Research Article

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Scaling Scalia: problems for Scalia's legal theory

https://doi.org/10.1515/ijld-2023-2002
Received August 4, 2022; accepted March 20, 2023

Abstract: Antonin Scalia's theory of judicial interpretation remains highly relevant in the legal landscape. This paper proposes three problems with Scalia's textualism-originalism that have yet to be adequately addressed in the legal philosophical literature. The problems are consecutively introduced as the *Madisonian Problem*, the *Promulgation Problem*, and the *Fairness Problem*. To explain these problems, I rely upon an understanding of coherent justification conceptualized by Keith Lehrer, and I utilize Feinbergian and Hobbesian modes of analysis. Key components of Scalia's textualism-originalism will be developed using Scalia's public discourse as well as Scalia's dissent in *Morrison v Olsen*. Following the three problems, to be proposed in the style of the Lehrerian Critic, I will counter objections to my arguments as well as argue against an alternative form of criticizing Scalia.

Keywords: Feinberg; Lehrer; originalism; Scalia; textualism

1 Scalia's acceptance system

Scalia's theory of judicial interpretation remains highly relevant in the legal landscape. Two legal scholars have recently written that "it is said that, perhaps more than any of his predecessors, he [Scalia] shaped how lawyers, judges, and even laypeople see the role of unelected judges in a democratic society" and that Scalia's "theories of originalism and textualism gave us an elegant and compelling way to put into practice the 'judicial restraint' that many have urged since the Founding" (Fitzpatrick and Varghese 2017: 2231).[1] This paper is concerned with key features of

1 In the article by Fitzpatrick and Varghese, the two legal scholars look particularly into "what some people have suspected may be Scalia's most influential sphere of all: legal education" (Fitzpatrick and

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Scalia's approach to judicial interpretation. Is Scalia justified and consistent in claiming that he knows what the judge ought and ought not to do when interpreting the law? To answer this question, let us first review the relevant features of Scalia's judicial approach.

Scalia avers that the words of a legal text primarily determine the law. In describing his "Supremacy-of-Text Principle", Scalia supports Justinian's claim, "*a verbis legis non est recedendum*", which means that 'one ought not to stray from the words of the law', and he adds that the words of the legal text are of "paramount concern" (Scalia and Garner 2012: 56). In describing his "Whole-Text Canon", Scalia writes, "the entirety of the document thus provides the context for each of its parts", and by the entire document he means an entire statute (Scalia and Garner 2012: 167). In his "Omitted-Case Canon", Scalia argues that "the principle that a matter not covered is not covered is so obvious that it seems absurd to recite it" and that an "absent provision cannot be supplied by the courts" (Scalia and Garner 2012: 93).

Scalia also asserts that judges ought to envision how "intelligent and informed people of the time" understood the law (Scalia 1997a: 38). Scalia explains that "a text should not be construed strictly, and it should not be construed leniently", but "it should be construed reasonably" (Scalia 1997a: 23). He further claims that "the ordinary-meaning rule is the most fundamental semantic rule of interpretation" (Scalia and Garner 2012: 69) and that "ordinary-meaning" implies that because "most common English words have a number of dictionary definitions, some of them quite abstruse and rarely intended […] One should assume the contextually appropriate ordinary meaning […]" (Scalia and Garner 2012: 70). It is also worth noting that Scalia justifies his judicial approach by stating "that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated" (Scalia 1997a: 17). Scalia opposes the conviction that a lawmaker's intent is what guides the interpretation of law, writing "it is the *law* that governs, not the intent of the lawmaker" (Scalia 1997a: 17).

Scalia is also an originalist. He writes, "what I look for in the Constitution is precisely what I look for in the statute: the original meaning of the text […]" (Scalia 1997a: 38), and elsewhere he elaborates on this idea of original meaning as the "fixed-meaning canon", adding that "originalism remains the normal, natural approach to understanding anything that has been said or written in the past" (Scalia and Garner 2012: 82). Scalia opposes those judges who believe that the meanings of the Constitution's words are thought to "bend and grow", or adapt, to what "a changing society

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Varghese 2017: 2232). Even though Scalia competes with other more heavily cited justices, such as Justice Samuel Alito, Scalia is "at or near the top of most of the metrics" when it comes to mentions in casebooks (Fitzpatrick and Varghese 2017: 2232).

requires" (Scalia 1997a: 41).[2] Furthermore, Scalia justifies his originalist or fixed-meaning approach to law by arguing that it is the only approach "compatible with democracy" (Scalia and Garner 2012: 82). For Scalia, it is crucial to the democratic process that judges follow the legal text's original meaning or risk corrupting what was originally sought through the legislature by altering the meaning of the text. In this manner, Scalia places a high value upon formalism, arguing that "the rule of law is *about* form" (Scalia 1997a: 25).

