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— Lecture —

Textualism's Political Morality

Honorable Neomi Rao†

Introduction

My lecture is about textualism's political morality. Let me begin with a parable, courtesy of David Foster Wallace:

> There are these two young fish swimming along, and they happen to meet an older fish swimming the other way, who nods at them and says, "Morning, boys. How's the water?"
>
> And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, "What the hell is water?"[1]

Today I'd like to talk about the "water" that textualists, perhaps unconsciously, swim in.

Specifically, my lecture will explore the political morality that undergirds and informs a textualist approach to statutory interpretation. I will endeavor to explain why formal approaches to legal interpretation, such as textualism, are an outgrowth of political morality and how they carry political morality into practice.

This way of thinking about textualism may seem surprising. After all, textualism is a kind of formalism, and it generally draws a sharp line between the law's objective meaning and the judge's moral preferences. Textualists hold fast to the principle that the law is the words enacted by the people's democratically elected representatives. It follows that in deciding individual cases, judges must give effect to the law as it is, not as they believe it should be. This textualist approach is often juxtaposed with methods of interpretation that rely on the judge's abstract normative values about justice or fairness or that seek to update statutes in accordance with evolving social or political norms. I am wholeheartedly on the textualist side of these debates.

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† The Honorable Neomi Rao is a Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit. These remarks were delivered as part of the Sumner Canary Memorial Lecture hosted by the Case Western Reserve University School of Law on March 3, 2022.

1. David Foster Wallace, Kenyon Commencement Address (May 21, 2005).

But the familiar defense of textualism sells it short. This lecture aims to identify the rich moral foundations of a text-based approach to interpreting statutes.[2]

I want to make two basic points. First, I want to defend textualism from the vantage point of political morality. Properly understood, textualism follows naturally from the moral commitments at the heart of our constitutional system of government.

Understanding textualism from this perspective is especially timely in light of recent criticisms of formal, text-based methods of interpretation. For instance, a wave of post-liberal scholars, such as Adrian Vermeule, have suggested that laws should be interpreted to promote the "common good."[3] They claim textualism is inadequate because it is indifferent to this common good. But this isn't really a new criticism. Rather, it merely reflects the familiar view that judges should give effect to certain substantive values, values that exist independently of the law. There are many variants of this view, but to name just a few: Ronald Dworkin argued that judges should act as philosophers, promoting justice understood in an abstract way;[4] William Eskridge has argued that statutes must be interpreted dynamically, in light of contemporary social and moral norms;[5] and Judge Posner maintained that judges must interpret statutes pragmatically, to promote efficient outcomes.[6]

In short, although the critics of textualism past and present disagree about the right yardstick, they all argue that judges should interpret statutes in light of principles found outside the law. They maintain that such principles will lead to "better" results than simply following the text.

But textualism isn't empty of moral content, as some of its critics would suggest. Rather, textualism is rooted in a distinctive moral commitment—a commitment to be governed by positive laws, namely the Constitution and statutes lawfully enacted by the people's representatives. We live under the rule of law, not the rule of men. The Constitution is the result of a reasoned moral choice that a society

2. I discuss some of these themes in the context of constitutional interpretation elsewhere. *See* Neomi Rao, *The Province of the Law*, 46 Harv. J.L. & Pub. Pol'y 87 (2023).

3. *See generally* Adrian Vermeule, Common Good Constitutionalism (2022).

4. *See* Ronald Dworkin, Law's Empire 90 (1986) ("[A]ny judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts.").

5. *See generally* William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994).

6. *See generally* Richard A. Posner, The Problems of Jurisprudence (1993).

governed by law is best for social flourishing and is therefore worth defending.

