution; (iii) imposes a direct restraint on the property or liberty of any citizen; or (iv) has other serious penal consequences or coercive effects upon any civil or criminal litigant before the court.
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> 4. In determining whether to repudiate a statute, a court should consider all attendant facts and circumstances, including: whether repudiation of the statute in favor of one litigant would demonstrably affect another identifiable person or party; whether the defendant was reasonably able to conform his or her conduct to the dictates of the statute prior to engaging in the behavior at issue; and whether considerations other than ambiguity also tend to render the statute unfair in its application.
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> 5. Repudiation is an extraordinary remedy.

Given the mercurial nature of equity, these can serve only as guideposts at best. The first reminds us that legitimate popular sovereignty and separation of powers concerns arise whenever a court

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72. *See supra* pp. 308-09.
73. *See supra* p. 309.
74. *Id.*

departs from a legislative directive. As demonstrated above, however, it is important that courts not lose sight of the fact that these are *concerns* and not *prohibitions*. The second guidepost reinforces the notion that this doctrine applies even where a statute is not constitutionally suspect but ensures that the statute is not stricken in the manner of a constitutional attack. Rather, it is repudiated as inequitable in a given set of circumstances. The third guidepost is not intended as an exhaustive list of circumstances in which a statute may be repudiated. Instead, it emphasizes the gravity of circumstances in which repudiation might be appropriate, including circumstances beyond the criminal sphere, e.g., in cases of civil commitment or forfeiture. The fourth guidepost reiterates the need to balance considerations other than mere ambiguity in a statute, as well as any concerns that militate against justice in favor of a specific litigant. The fifth is a final reminder meant to evoke other circumstances in which courts afford extraordinary relief.

One may view these as an outrageous encroachment upon legislative authority or as an incremental increase in the severity with which existing maxims are applied, e.g., the maxims of lenity and strict construction of statutes derogating common law. For reasons discussed above, they are constitutionally permissible principles, and for reasons discussed below, they are a desirable framework within which existing interpretive models might function.

B. Justifications for Equitable Repudiation

The failures of traditional interpretive models provide the greatest recommendation for equitable repudiation. It makes sense, then, to address the need for it in terms of the shortcomings of other doctrines.

1. Judges as Congressional Agents

The first shortcoming is the exaggerated notion that judges are mere agents of Congress. As mentioned above, the American Revolution saw a popular movement in favor of elected legislators.[75] But by the time of the Constitutional Convention, which followed a period of legislative dominance under the Articles of Confederation, the Framers widely considered the judiciary a check upon congressional excesses. The views of Hamilton and Madison, among others, confirmed that "judges owe an agency duty directly to the people and not to Congress . . . ."[76] The Framers did not limit this duty to judicial review on a constitutional level. Hamilton wrote: "[I]t is not with a

75. González, *supra* note 19, at 646-59.
76. *Id.* at 656.

view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society . . . by unjust and partial laws."[77] Both Madison and Gouverneur Morris spoke of the public dangers posed by "legislative usurpations,"[78] and Hamilton voiced the sentiments giving rise to this view:

> The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments.[79]

Equitable repudiation meets these concerns. It imposes a judicial barrier between the excesses or omissions of a majoritarian legislature and the citizens whom that legislature has been elected to represent. Given the rhetoric from the textualists' champion, Justice Scalia, there is a dire need for equity of some description. In typically slavish fashion, Justice Scalia says that, regardless of his personal views concerning the merits of a given statute, "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."[80] This may prove a fine and consistent academic approach, but judges deal in human lives on a daily basis. It simply will not do in many peoples' minds, or in the minds of Hamilton and Madison apparently, for Congress to enact a "foolish" statute with the expectation that courts will carry it to its knavish ends. Indeed, I would go so far as to hold this approach unconscionable where the better portion of a defendant's life depends upon the outcome, particularly when it is combined with the self-deprecating conceit inherent in the textualists' philosophy.[81] Of course, the judiciary must mediate where justice demands it. Equitable repudiation does so without the need for constitutional attacks upon otherwise valid statutes, and avoids the subterfuge of feigned congressional deference. This, in turn, illuminates the doctrine's important normative benefits.

If judges are forced to express their unwillingness to apply a statute and to justify that hesitancy in a written opinion on the equities of a case, they are likely to take a hard look at their reasons before doing so. Two things happen here. First, the judge's ability to apply

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77. THE FEDERALIST NO. 78, *supra* note 5, at 528.