2 Madisonian problem

It should be initially stated that I rely upon an understanding of coherence and justification conceptualized by Keith Lehrer for the three problems presented and defended in this paper. Lehrer explains that "acceptance is the fuel for the engine of justification", and "an acceptance system tells us when we should trust" something "and when not" (Lehrer 2000: 124–125). Moreover, just as acceptances regarding "sources of information", "senses", and "memory" ought to cohere with a background system of acceptances (Lehrer 2000: 125), so too, I believe, ought this to be the case with theories for interpreting the law. Therefore, in the spirit of the Lehrerian Critic (Lehrer 2000: 132–137), each problem will be presented in the general format of: (1) Scalia accepts that *A*; (2) Scalia accepts that *B*; (3) acceptance that *A* and acceptance that *B* cannot reasonably be held within the same acceptance system. Either it is the case that *A* and *B* are contradictory, or it is the case that the reasoning supporting *A* does not allow for the acceptance of *B*. In a word, I will be identifying crucial inconsistencies in Scalia's approach to judicial interpretation that, in turn, prevent proper justification for Scalia's legal theory.

The Madisonian Problem will challenge Scalia's coherent justification as follows: (1*M*) Scalia implicitly argues that it is wrong for judges to make reference to extra-legal philosophers when interpreting the law; (2*M*) Scalia appeals to Madisonian political philosophy in his own judicial practice; (3*M*) Scalia cannot both accept that (1*M*) and accept that (2*M*) while maintaining Lehrerian justification since Scalia is both denying the use of extra-legal philosophy to judges while affirming the use of extra-legal philosophy in his judgment. So, to see Scalia's (1*M*) acceptance, let us consider an excerpt from Scalia where he elaborates on his opposition to Living Constitutionalism:

> What is it that the judge must consult to determine when, and in what direction, evolution occured? […] Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of

2 See (Scalia 1997a: 38) for a variation of this same claim.

> Aristotle? As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy (Scalia 1997a: 45).

Among other things, Scalia opposes the judicial use of "the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle" because this would not provide a viable means of guiding "evolutionism", or the Living Constitution school of legal interpretation (Scalia 1997a: 45). This amounts to acceptance (1*M*) that Scalia implicitly argues against judges referring to extra-legal philosophers when interpreting the law. However, it is also the case that Scalia accepts (2*M*) which will be demonstrated via Scalia's dissent in *Morrison v Olsen*.

In his *Morrison* dissent, Scalia argues against the constitutionality of the independent counsel, established by Congress, using Madisonian philosophy that is extra-legal in nature. Consider when Scalia refers to the separation of powers doctrine, arguing that "the Framers […] similarly viewed the principle of separation of powers as the absolutely central guarantee of a just government. In No. 47 of The Federalist, Madison wrote that '[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty'" (Morrison 1988: 697). Not only does Scalia explicitly quote Madison in his dissent, but he uses Madison to support the idea that the separation of powers doctrine possesses "*intrinsic value*" as the "*absolutely central guarantee* of a just government", even though this claim and Madison's words do not lie within the Constitution's legal contents (emphasis added).

Scalia expresses his desire to "resist" a concentration of power in government, writing that he seeks "the allocation of power among Congress, the President, and the courts in such a fashion as to preserve the equilibrium the Constitution sought to establish – so that 'a gradual concentration of the several powers in the same department', Federalist No. 51 […] (J. Madison), can effectively be resisted" (Morrison 1988: 699). Scalia desires to resist a concentration of power because Madison's philosophy advises him to do this. Scalia reveals this by continuing to quote Madison in support of his claims. Furthermore, Scalia argues that the executive branch was originally intended to be strengthened in ways that the legislature was not intended to be (Morrison 1988: 698–9). Scalia's claim here continues to support his Madisonian perspective on the separation of powers doctrine to be had in the federal government. The Constitution itself does not speak to his claim one way or the other. Scalia's defense that "proposals [at the Constitutional Convention] to have multiple executives […] were rejected" and that the legislature was, unlike the executive branch, divided, makes no reference to the Constitution's legal text (Morrison 1988: 698–9). Scalia additionally claims that Madison's *Federalist* 51, "gives

comprehensible content to the Appointments Clause and determines the *appropriate scope of the removal power*" because "the inseparable corollary to each department's 'defense must […] be made commensurate to the danger of attack'" (Morrison 1988: 704, emphasis added). So, Scalia uses Madisonian thinking to *supplement*, or provide "comprehensible content" and "appropriate scope" to what the Constitution lacks in terms of ultimate purposes or intentions beyond the words of its legal text.

Indeed, Scalia does accept (2*M*) that Madisonian political philosophy is to be used in judicial decision-making since he accepts and propounds Madisonian thinking in *Morrison*. All that remains is for the Lehrerian critic to ask: How can Scalia deny the use of extra-legal philosophy on the one hand, while affirming its use in a particular case with a particular philosopher, namely, Madison, on the other hand? The critic will say that he cannot accept (1*M*) and (2*M*) while maintaining justification via a coherent acceptance system. Therefore, (3*M*) has also been demonstrated, and Scalia is not coherently justified here.