My second point is that statutes are enacted within a legal tradition that subsumes political morality. Our mature and sophisticated legal tradition is built on principles of natural law, common law, and concepts rooted in the Roman law. In determining the meaning of a statute, textualists may rightly turn to these *legal* sources for guidance. Interpreting statutes within our legal context is part of exercising the Article III "judicial Power."[7]

Seen this way, textualists aren't indifferent to political morality in interpretation; they simply recognize that our legal tradition has translated and disciplined principles of political morality into postulates of *law*. A faithful textualist, therefore, must grapple not only with the words on the page, but also with the meaning of those words in the context of our legal traditions.

Those are my two basic points: fidelity to positive law is a profound moral choice, one that Americans made when ratifying the Constitution. And textualism, properly understood, incorporates fundamental principles drawn from our legal customs and foundations.

I. Moral Foundations of the Positive Law

I begin by discussing the moral choice at the root of any system of binding positive law.

Perhaps it will seem puzzling and counterintuitive to say that textualism includes a distinct political morality because textualists quite rightly seek to separate legal interpretation both from the partisan political fray and from the demands of morality or justice, abstractly defined. Moreover, critics of textualism and other formal methods of interpretation often emphasize that the outcomes of text-based interpretation can be unjust, unfair, inefficient, or immoral. Non-textualists frequently propose that when interpreting statutes, judges must apply some non-legal yardstick—whether it be justice, fairness, or the common good. On this view, judges should cite these values to "correct" the results of an exclusively text-based interpretation. Because textualism separates law from these abstract values, it is sometimes labeled as amoral or even immoral.[8]

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7. U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

8. *See, e.g.*, Andrei Marmor, *The Immorality of Textualism*, 38 Loy. L.A. L. Rev. 2063, 2069 (2005) (discussing that the "main moral concern" of textualism is that it "us[es] the particular litigants only as a means to an end" by "put[ting] the responsibility on the legislature to eliminate inequities resulting from poor legislative drafting"); Hadley Arkes, *A Morally Empty Jurisprudence*, First Things (June 17, 2020), https://

Despite these critiques, I maintain that textualism rests on a moral foundation. Focusing on the enacted law does not entail moral indifference. Rather, it respects a prior moral decision about how to resolve inevitable disagreements about the content and application of the moral law. In other words, the moral foundation of textualism is rooted in natural law ideas about reason, justice, and the good.

Philip Hamburger learnedly details this history in *Law and Judicial Duty*, and I draw from his account here. Human society faces a fundamental problem: there are many good-faith disagreements about what justice requires in a particular case. The establishment of lawmaking authority and the creation of positive law provide a solution to that problem. As Professor Hamburger explains, earlier justifications for obeying the law depended on believing the law coincided with God's will, or with the natural law itself.[9] But of course there are often disagreements and confusion about what the natural law or the common good requires. To take Aquinas's example, what exact punishment does natural law require for a given crime?[10] There is no single answer.

Furthermore, even if we were all Catholics, libertarians, utilitarians, or Marxist revolutionaries, such that we agreed on first principles, we would still inevitably disagree about how those principles cash out in any given case. Human reason is limited, and human beings are flawed. A functioning political society needs rules that everyone agrees are binding.

The solution arrived at over time was to choose a sovereign lawmaking authority that would translate the natural law into binding positive law.[11] The justification for this authority was not that it would always choose the right answer, but rather that such lawful authority is necessary to settle disputes.[12] While individuals will necessarily disagree as to what is good, a representative government can channel these disputes into debates about legislation. Viewed in this light, the decision to adopt a system of positive law made a good deal of sense as a *moral* matter.

The point of this highly condensed history is that legal doctrines don't displace morality—they implement it. At bottom, the

www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence [https://perma.cc/T79Z-Q27S]; Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 Harv. J.L. & Pub. Pol'y 917, 944–45 (2021).

9. *See* Philip Hamburger, Law and Judicial Duty 607 (2008).

10. *See* Thomas Aquinas, Summa Theologica, pt. I-II, q. 95, art. 2 (Benziger Bros. ed. 1947).