78. González, *supra* note 19, at 648-50.

79. THE FEDERALIST NO. 71, at 483-84 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), *quoted in* González, *supra* note 19, at 649.

80. SCALIA, *supra* note 27, at 20.

81. *See* discussion *infra* Part IV.B.2.

the doctrine willy-nilly is tempered by the possibility of reversal, scholarly ridicule, or perhaps most importantly, the innate fear of publicly making a fool of himself. This is not as flippant an analysis as it may appear. The judiciary is conservative by nature and ours is one already possessed of a tremendous—indeed unhealthy—deference for legislative enactments. Few judges would take lightly the task of openly repudiating a statute without sufficient justification. Holmes' statement quoted above makes this point.[82] A second benefit is related inexorably to the first. If judges search themselves in this manner before repudiating a statute, they will likely apply the doctrine only in those cases where it is sorely needed. That is to say, one of the overriding factors in any judge's soul-search will be the merits of the litigant's appeal to equity. Ultimately, this should mean that the doctrine is applied sparingly, supported by an articulable basis, and invoked only in the neediest of cases. This provides the perfect prescription for curing the judiciary's current pathological deference to Congress.

The doctrine also preserves statutes. A court need not attack the constitutional validity of a statute to reach an equitable result—a common scenario in cases of so-called liberal activism. Nor must a court, wishing to reach an equitable result, don the mask of deference worn in *Holy Trinity*. The first scenario undermines the separation of powers, while the second discredits the moral authority of the courts. With the doctrine of equitable repudiation, however, a court can freely recognize that even an otherwise valid statute may suffer for its universality. Few would consider earthshaking the idea that legislators cannot foretell the endless factual scenarios that might ultimately fall within the orbit of a given act. Aside from the presidential pardon power, there exists no other constitutional process for determining whether a given individual *should* be subjected to laws of general application. It is the unique role of the judge to ensure that citizens, including criminals, do not fall between the institutional cracks if the substantive protections of our laws are to have moral force or real meaning. Equitable repudiation offers a means for carrying out this task without unnecessarily striking statutes and without feigning deference, both of which polarize the judicial/legislative relationship and undermine the legitimacy of our courts.

Justice McKenna's dissent in *Caminetti v. United States*[83] made a similar point. He cited a number of cases that disregarded, limited, or extended statutory wording in order to further the purposes of the act.[84] He then explained the need for the rule in such cases:

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82. *See* HOLMES, *supra* note 71, at 184.
83. 242 U.S. 470 (1917).
84. *Id.* at 500-01 (McKenna, J., dissenting).

> It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity, a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense . . . . Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.[85]

Justice McKenna spoke in terms of furthering a statutory purpose rather than repudiating it. Yet his thoughts are relevant to the extent that repudiation applies a statute narrowly, or not at all, while preserving it in all other valid applications. With this in mind, repudiation of a statute appears not as a judicial usurpation but as a narrow refusal in a specific context—a flag of distress marking a problematic point. If handled properly, this could well lead to dialogue between courts and the legislature. If not handled properly, then the final word lies where it should—with the judges, who are the final arbiters of statutes under every conceivable interpretive model. To do otherwise abdicates a judge's duty as public agent in favor of his role as congressional agent—an ironic twist given that congressional deference rests upon its majoritarian character. If, as happened in *Smith*, a court finds itself divided over the meaning of a statutory term following fifteen pages of explanation, it should not claim certitude. It should exonerate the defendant due to an inherent defect in the universality of the statute. In this way, judges may save a law in its remaining applications but retain the essence of their role as adjudicators of individual affairs.

2. Resisting the Myth of Objectivity

The second major task accomplished by an honest application of the equitable repudiation doctrine is the judiciary's acceptance of subjectivity as an inescapable feature of judging. The fluidity of equity seems to be the prime objection to it. Yet we have seen in *Holy Trinity* that discretion may be applied bluntly behind a thin veil of deference. Much as the alcoholic's first step to recovery is in recognizing the illness, our judges must admit themselves incapable of perfect objectivity. Equitable discretion is mercurial and subject to inconsistency. Yet "[a] lively appreciation of the danger is the best assurance of escape from its threat . . . ."[86] It must be foremost in any judge's mind that he or she does indeed owe fidelity to Congress in construing statutes, unless justice demands otherwise.[87] In response

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85. *Id.* at 501 (McKenna, J., dissenting).

86. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 29 (1961) (quoting United States v. Am. Trucking Ass'n, 310 U.S. 534, 542 (1940)).

87. Even Justice Scalia has admitted "[t]here are worse things than unpredictability and occasional arbitrariness. Perhaps they are a fair price to pay for preservation of the

to the obvious objection, "justice" must necessarily be measured by the "Chancellor's foot," as that is the only measure available. Judges act in equity on a daily basis and are well versed in the application of extraordinary remedies. It would be illegitimate to presume our courts incapable of exercising measured discretion when, in reality, they do so in every instance of statutory interpretation. To apply equity openly and consciously would require self-examination and an honest attempt toward objectivity.

Thus, to *strive* for objectivity should be the goal of every judge; to believe it has been obtained, however, is what I call the myth of objectivity. It leads to a mind-set that cannot be reasoned with: the delusion of infallibility. The strict textualist is perhaps most dangerous in this regard, and so it is no wonder that Justice Scalia's writings portray as clearly as any the myth of objectivity at work. His synopsis of statutory interpretation is telling: "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[88] This is akin to telling a football squad that to win it need only score more points than the other team. For this to have any broad application, a judge must either embrace diverse interpretations equally or else believe himself, consciously or otherwise, the infallible oracle of truth. Scalia falls squarely into the latter category. In writing on the *Smith* opinion, Scalia blandly asserts that "[t]he phrase 'uses a gun' fairly connoted use of a gun for what guns are normally used for, that is, as a weapon."[89] Elsewhere, he casually dismisses decades of scholarship and Supreme Court precedent by asserting that the Due Process clause "quite obviously" does not include a substantive component.[90] The only problem with his analysis in *Smith* is that a majority of our Supreme Court interpreted the matter differently, just as generations of capable judges have read a substantive component into the Due Process clause.

Scalia's self-assuredness rises to a level of steadfast arrogance, redolent of the religious zealot who claims title to *the* truth. In fact, this is indispensable for the textualist because the entire interpretive philosophy relies upon the premise that language may carry a singular and unerringly discernible meaning. Note that Scalia is willing to apply "foolish" laws as written because that is the duty of any faith-

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principle that one should not be held criminally liable for an act that is not clearly proscribed . . . ." SCALIA, *supra* note 27, at 28.

88. *Id.* at 23.

89. *Id.* at 24. The author happens to agree strongly with Scalia's interpretation in this instance but recognizes that this belief does not render the statute unambiguous or prove all who disagree wrongheaded.

90. *Id.*

ful textualist;[91] yet it seems never to occur to him that just as laws may be written foolishly, so might they be interpreted foolishly, even by him.[92] To admit this would undermine the very foundation of textualism as an interpretive paradigm. At best, it would admit that courts will make mistakes for which litigants, including criminal defendants, must pay the price. Though differences with this philosophy might at root prove a matter of preference, it is difficult to shake a predilection for caution when the personal liberties of citizens are involved. Moreover, Scalia loses the forest for the trees by having citizens pay the price for foolish laws or foolish interpretations of those laws because a "good" judge defers to Congress based upon congressional accountability to the citizens. This seems akin to withholding money from a starving man so you can donate to the United Way. Most disturbing, however, is Scalia's and all textualists' necessary belief that one correct interpretation exists. While convenient, this argument flies in the face of ordinary experience with the vagaries of language.

Unfortunately, the textualists are not alone. The majority opinion in *Smith* also betrayed this brand of self-assuredness. The opinion reads as if the Court would appear less correct or less authoritative were it to admit the difficulty of the question. Instead, it emphatically denied any ambiguity and ultimately claimed title to the "correct" interpretation of the statute . . . by two votes.[93] While purposivism and intentionalism provide room for equitable treatment of cases, they do not demand judicial attention to any notion of fairness. As such, they do little to mitigate the tendency toward the myth of objectivity and might arguably promote a failure of self-examination and candor in judicial opinions. Put simply, they make it easier to fudge.

The myth of objectivity shrouds the fundamental inability of any one human to commune with another to the degree required in "hard" cases like *Smith*. Judges easily forget or ignore that they bring inherent values and prejudices to each decision and that, as a matter of base human nature, they likely hold a preference for one outcome or another for reasons known or unknown. Often these preferences may arise subconsciously, tending toward manipulation of

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91. *Id.* at 20.