3 Promulgation problem

The Promulgation Problem will challenge Scalia's coherent justification as follows: (1*P*) Scalia argues against the judicial use of a lawmaker's intent because this risks holding people accountable to laws they were not aware existed; (2*P*) Scalia avers that the original meaning of a law at its enactment is binding for all later generations; (3*P*) Scalia's reasoned support for (1*P*) is also sufficient reason to deny (2*P*), so Scalia is not coherently justified in accepting (1*P*) and (2*P*) within the same acceptance system (that is unless he alters the reasoning used to justify (1*P*)).

To see acceptance (1*P*), consider the following about Scalia. Scalia opposes the law being "determined by what the lawgiver meant, rather than by what the lawgiver promulgated", and he argues further that any judicial reference to a lawmaker's intent is "one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read" (Scalia 1997a: 17).[3] So, Scalia considers it unfair to expect the public to know what a lawmaker intended since intention takes one beyond the mere words of the statute, and this explains why Scalia compares intention-based judicial decisions to Nero placing the laws beyond clear perception of the public.[4]

3 Scalia also argues extensively against the judicial decision made in *Church of the Holy Trinity v United States* (1997a: 18–23), where the court follows "unexpressed legislative intent" as opposed to the letter of the law (Scalia 1997a: 21).

4 See Macagno and Walton for an extended analysis of Scalia's opposition to intentionalism and his reasoning behind such a position. Macagno and Walton enlighteningly write, "Justice Scalia pointed out some crucial critical dimensions of this scheme, related to the fact that attributing a specific

Scalia shows his acceptance of (2*P*) when he writes "what I look for in the Constitution is precisely what I look for in the statute: the original meaning of the text […]" and he juxtaposes his support of "*original* meaning" against his opposition to "*current* meaning" (Scalia 1997a: 38, emphasis in original). While a rejection of intentionalism and an acceptance of originalism do not contradict each other, Scalia's reasoning behind his rejection of intentionalism should also lead him to reject originalism. So, the reasoning of acceptance (1*P*) is made problematic by acceptance (2*P*). This is the case because acceptance (2*P*) also risks holding the public accountable for crimes they did not know existed.

To demonstrate that (2*P*) also risks affirming laws that the public is unaware exist, let us consider the Hobbesian view of law and its relationship to promulgation. Hobbes writes,

> To rule by Words, requires that such Words be manifestly made known; for else they are no Lawes: For to the nature of Lawes belongeth a sufficient, and clear Promulgation such as may take away the excuse of Ignorance; which in the Lawes of men is but of one onely kind, and that is, Proclamation, or Promulgation by the voyce of man (Hobbes and Smith 1909: 275).

Notice that Hobbes connects laws and their promulgation without qualification. If a law is not promulgated, then it is not a law. Scalia, at least in respect to his opposition to intentionalism, agrees. However, what of his acceptance of originalism? Again, Scalia asserts that the law as understood at its enactment is binding. How a law was understood at its enactment has been known to evolve over time with the passing of generations. Word meanings and usages shift over time, as do community values. Just as these aspects of law change, so too do the ways in which law is promulgated. How a community *previously promulgated* laws changes over time in arriving at its *current promulgation*.[5] Hobbes does not affirm that the law as promulgated and

intention to a body is extremely problematic, and depending on the viewpoint one wants to defend, he will choose the opinions of the personages better suiting his own purpose" (Macagno and Walton 2017: 66). These two scholars creatively and usefully divide their treatment of intentionalism into its *psychological* and *historical* dimensions, among other things (Macagno and Walton 2017: 64–67).

5 For an historical example illustrative of this danger, see Adam Davidson's analysis of U.S. marijuana laws where he concludes that "the executive and legislative branches of the federal government, and the American people have placed decreasing emphasis on the seriousness of marijuana crimes" despite federal law and previous court decisions indicating that marijuana crimes *are serious* (Davidson 2016: 2106). The disconnect between what federal government has recently promulgated via legislation and enforcement regarding marijuana laws, and what was originally promulgated and remains federal law regarding marijuana with the past "War on Drugs", poses a serious challenge to Scalia's acceptance of originalism. Would it not be Nero-like to hold people accountable to the federal law on marijuana as *originally promulgated* even when the federal government has made moves that suggest the law is not so serious after all? Hobbes accounts for this situation when he writes that "those facts which the Law expressly condemneth, but the Law-maker

understood at its enactment takes precedence over later understandings,[6] and because of his unqualified elaboration of promulgation, he sheds light upon the internal inconsistency in Scalia's acceptance system. This leads us to (3*P*) that Scalia's reasoned support for (1*P*) is also sufficient reason to deny (2*P*). If Scalia rejects intentionalism for its risk of Nero-like laws, meaning laws without proper promulgation, then he must also reject originalism since it provides the same risk. Even though neither intentionalism nor originalism *always* risks Nero-like laws, if Scalia's reasoning via Nero is enough to reject intentionalism, then it is also enough to reject originalism. Stated alternatively, just as a lawmaker's intent can be esoteric, so too can a law's original meaning become esoteric to the public through the progression of time.