11. *See* Hamburger, *supra* note 9, at 607 ("The natural law discerned from human nature thus seemed to subject men to the lawmaking will of their earthly rulers.").

12. *See id.* at 618 (discussing "the use of legal authority to redress the peculiarly fractured character of humanity").

establishment of the positive law originates in a moral decision by the people: it is part of a reasoned choice to promote a peaceful and free society by resolving disputes through the enactment of law, rather than through abstract moral debate.

More specifically, in the United States, our constitutional government is an attempt—a uniquely successful attempt—to establish political and legal authority in the face of imperfect human knowledge and reason.

As the Preamble to the Constitution states, the people consented to a Constitution that would "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[13] Our Founding Fathers separated law from moral philosophy precisely in order to establish a just and good society committed to the well-being and safety of the people.

II. Textualism and the Rule of Law

What does all of this have to do with textualism?

Textualism is a natural and perhaps necessary corollary to our constitutional decision to create a system of formal law and to vest judges with only the "judicial Power." It may be helpful here to summarize some of the basic tenets at the heart of textualism.

First, there is a constitutional foundation. The statutes that bind society must be enacted through the Constitution's exclusive process of bicameralism and presentment.[14]

Second, it follows from this constitutional requirement that judges must follow the plain meaning of the enacted words. The interpretation of a statute doesn't turn on the intentions of the lawmakers or the judge's beliefs about social justice or morality. None of these intentions or beliefs went through the constitutional process for enacting law. In practice, this means a judge must focus on the text of the statute to determine its meaning.

Third, the rule of law requires a law of rules—rules that are impartially adjudicated by neutral decisionmakers. Law does not include arbitrary decrees from the Executive Branch or lawmaking from the bench.[15]

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13. U.S. CONST. pmbl.

14. *See id.* art. I, § 7 (describing this process); *id.* art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

15. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) ("I stand with Aristotle . . . in the view that personal rule, whether it be exercised by a single person or a body of

The proponents of textualism have endeavored, quite properly, to emphasize limits on judicial discretion in a democratic society. They maintain that text-based interpretation is a distinct enterprise from abstract moral, philosophical, or theological inquiry. Since we are apparently all textualists now, as Justice Kagan has said, these arguments have become relatively familiar.[16]

Nonetheless, the political morality of textualism is often obscured. We should look at it more closely. Textualism is the most legitimate mode of interpretation in a society that has made the choice to live under enacted law. As a method of interpretation, textualism respects the initial choice of the American people to distinguish law from other human inquiries like moral philosophy. Rooted in natural law and reason, the creation of a separate domain of law reflects a considered judgment about what is most conducive to a peaceful, prosperous, and good society.

III. Substantial Foundations of the Positive Law

Next, I want to explore how the positive law incorporates legal principles and legal methods that have developed over time. These principles and methods reflect basic moral commitments and reasons. In the United States, we enjoy a highly advanced and developed legal system. Congress doesn't enact statutes in a vacuum. Lawmakers act within our particular legal context. Indeed, it would be impossible to write an effective statute that could be interpreted only by reference to Webster's Third Dictionary.

Every statute enacted through the constitutional process is rooted in our distinct legal history and tradition. Judges vested with "judicial Power" may rightly rely on that legal tradition when construing statutory text.[17] And that tradition, in turn, has been shaped by and is an expression of certain fundamental moral commitments.

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persons, should be sovereign only in those matters on which law is unable . . . to make an exact pronouncement." (cleaned up)); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1502 (2015) ("The Constitution creates a careful separation of powers in order to check the exercise of federal power and to protect individual liberty.") (citing Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991)).

16. Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

17. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1131 (2017) (suggesting judges use "the law of interpretation as it stood at the Founding" when interpreting difficult texts).