92. The Corbin-Williston debate over facial ambiguity in contract interpretation visits upon these issues. Common sense and the mere existence of this debate militate against the *premise* that language can be infallibly interpreted on its face. Nor is it enough to simply try one's best. Rather, to progress beyond the fictions comprising the myth of objectivity, there must be an admission that the act is impossible.

93. The Court rejected the defendant's appeal to the rule of lenity by deeming the statute unambiguous. Smith v. United States, 508 U.S. 223, 239-40 (1993).

the rules, as in the use of interpretive maxims,[94] and toward the exaggerated belief in the obviousness of one's conclusions. This topic could fill a volume in its own right. It suffices for present purposes to point out that the doctrine of equitable repudiation aspires to perfect objectivity but relies in no way upon the unattainable myth that it can be achieved. Rather, it demands that a judge come to terms with subjective inevitabilities and, ideally, that the judge's opinion address these matters as an inherently defensive posture.

3. The Ability to Do Justice

Of course, the point of this entire doctrine—and of equity generally—is to achieve basic fairness. By unfettering the judiciary from the congressional hold that has become a cherished institution in itself, the doctrine affords flexibility. By shattering the myth of objectivity, judges are forced to analyze the reasons they reach, or wish to reach, particular results. It is categorically impossible to do justice on a case-by-case basis merely by interpreting universal rules of general applicability. This is precisely why equitable concerns tend to creep into opinions. Unfortunately, they are let in the back door and told to keep quiet. This reveals an odd state of affairs given the pedigree of equity and the absence of any constitutional bar to judicial repudiation of statutes.

As noted above, courts employ equity on a daily basis.[95] The equitable tolling of limitations periods is a perfect example of equitable repudiation employed on a routine basis in the name of justice.[96] Likewise, courts deal routinely in extraordinary remedies. The doctrine of equitable repudiation's similarity to a judgment notwithstanding the verdict (JNOV) provides an example. Like JNOV, equitable repudiation would be seldom used but drastically needed when invoked. And, incidentally, it would be subject to appellate review as with the JNOV. It proves difficult, then, to countenance the predictable objection that the courts will run amok if given outright the power to ignore congressional enactments in the nebulous name of "justice." Humans are not machines, and justice will never achieve precise consistency even if we employ the most mechanical interpretive models. Rather, if justice can exist at all, it can come only from the interaction of human beings and from the observations of one who bears uniquely human capacities: wisdom, empathy, and even the ineffable, visceral hunch. We make choices each moment based

94. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

95. *See supra* pp. 319-20.

96. *See* cases cited *supra* note 30.

upon an inscrutable combination of these qualities. And we often make mistakes. But few would find it anything other than ludicrous to suggest that we fashion a consistent, objective model to resolve the inscrutabilities and correct the mistakes. The task is simply impossible. It is astonishing, then, that we seek to achieve just that on an exponentially more complex level of criminal adjudication while refusing to trust that our instincts might yield fair and permissibly consistent results.

Regardless of whether one agrees with these observations, it is difficult to make the case that existing interpretive models have resolved the objections that might be lodged against the equitable repudiation of statutes. At worst from a social standpoint, a judge will err on the side of liberty—a notion we embrace on a constitutional level. At worst from a litigant's standpoint, a judge will refuse to apply the doctrine and rely solely upon existing models. In this sense, what have we to lose?

V. CONCLUSION

To those who fear judicial usurpation, understand that it can happen at this moment with no accountability. To those who fear the inconsistency of judicial discretion, understand that it can happen at this moment with no accountability. The same response can be made to virtually any objection. Our system allows the courts to always have the final say over legislation. This tremendous responsibility should not—and would never, I think—be disregarded lightly. Judges should explain themselves if they wish to depart from ostensible legislative will. In doing so, they will restore the judiciary as a co-equal branch and fulfill their obligations as agents, not to a majoritarian legislature, but to the majority itself or to its constituents whose rights are at issue. Perhaps most important for judges, they will be forced to examine their motives and their reasoning. They will have to balance the "will of people" against the rights of the individual. In the end, we may lose the illusion of consistency, the illusion of deference, and the illusion of objectivity; but we might find the reality of justice flourishing in their place.