4 Fairness problem

The Fairness Problem will be presented as follows: (1*F*) Scalia accepts that moral considerations are not a legitimate reference for the judge to make in interpreting the law; (2*F*) Scalia accepts that fairness is an underlying reason for his support of formalism; (3*F*) Scalia cannot both accept that (1*F*) and accept that (2*F*) without his judicial theory suffering incoherence since (2*F*) embraces moral consideration while (1*F*) condemns moral considerations. So, again Scalia lacks coherent justification in his acceptance system due to the conflict of these claims.

When Scalia criticizes "the evolutionists" because they "divide into as many camps as there are individual views of the good, the true, and the beautiful", he implicitly reveals his acceptance of (1*F*) that moral considerations ("the good" and "the true"), like aesthetic considerations ("the beautiful"), vary widely depending on the individual and are thus not suitable judicial references (Scalia 1997a: 45). When Scalia writes, "it is simply incompatible with democratic government, or indeed, even with *fair government*, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated" (Scalia 1997a: 17, emphasis added), he reveals his acceptance of (2*F*) that fairness is to be used to justify his formalism.[7]

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by other manifest signes of his will tacitly approveth, are lesse Crimes […]" (Hobbes and Smith 1909: 235).

6 See Hobbes's argument that "when the Sovereign commanded anything to be done against his own former Law, the Command […] is an abrogation of the [previous] Law" (Hobbes and Smith 1909: 232).

7 Note that these interpretive considerations affirm some of the insightful analysis by Maija Aalto-Heinila. Aalto-Heinila argues that "[…] textualists have to assume that language is sufficiently *acontextual* so that the meanings of words remain constant and do not change on every occasion of their application" (Aalto-Heinila 2016: 198). This variability, and thus lack of stability, in interpretive meaning is just what Scalia vehemently opposes in the above references.

Arguments made by Joel Feinberg regarding fairness, and the difficulties that come with a too-strict adherence to legal texts, provide clarifying power over the problem presented. In examining a hard case, Feinberg writes "a vaguely written statute might leave out any mention of fairness or unfairness, in which case, natural justice, though unstated, must be assumed to cover the omission" (Feinberg 2003: 4). However, Scalia is opposed to the judicial reference of fairness as demonstrated in acceptance (1*F*), so Scalia cannot do what Feinberg says must sometimes be done by the judge. When the Lehrerian critic asks Scalia, why should I follow formalism and avoid legislating? Scalia answers using acceptance (2*F*), asserting that formalism is required because a judge must follow the dictates of fairness. Yet, fairness, for Scalia, is an unreliable appeal according to acceptance (1*F*). This is the crux of the Fairness Problem.

Feinberg predicts the problem here demonstrated in Scalia's acceptance system. Feinberg acknowledges that though legal positivists and natural law theorists disagree on much, "each group of philosophers contains people who respect both established law and its duties of fidelity and obedience, on the one hand, and precepts of justice with their duties of reasonable fairness, on the other" (Feinberg 2003: 10). In this manner, even though Scalia's theory is antagonistic to extra-legal appeals to "the good" or "the true", he still appeals to fairness when arguing against using a lawmaker's intent to determine the law.

> Scalia might counter the Lehrerian critic similarly to the words of the legal positivist in Feinberg's fictitious dialogue:
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> I might have no doubt at all what my duty as a judge requires of me. But as a full human being, not simply a judge, I may be so appalled morally at what my legal duty requires that my conscience will tell me not to do my judicial duty (Feinberg 2003: 27).

Thus, Scalia might argue that his understanding of fairness as a human being can still carry weight even if his judicial theory avoids any appeal to fairness. However, the Fairness Problem would not be properly countered by this appeal because it remains the case that Scalia's textualist-originalist theory cannot coherently justify what makes a government fair, and if his theory cannot do this then neither can it justify his opposition to the use of a lawmaker's intent as a means of discovering what is legally binding. Therefore, the inconsistency between acceptance (1*F*) and (2*F*) remains, leading us to (3*F*) that Scalia both denies the use of moral considerations, like fairness, yet he uses fairness to justify an acceptance of formalism. Thus, for the third time, Scalia is shown to lack coherent justification in his acceptance system of judicial interpretation due to internal inconsistency.

5 A scalian objection

It may be tempting to argue that Madison, being the "father of the Constitution", is most qualified to understand the meaning behind the Constitution and that, therefore, he can be referenced in judicial decisions by the textualist-originalist. However, this conflicts with Scalia's opposition to intentionalism. As previously argued, a lawmaker's intent holds no sway over what is legally binding for Scalia. Still, Scalia may defend his judicial praxis in a different manner. He might argue that he refers to Madison's extra-legal thinking only to grasp what the averagely intelligent and well-informed person considered the law to be at the time of enactment. Indeed, Scalia does argue this,

> I will consult the writings of some men who happened to be delegates to the Constitutional Convention […] I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was understood (Scalia 1997a: 38).