To be clear, the legal foundations that inform meaning must be postulates of *law*. They do not include abstract moral principles or policy views. Nor do they include the intent of the lawmakers, the "spirit" of a statute, or the personal preferences of the judge.[18]

As Justice Scalia explained,

> To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed . . . to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue these broader purposes or write those new laws.[19]

In a constitutional democracy, the legislators enact laws. Judges interpreting those laws cannot reach for external values, such as their notions of justice and the common good. In deciding cases, however, judges can and must consider interpretive resources internal to the law.

This all might sound highly abstract but, I assure you, it's not. The legal foundations that I have in mind are quite specific, and their range is manageably bounded by historical considerations. Some examples will help to mark out the limited province of the law.[20]

First, judges rely on constitutional principles. The Constitution's text and structure establish the social compact that provides the basis for all other enacted law. The supreme law of the land incorporates choices about what type of government will be most conducive to a free and flourishing political community.[21] By establishing popular sovereignty, separating the powers of government, and making laws difficult to enact, the Constitution protects individual liberty. As James

18. *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 16–23 (1997); *see also* Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 866 (1824) ("Courts are the mere instruments of the law, and can will nothing.").

19. Scalia, *supra* note 18, at 23.

20. *See generally* Rao, *supra* note 2.

21. *See, e.g.*, Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. Puget Sound L. Rev. 351, 360 (1987) (discussing the "elements of rationality implicit in the choice of a free government" and incorporated in our Constitution); Harry V. Jaffa, *Equality as a Constitutional Principle*, 9 Harv. J.L. & Pub. Pol'y 25, 28 (1986) ("[T]he Constitution of the United States was an instrument for protecting and implementing the equal natural rights that all men had by birth as human beings."); Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. St. Thomas L.J. 48, 57 (2005) ("Societies, to enable their effective pursuit of the common good, must entrust the common good of the society to particular offices. . . . Our society has a specific social ordering, much of it embodied in the Constitution."). *See generally* John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013).

Madison said, the "preservation of liberty requires, that the three great departments of power should be separate and distinct."[22]

Our laws must be interpreted within this constitutional framework. For example, statutes are interpreted, when fairly possible, to avoid inconsistency with the Constitution. Principles of interpretation can reinforce constitutional requirements. For example, Article I, Section 1, vests all legislative power in Congress, from which follows the principle that legislative power may not be delegated to the Executive.[23] Even though direct enforcement of the nondelegation principle is rare, the Supreme Court assumes that Congress does not "hide elephants in mouseholes."[24] This means that major policy questions must be decided by the people's representatives and that such questions cannot be implicitly delegated to administrative agencies. In 2020, the Centers for Disease Control (CDC) issued a nationwide eviction moratorium intended to slow the spread of COVID-19. In reviewing that order, the Supreme Court applied the major questions doctrine and concluded the CDC lacked authority to issue the moratorium.[25] Because Congress had not clearly granted such authority to the agency, the CDC couldn't rely on a decades old statute to grab such unprecedented and sweeping power to act on a matter of "vast economic and political significance."[26]

Similarly, the vesting of all executive power in the President has important consequences for how far Congress may insulate

22. The Federalist No. 47, at 250 (James Madison) (George W. Carey & James McClellan eds., 2001).

23. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."). *See generally* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 Fla. L. Rev. 1 (2018).

24. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not . . . hide elephants in mouseholes.") (collecting cases); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 330 (2000) ("[A]gencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary.").

25. Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

26. *Id.* (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)). Subsequent to this lecture, the Supreme Court decided *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022). There, the relevant statute allowed the EPA to "'determine[]' the 'best system of emission reduction'" for power plants. *Id.* at 2607 (quoting 42 U.S.C. § 7411(a)(1)). Relying on that allowance, the EPA claimed authority to effectively force coal plants to close, thereby shifting the nation toward renewable energy sources. *See id.* The Court held the EPA could not assert a power of such "economic and political significance" in the absence of "clear congressional authorization"—which the statute did not provide. *Id.* at 2608–16 (cleaned up).

administrative agencies from presidential control.[27] In a recent decision involving the Consumer Financial Protection Bureau, the Supreme Court identified substantial limits on such agency independence.[28] The Court explained, "The President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch."[29] The President must supervise the execution of the laws, even over so-called "independent agencies." These principles stem from the Constitution's creation of a unitary executive, designed to promote democratic accountability and limit government overreach. As Chief Justice Roberts maintained: "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."[30]

Interpreting statutes against the backdrop of constitutional principles furthers the political and moral choices inherent in our constitutional form of government. Those values include protections for individual liberty, limitations on government power, and the importance of representative government.

Another background source of legal meaning is the common law. Many of our legal principles as well as our statutes have common law roots and must be understood against a common law baseline drawn from our Anglo-American legal tradition. Statutes will sometimes use a legal term without defining it because the term carries with it a developed meaning from the common law.[31] As Justice Frankfurter noted, "if a word is obviously transplanted from another legal source . . . it brings the old soil with it."[32]

Such transplants are often found in criminal law because statutes codify common law crimes. For example, a statute that punishes the

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27. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see also* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1212–13 (2014).

28. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020); *see also* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2544 (2011) ("The Court's logic [in Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010)] can lead to the conclusion that even one layer of for-cause removal protection is unconstitutional.").

29. *Seila Law*, 140 S. Ct. at 2203 (cleaned up) (quoting *Free Enter. Fund*, 561 U.S. at 496–97).

30. *Id.* at 2202 (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986)).

31. *See* Morissette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . .").

32. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

"reckless" destruction of another's property requires a meaningfully different mens rea than one punishing the "negligent" destruction of property because both of those concepts—recklessness and negligence—have deep common law roots.

Other statutes incorporate common law concepts to deal with modern problems. Consider the case of *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[33] The question presented was whether modifying an endangered species' habitat was a prohibited "taking" of that species. The majority relied on the Endangered Species Act's broad purpose of protecting wildlife. Because the statute defined "take" to include the word "harm," the majority found that habitat damage could be a taking. After all, you "harm" an animal, literally speaking, when you hurt its habitat.[34] Justice Scalia dissented. He emphasized, correctly in my view, that the Act criminalized "taking" an animal. And the phrase "taking an animal" has a long history in the common law that traces back to the Roman law.[35] One can only "take" an animal through intentional action directed against that particular animal. Damaging an animal's habitat is not enough.[36]

Congress may of course choose to displace the common law. But when a common law term has been enacted without modification, judges interpret the relevant provision in light of the underlying common law principles.

Another example stems from a recent case I decided involving Indian lands.[37] The statute directed the government to take into "trust" lands acquired by the Sault Ste. Marie Tribe. We concluded that, because the statute "imposes a trust responsibility on the government, background principles drawn from the common law of trusts may inform our interpretation."[38] At common law, a trustee could not manage illegally acquired property or establish a trust contrary to public policy.[39] These common law concepts were essential to our holding that the government may determine whether land is properly acquired before taking it into trust.

In addition to constitutional and common law foundations, general legal principles and background understandings also inform the interpretation of statutes. These are increasingly less familiar to lawyers

33. 515 U.S. 687 (1995).

34. *Id.* at 697–703.

35. *Id.* at 717 (Scalia, J., dissenting).

36. *Id.* at 721–22.

37. Sault Ste. Marie Tribe of Chippewa Indians v. Haaland, 25 F.4th 12, 28 (D.C. Cir. 2022).

38. *Id.* at 19 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011)).

39. *Id.* (citing Restatement (Third) of Trusts § 29(c) (Am. L. Inst. 2003)).

and judges. Yet there was a time when legal professionals studied and were steeped in certain basic concepts about the law.[40] These concepts didn't necessarily need to be specified in particular cases because they were simply taken for granted, like water for the fish.

What is included within these general legal principles and background understandings? A few examples should make this idea more concrete.