However, is it true that Madison provides Scalia with an "intelligent and informed" person's perspective and nothing more? If not, then Scalia does indeed possess an inconsistent acceptance system because he breaks with acceptance (1*M*) that extra-legal philosophers cannot be referenced for judicial decision-making.

Although Scalia claims that Madison holds the standard "intelligent and informed" view of the Constitution at its enactment, this is not clear according to the historical record. Since this is not clear according to the historical record, Scalia is not justified in his claim. Firstly, Madison's writings in *The Federalist* were not mere understandings of how the averagely intelligent, well-informed person understood the law because *The Federalist* was not an unbiased, neutral source during the time of the Constitution's enactment. Much beyond this, Madison, along with John Jay, and Alexander Hamilton, sought to *shape* how people perceived the Constitution to advocate for the new national document's adoption in New York as well as in the other states.[8] Madison took the side of the Federalists in the national debate over whether the Constitution should be ratified. Scalia provides no references in *Morrison* to the Anti-Federalists, even though Anti-Federalist persons were "intelligent and informed" on the Constitution's contents too. Ultimately, Scalia's "intelligent and informed" person principle is too vague to be able to discriminate between the use of sources from Federalists and Anti-Federalists, even though he does so in practice.

8 Brock writes, "it was to explain and *justify* the constitution in the important and doubtful state of New York that there appeared, between October 1787 and May 1788, eighty-five anonymous newspaper articles over the signature 'Publius'" (Hamilton et al. 1961: vi, emphasis added).

The Anti-Federalist writer, Brutus, is an example of an "intelligent and informed" person who held opposing constitutional interpretations to Madison during the time of the Constitution's enactment and promulgation. In opposition to Madison, Brutus considered the separation of powers not properly established in the Constitution. He writes that the Senate "will possess a strange mixture of legislative, executive, and judicial powers, which in my opinion will in some cases clash with each other" because the senators, intended to be only part of the legislative branch, will also join "the branch of the executive in the appointment of ambassadors and public ministers, and in the appointment of all other officers not otherwise provided for […]" (Dry and Storing 1985: 190). While Brutus also seeks a separation of powers doctrine to limit the government's concentration of power (Dry and Storing 1985: 191, 217), this leads him to *oppose* those powers invested in the legislative branch by the Constitution. While Madison, in *The Federalist*, argues that the Constitution effectively prevents the concentration of powers with its structuring of government, Brutus is not convinced of this. Therefore, Brutus interprets the words of the Constitution, and its enforcement of the separation of powers, very differently than Madison does. It is unclear upon what textualist-originalist grounds Scalia can justify his appeal to Madison and not Brutus in his *Morrison* dissent when interpreting the Investment Clauses of the Constitution. Furthermore, the editors of *The Anti-Federalist* volume, Storing and Dry, write in a footnote, "Although a system of separation of functions is advocated, there is nothing in Brutus like Publius' [Madison's] discussion of separation of powers in *The Federalist* no. 51 […]" (Dry and Storing 1985: 196).

It is also evident that the Bill of Rights was very important to the Anti-Federalists but generally not so for the Federalists.[9] This can be seen by the fact that the U.S. Bill of Rights was added to the Constitution as a compromise to secure support from the Anti-Federalists, as scholar Levy writes, "the single issue that united Anti-Federalists throughout the country was the lack of a bill of rights" (Levy 1999: 30). In his dissent, when arguing for why the separation of powers doctrine holds "intrinsic value", Scalia writes, "without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours" (Morrison 1988: 697). Putting aside the question of this claim's truth-value,[10] the more immediate question is whether Scalia can make this claim without

9 Madison characterized the business of adding the ten Constitutional amendments as that "nauseous project of amendments" (Levy 1999: 12).

10 See Akhil Amar for a compelling case that the Bill of Rights is not fundamentally different in structure than the Constitution which poses an additional challenge to Scalia's assumption here. Amar writes, "I hope to refute the prevailing notion that the Bill of Rights and the original Constitution represented two very different types of regulatory strategies" (Amar 1991: 1132).

breaking with his acceptance system. Nowhere in the Constitution, or any other U.S. legal text, are there provisions or explanations regarding which parts of the Constitution take precedence over others in significance or effectiveness.

However, Scalia still finds the structuring of the Constitution more important than the ten amendments added following ratification, and he argues for this in his judicial dissent. Scalia further confirms his judicial claim in his public writings. When reflecting on the Constitution, Scalia writes,

> The reason, of course, is that a bill of rights has value only if the other part of the constitution – the part that really 'constitutes' the organs of government – establishes a structure that is likely to preserve, against the ineradicable human lust for power, the liberties that the bill of rights expresses (Scalia and Whelan 2017: 163).