Consider the venerable concept of "due process of law."[41] While due process is protected by the Constitution, the meaning of due process incorporates a long history of working out what process is "due." For instance, due process usually includes notice and the opportunity for a hearing.[42] The Court has also recognized that due process varies by context and the rights that are at stake—that it requires balancing the government's interests with the individual's interests and rights.[43] The Executive Branch and courts face questions about due process in many contexts. For example, the Department of Justice's Office of Legal Counsel issued an opinion about what process is due to an American citizen targeted in a drone strike.[44] Detainees held at Guantanamo Bay have maintained that they are entitled to the protections of the Due Process Clause.[45] More prosaic, but no less important, my court

40. *See* R.H. Helmholz, Natural Law in Court: A History of Legal Theory in Practice 89–90 (2015); Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1831 (2012) ("The idea of a court applying law that wasn't the product of a legislature . . . may seem odd in today's world. But it's worth remembering that this approach was commonplace for the first 150 years of the Constitution's existence . . . . Courts routinely investigated and applied 'general' law . . . .").

41. *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property [by the federal government], without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

42. Mathews v. Eldridge, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" (alteration in original) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring))).

43. *See* Kaley v. United States, 571 U.S. 320, 333–34 (2014).

44. *See* Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times (Oct. 8, 2011), https://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html; Dep't of Just., White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force (2011).

45. Al-Hela v. Biden, 66 F.4th 217, 225 (D.C. Cir. 2023) (en banc) (declaring it an open question whether due process protections apply to Guantanamo detainees); *id.* at 250–59 (Rao, J., concurring in the judgment in part and dissenting in part) (explaining that under both Supreme Court precedent

frequently hears challenges to the process afforded by administrative agency proceedings.[46]

Other background principles arise from the fact that judicial decisions give the reason for a particular judgment, the *ratio decidendi*, providing principles to govern future cases. Chief Justice Marshall spoke about the "peculiar province" of the judge to say what the law is.[47] And when judges say what the law is, they provide reasons for their interpretations of the law. Although such reasons are not part of the enacted law, they invariably become part of our legal system and shape how we interpret the law.

Background principles of law also include *axioms of reason*. Hadley Arkes, for instance, has identified several such axioms in the writings of Chief Justice Marshall and Justice Story.[48] I agree that the law and legal interpretation incorporate certain reasons, but these aren't abstract moral reasons; they are reasons inherent to the law. For example, Justice Marshall argued that the power to make binding law entails the power to punish violations of that law.[49] Alexander Hamilton explained that courts ordinarily seek to reconcile the meaning of statutes, but when that is not possible, the later law will be given effect over the earlier, a principle of construction that follows "from the nature and reason of the thing."[50]

Or consider the search for the *ratio legibus*, the reason of the *laws*, plural. Interpreting the words of a statute requires understanding the statute in the context of our other laws. Justice Scalia called this "judicial rationalization," by which he meant that judges interpret various laws as a coherent whole, even if lawmakers don't always, in

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and the original meaning of the Constitution, the Due Process Clause does not apply at Guantanamo Bay).

46. *See, e.g.*, Humane Soc'y of the U.S. v. U.S. Dep't of Agric., 41 F.4th 564, 565 (D.C. Cir. 2022).

47. Williams v. Peyton's Lessee, 17 U.S. (4 Wheat.) 77, 83 (1819); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); Rao, *supra* note 2.

48. *See* Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 Notre Dame L. Rev. 1245, 1252–58, (2012) [hereinafter Arkes, *Natural Law Manifesto*] (discussing the role of axioms in Justice Marshall's and Alexander Hamilton's thought); Hadley Arkes, William Bentley Ball, Robert H. Bork & Russell Hittinger, *Natural Law and the Law: An Exchange*, First Things (May 1992), https://www.firstthings.com/article/1992/05/natural-law-and-the-law-an-exchange [https://perma.cc/455X-F8KT].

49. Arkes, *Natural Law Manifesto*, *supra* note 48, at 1256–57 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416–17 (1819)).

50. *Id.* at 1256; *see also* The Federalist No. 78, *supra* note 22, at 404–05 (Alexander Hamilton).

practice, seek such coherence.[51] One way we do this is by applying the "whole code" canon, which favors interpreting statutes to fit within the context of other laws. This presumption drove the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*,[52] which held that the Food and Drug Administration lacked the power to regulate cigarettes.[53] Because nicotine literally fit within the statutory definition of a "drug," one might have concluded that the FDA could regulate cigarettes.[54] Justice Breyer made this argument in dissent.[55] But the majority, joined by Justice Scalia, properly considered all of the different statutes Congress had enacted specifically regulating tobacco and found that those laws were incompatible with letting the FDA regulate cigarettes.[56] The legislative landscape—the whole code—mattered for finding the best and most rational interpretation of the statute.

These are just some examples of how statutes rest on deep foundations shaped by constitutional law, the common law, and background legal principles. These traditional sources of legal meaning in turn incorporate and reflect moral values drawn in from the natural law and the reasoned working through of legal principles over time.

I hope it is clear from these examples that what I am calling fundamental legal principles and traditions are entirely different from Dworkinian justice or the pursuit of an abstract moral good. These principles are neither plucked from the air nor found in the heart of the judge; they are the principles integral to the distinct province of the law. A faithful textualist interprets statutes in light of these foundations.

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51. Antonin Scalia, Speech on Use of Legislative History: Delivered Between Fall 1985 and Spring 1986 at Various Law Schools ("The task of determining the reasonable import of a statute from its text, from its apparent purpose, and from its relationship to other laws is a difficult one—and, as I have suggested, assuredly involves judicial rationalization of the laws.").

52. 529 U.S. 120 (2000).

53. *Id.* at 133.

54. Drug is defined as an "article[] . . . intended to affect the structure or any function of the body," and tobacco cigarettes are, among other things, a "contrivance . . . intended to affect the structure or any function of the body." *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C), (h)).

55. *Id.* at 162 (Breyer, J., dissenting) ("[T]he majority nowhere denies . . . [that] tobacco products (including cigarettes) fall within the scope of th[e] statutory definition, read literally.").

56. *Id.* at 143–59.

Concluding Thoughts

This lecture reflects some early observations drawn from my experience on the bench. A significant number of cases that I have decided turned on questions of statutory interpretation. Some cases are relatively easy because the text of a statute has a readily discernible meaning. In others, however, the right interpretation doesn't immediately spring up from the words of a page. Rather, judgment must be exercised to determine the meaning of the law. That judgment focuses on the text and structure of the statute, but it also encompasses the meaning of statutory terms in a wider legal context, as rooted in the soil of our legal traditions and practices.

In taking this approach, the textualist judge respects the political morality of our constitutional form of government. Identifying the broader legal principles at work in statutes, whether derived from the Constitution, the common law, or other background legal concepts, isn't an abstract search for the moral and good. Rather, the textualist draws from our distinct and rich legal culture, which has incorporated particular principles of reason, justice, and political morality.

I recognize that there may be some danger in emphasizing textualism's political morality. Critics may claim that legal foundations are just another way for judges to impose their personal preferences and values. Justice Scalia, our public textualist number one, rightly emphasized curbing judicial discretion. He didn't focus on political morality per se, but he practiced it in his decisions. His interpretations of statutes masterfully wove in background principles, including those drawn from the constitutional structure and the common law.

There are also advantages in demonstrating, explaining, and developing the particular political morality of formal methods of interpretation, such as textualism. That advantage comes from showing that textualism isn't amoral or dull or disconnected from the foundational truths of reason and justice.

It's both true and humbling that judging requires the exercise of *judgment*, the particular type of judgment required by and inherent in the Article III judicial power. Textualism emphasizes the right type of judgment and the right types of reasons to apply when interpreting statutes within our constitutional form of government.