However, when he asserts this idea in a judicial decision, then Scalia's textualist-originalist approach must apply. Yet, it is evident, at the very least, that Scalia does not justify how he can weigh the Bill of Rights' importance against the other parts of the Constitution without parting with acceptance (1*M*). Instead, Scalia departs from a coherent acceptance system and adopts Madisonian philosophical thinking.

6 "Blue-print" objection

John Baker provides an alternative objection to Madisonian Problem:

> Now, this approach may pose a problem for some textualists, because they might say: 'Where is separation of powers even in the Constitution?' There's no such term there […] It doesn't appear in our Constitution. The term doesn't appear because the text is a blueprint; it's not an explanation. Articles I to III begin by assigning to each branch one of the three powers: legislative, executive, or judicial, which collectively manifest the doctrine of the separation of powers. *The Federalist* provides the explanation of the blueprint (Baker 2016: 67).

So, for Baker, the Constitution is only a "blueprint", and thus it requires an explainer, just as any plan might require explanatory supplementation from its author. If Baker is correct, then he has provided an exception for acceptance (1*M*) that allows for acceptance (2*M*) to exist coherently in the same acceptance system as (1*M*). However, Baker's argument is problematic.

The concept of a blueprint is never, to my knowledge, explained by Scalia in his delineations of his textualist-originalism. Scalia explains that his interpretive approach to the Constitution is like his approach to statutory law at least with respect to his originalism, as he writes, "what I look for in the Constitution is precisely what I look for in the statute: the original meaning of the text […]" (Scalia 1997a: 38). However, more importantly than this, Scalia's other relevant

acceptances of opposing intentionalism and extra-legal supplementation of law seem to prevent any legitimate appeal to the blueprint argument.

As was previously argued, Scalia opposes the idea that the lawmaker's intent is what determines the law, writing "it is the *law* that governs, not the intent of the lawmaker" (Scalia 1997a: 17). Moreover, Scalia claims that "the principle that a matter not covered is not covered is so obvious that it seems absurd to recite it" (Scalia and Garner 2012: 93). So, if the Constitution does not cover something, such as the phrase "separation of powers", then how can Scalia's textualist-originalist theory allow for supplementation of what is omitted by means of the blueprint argument? Viewing the Constitution as a blueprint brings into question its very legal nature and purpose. Blueprints can be altered or replaced, as they are non-binding. Moreover, while blueprints may need to be referenced again after a structure is built, they do not prevent the building owner from replacing certain floor plans with others.[11] Lastly, if one resorts to questioning the blueprint's author, does this not clearly make the author's intent authoritative as opposed to the plan itself? For these reasons, the blueprint objection's analogical appeal fails to adequately reconcile acceptances (1*M*) and (2*M*).

7 Robertson's intentionalist objection

Michael Robertson argues that Scalia's textualism is impossible, writing, "when Scalia claims to be attending to syntax and semantics alone, he is misdescribing his practice because the practice he claims to be performing is impossible", (Robertson 2009: 394). Robertson explains that Scalia's approach is misdescribed because Scalia must always resort to authorial intent to discover any "clear conventional [or unconventional] meaning" (Robertson 2009: 390). To be sure, intent matters when interpreting a legal text, as it matters in interpreting any utterance made by a speaker or author.[12] If Michael Robertson is correct in his thesis that Scalia is "deeply confused" (Robertson 2009: 387) regarding his approach to legal interpretation because textualism is impossible, then this paper's previous criticisms of Scalia fall well short of the truth. However, Scalia embraces a type of intention, namely, *semantic intention* (to be demonstrated below) when interpreting the law,

11 That is unless the building owner agreed to a legally binding contract that stated that she must maintain the building plans as they are in the original blueprint. However, the fact that a separate contract would be required to protect the blueprint plans shows that they are not binding on their own. It is also true that one may be *practically restricted* to adhering to blueprint plans to safely alter a building but being *practically restricte*d to a blueprint is different than being *legally bound* to a document. Thank you to Corlett for bringing this point to my attention.

12 See (Grice 1957).

and Robertson does not fairly incorporate several of Scalia's views in his arguments. So, Robertson's arguments do not succeed against Scalia.

Robertson quotes Peter Schank asking how one can know the meaning of the word "cat" without referring to authorial intent.[13] Schank explains that because "cat" has a host of possible meanings, such as meaning different types of felines, as well as different people and objects, one must refer to authorial intent to discover meaning (Robertson 2009: 388). However, the way Robertson sets up his case is inadequate because he never considers Scalia's "Whole-Text Canon". Until Robertson analyzes and counters Scalia's "Whole-Text Canon", it is unclear whether Scalia has or has not already satisfied the need to narrow down word meanings used in texts.[14] In his "Whole-Text Canon", Scalia argues that "the entirety of the document thus provides the context for each of its parts", (Scalia and Garner 2012: 167). Because legal texts sometimes provide detailed definitions and criteria for certain words, and because possible word meanings can be narrowed down by logical and reasonable connection to other words within texts, Robertson's argument that words have multiple possible meanings is not sufficient to imply impossibility in Scalia's textualist approach.[15]

Robertson also mentions that textualism "denies any need to consider nonlinguistic matters, such as purpose behind the text or the intention of the author" (Robertson 2009: 386). However, Scalia does incorporate considerations of purpose in his judicial approach. Scalia explains that "words are given meaning by their context, and context includes the purpose of the text" (Scalia and Garner 2012: 56). Scalia even outlines four detailed rules for deriving purpose from legal texts, stating among other things that "purpose must be defined precisely", that "concrete" purpose is preferred over "abstract" purpose, that purpose "cannot be used to contradict text or to supplement it [legal text]", and that "purpose sheds light only on deciding which of various textually permissible meanings should be adopted" (Scalia and Garner 2012: 56–57). Robertson might counter that he only

13 Decades earlier than Schank and Robertson, Grice provides examples demonstrative of intent's importance (Grice 1957: 377–8, 382).

14 Grice argues that "an utterer is held to convey what is normally conveyed (normally intended to be conveyed), and we require a good reason for accepting that a particular use diverges from the general usage" and that "we tend to refer to the context (linguistic or otherwise) of the utterance" to discover its meaning (Grice 1957: 387). With these arguments, it does not appear that Grice would call Scalia's textualist approach impossible since Scalia uses the context of a whole text to understand the meaning of its parts, and, as will be shown, Scalia does admit to using *semantic intention*.

15 Still, the warning from Solan and Gales is well-taken that "Definitions often differ from one dictionary to another. Differences arise from the fact that publishers have different policies about how many words to include, which kinds of words to include, how many sense of each word to include […]" and more (Solan and Gales 2016: 257). If Robertson provided a more subtle criticism like this one, this author would be in agreement with him.

means "non-linguistic" purpose, but then, it remains unclear why he wishes that purpose be considered only non-linguistically.

When Robertson writes that "a text only exists if it was deliberately produced by an author in order to express a meaning intended by that author. Without authorial intention there is no text at all. Consequently, textualism turns out to be impossible" (Robertson 2009: 387), he equivocates disregard for a thing and the denial of a thing's existence to attack textualist thinking. However, to my knowledge, Scalia never denies that texts must be created by human authors with intentions, nor does Robertson quote Scalia making this claim. While Scalia does disregard certain considerations of intent, he does not deny intent's existence. Denying something's existence and ignoring or disregarding something are two different things.

Ultimately, when Robertson claims that "if one sees the text before him as having a clear conventional meaning, this is not simply because he knows the conventional word usage, but because he also assumes the author *intended to employ those conventions*" (Robertson 2009, 390), he does not prove anything against Scalia's textualism. He merely disagrees with it. In response to criticism from Dworkin, Scalia writes, "I agree with the distinction that Professor Dworkin draws in part 1 of his Comment, between what he calls 'semantic intention' and the concrete expectations of lawgivers. It is indeed *the former rather than the latter that I follow* […] so far Professor Dworkin and I are in accord: *we both follow* '*semantic intention*'" (Scalia 1997b: 144, emphasis added). So, Scalia embraces the use of intent, even if only a restricted kind of intent. For all these reasons, Robertson's impossibility critique is inconclusive against Scalia.[16]

On top of all this, it is worth adding that analysis by Aalto-Heinila renders intentionalism, of at least certain forms, itself incoherent. Aalto-Heinila shows with "some Wittengensteinian reminders, this type of intentionalism is an incoherent

16 Simply because Robertson's attempt fails, does not clear Scalia's judicial approach from impossibility. Corlett offers a compelling alternative critique to originalism that applies to both textualist-originalism and intentionalist-originalism. In his analysis of Benjamin Cardozo's approach to judicial interpretation, Corlett explains that "for Cardozo […] where the law is silent, judges *cannot* be" (Corlett 2009: 37). Then, when analyzing the Dworkinian approach to judicial interpretation, Corlett writes "Dworkin defines a hard case as one in which no settled law or rule dictates a judicial decision one way or another because either (a) legislative intent is uncertain due to vagueness or ambiguity or (b) it is a case of first impression" (Corlett 2009: 43). Corlett argues that Cardozo and Dworkin acknowledged that their theories of judicial interpretation had to account for hard cases where the law is silent, and the law always has the possibility of falling short because legislators have limited perspectives and are fallible. However, Scalia's originalism offers no solution to the problem of a hard case, except that his solution is to assert that judges ought never to decide on matters not covered by the law (see his "Omitted-case Canon" above). Is it practically possible for a society's judiciary to ignore all cases of first impression? If not impossible, this at least holds potentially disastrous consequences.

position" with the compelling point that even intentionalists require words to have fixed meaning to discover any intentionality in such writing in the first place (Aalto-Heinila 2016: 205–207). Insofar as any intentionalist seeks to offer a philosophically and legally viable alternative to textualism, it is not enough to simply object to textualist positions. In the broader selection process regarding any theoretical approach, including those of legal interpretation, one might choose to subscribe to the reasonable and plausible Rawlsian method of *reflective equilibrium*,[17] weighing the strengths and weaknesses of *all* the philosophical-legal approaches to interpretation presented to us. This can be done while acknowledging that no approach is perfect without any risk of incoherence. So, with these considerations in mind, intentionalists like Robertson still have much work to do.

8 Democracy objection

Because it is possible to interpret Scalia as using "democratic government" and "fair government" as synonyms, some might argue that Scalia provides a non-moral definition for what makes a fair government. Again, Scalia writes, "it is simply incompatible with *democratic government* or indeed, even with *fair government* […]" (Scalia 1997a: 17, emphasis added). If Scalia uses fair government and democratic government interchangeably, then one could argue that his definition of fairness is not problematic because it is less a moral consideration than simply an approval of a certain type of political system, namely, the system of democracy. However, by deferring Scalia's definition of fairness to the concept of democracy, one only begs the question of fairness because it is not self-evident how democracy is fair, and Scalia must still use fairness in *some way* to justify his acceptance of formalism. Furthermore, Dworkin shows that democracy is not a morally empty concept. True democracy is one that provides moral membership to all members which demonstrates further that Scalia cannot escape the Fairness Problem by deferring his concept of fairness to the democratic system.

Dworkin considers the strongest case he can for a conception of democracy that avoids moral considerations. Dworkin calls this conception the *majoritarian view*. Dworkin argues that the majoritarian view of democracy "insists that political procedures should be designed so that […] the decision that is reached is the decision that a majority or plurality of citizens favors […]" (Dworkin 2003: 241). In this manner, Scalia could argue that democracy is purely formalistic and avoids moral considerations. Yet, "most people who assume the majoritarian premise […] accept

17 See John Rawls's *A Theory of Justice: Revised Edition* for an excellent description of such an analytical process.

that on some occasion the will of the majority should *not* govern", says Dworkin (Dworkin 2003: 242). Democracy as the will of the majority has its limits because a majority may vote to oppress a minority, depriving the minority of their democratic membership and thus destroying the democracy itself. This leads Dworkin to propose an alternative view of democracy that does not pretend to deny moral considerations. Dworkin's conception of democracy hinges upon the requirement of "moral membership", which means that each individual member is guaranteed "a *part* in any collective decision, a *stake* in it, and *independence* from it" (Dworkin 2003: 248, emphasis in original). So, even if Dworkin's alternative formulation of democracy is unappealing to Scalia's acceptance system, it remains to be seen how Scalia can formulate a desirable conception of democracy devoid of moral considerations.[18] For this reason, the Democracy Objection does not save Scalia's acceptance system from the Fairness Problem.

9 Conclusions

This paper delineated three problems in Scalia's acceptance system of judicial interpretation. The method of critique throughout was informed by the style, disposition, and aim of the Lehrerian critic, who seeks to find inconsistency and contradiction within the acceptance systems of others. Additionally, the work of Hobbes and Feinberg provided lines of thinking crucial for elucidating the Promulgation Problem and the Fairness Problem respectively. It should be conceded that taking the position of the critic is often a much more advantageous position to be in than that of the defender of her acceptance system; to poke holes in arguments is one thing, but to propound and defend coherent theories is quite another. Still, as Lehrer advises, with "the agnoiology of some skeptics" being "closer to the truth than the epistemology of many dogmatists" (Lehrer 2000: 213), "she [the skeptic] is the touchstone of sound epistemology and merits our

18 While Scalia does not explicitly affirm his support of the majoritarian premise, his writings imply this support. Consider when Scalia writes, "the legislative power is the power to make laws, not the power to make legislators. It is nondelegable", meaning that only the legislature can legitimately compose law (Scalia 1997a, 35). Also, see where Scalia denounces common-law practice because it turns judges into "kings"; the implication here is that judges are kings because they are not elected by the people and thus are not accountable to the people, *at least in the majoritarian conception of democracy*; he writes, "it [the first year of law school] consists in playing common-law judge, which in turn consists of playing king – devising, out of the brilliance of one's own mind, those laws that ought to govern mankind" (Scalia 1997a, 7). Even if one is not convinced that Scalia supports the majoritarian premise, it remains unclear how Scalia holds a conception of democracy devoid of moral considerations like fairness.

conscientious regard" (Lehrer 2000: 230). Scalia's judicial approach offers many important contributions to our ever-growing understanding of judicial interpretation. However, to those who seek a coherently justified acceptance system, amendments must be made to Scalia's version of textualism-originalism before it can be plausibly embraced by any judge.

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