

REVIEW OF STEVEN D. SMITH'S *LAW'S QUANDARY*

Antonin Scalia^{*}

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Steven Smith takes us on a lively, thought-provoking romp through the philosophy of law. Like most romps, it has no destination, but the experience is worth it.

Although Smith protests at the outset of *Law's Quandary* that he is "a law professor, not a metaphysician (or even a philosopher)," he cannot honestly be absolved of that sin. He is, after all, co-director of the Institute for Law and Philosophy at the University of San Diego, and he displays an impressive familiarity with the scholarship, from ancient to modern, bearing upon the philosophy of law. By the time this book ends, it has, with a minimum of cant and a maximum of wit, plausibly consigned the modern part of that scholarship to error (or, at least, incomprehensibility)—from Holmes to Pound, Llewellyn to Dworkin, Posner to Bork (and Scalia, honored as I am to be condemned in such eminent philosophical company), with many others in-between. Even Plato, it develops, leaves much to be desired. The only philosophers to survive Smith's critical scrutiny are Socrates (because he, like Smith himself, did not propose a solution but only called attention to a problem) and what Smith calls the "classical school" of legal philosophy, stretching from Aquinas through Coke, Blackstone, and Story (because that school, unlike all the others, had a coherent theory of law, though it unfortunately rested upon "theistic metaphysics").

Early on in its analysis, *Law's Quandary* sets forth three "ontological inventories"—three categories describing what we in twenty-first-century America "believe to be real": everyday experience, science, and religion. The last is excluded from the book's ensuing analysis because of the "norm prescribing that religious beliefs are inadmissible in academic explanations." Law's quandary, to which the title of the book refers, is this:

Since at least the time of Holmes, lawyers and legal thinkers have scoffed at the notion that "the law" exists in any substantial sense or that it is not reducible into our discourse and practices. Law is not a "brooding omnipresence in the sky."

^{*} Antonin Scalia is an associate justice on the United States Supreme Court.

We have rejected any such conception of law . . . because we perceive, correctly, that our ontological inventories (or at least those that prevail in most public and academic settings) could not provide any intelligible account of . . . this "preexisting thing called 'The Law.'" At the same time, . . . [there is] cogent evidence suggesting that we still do believe in "the law." . . . Our actual practices seem pervasively to presuppose some such law: our practices at least potentially might make sense on the assumption that such a law exists, and they look puzzling or awkward or embarrassing without the assumption.

The practices to which this passage alludes include the retroactivity of judicial decisions, even novel or unexpected ones. We apply the new rule that those decisions announce to conduct that occurred before the decisions were rendered. This makes sense on the classical view that judicial decisions merely "discover" the law but not on the view that they *make* the law.

Similarly, we have a practice of relying upon judicial precedent (so-called *stare decisis*), which is no less extensive post-Holmes than pre-Holmes. That made sense in a legal system that regarded judicial opinions as "evidence" of what "the law" is. It makes no sense in a legal system that regards the judicial opinion *itself* as "the law," any more than it would make sense to bind today's legislature to the laws adopted in the past.

And finally, the fact that the "holding" of a judicial opinion—the portion of its text or the aspect of its disposition that binds later courts—is almost infinitely expandable or contractable, ranging from the mere prescription that these particular facts produce this particular result to the broad "rationale" expressed by the court to justify that prescription. This is an inconvenience, perhaps, but not a contradiction in a system that regards judicial opinions as mere "evidence" of "the law"; in a system in which the judicial opinion *is* the law it produces law that is virtually lawless.

Law's quandary, then, is that we believe like legal realists but act as though there were indeed some omnipresent, overarching law. Smith proceeds to discuss why the broad variety of twentieth-century jurisprudential movements—sociological jurisprudence, legal realism, legal process, law and policy (including law and economics), law and society, law and philosophy, critical legal studies, law and literature, feminist jurisprudence, critical race theory, legal pragmatism and, oh yes, textualism—try but fail to resolve this quandary, try but fail to explain "how the law makes sense without 'the law.'"

Some of these movements rely upon one or another version of so-called "reader-response" theory, which in its purest form holds that the

meaning of words is what they convey to the particular reader. That is conclusively enough refuted as a viable theory for law, Smith thinks (or for anything else, I think), by the consideration that “every reading would be as valid as every other reading.” Other jurisprudential movements require reference to a real or hypothesized author; Smith agrees this is necessary in theory, but finds none of the leading candidates for authorship acceptable. The actual legislators often intended conflicting meanings, and often had no intent at all on the particular question at issue. The hypothetical “normal speaker of English” may serve for “some of law’s more modest . . . functions,” but “has no apparent qualification to perform law’s more ambitious functions,” such as “establishing social policy” or resolving “high-level disputes.” As for a hypothetical author “wiser and more articulate than we are”: If he is indeed that, then we cannot know his mind, and we will merely “project onto him” our own intentions.

As interesting as Smith’s analysis is, it essentially addresses a legal system that is now barely extant, the system that Holmes wrote about: the common law. That was a system in which there was little legislation, and in which judges *created* the law of crimes, of torts, of agency, of contracts, of property, of family and inheritance. And just as theories such as the Divine Right of Kings were necessary to justify the power of monarchs to make law through edicts, some theory was necessary to justify the power of judges (as agents of the King) to make law through common-law adjudication. That theory was the “brooding omnipresence” of an unwritten law that the judges merely “discovered.”

But democracy has overtaken all that. Modern governments, or modern governments in the West at least, are thought to derive their authority from the consent of the governed, and the laws they prescribe are enacted by the people’s representatives. Such a system is quite incompatible with the making (or the “finding”) of law by judges—and most especially by unelected judges. Even in state courts, it is a rare case that does not involve interpretation of an enacted text. And federal courts have, since the decision of *Erie R.R. v. Tomkins* in 1939, completely abjured common-law powers except in a few limited fields such as admiralty; they do not pretend to have the power either to “find” or to “make” a law unevidenced by enacted text or (in cases coming within their diversity jurisdiction) by the text of state judicial decisions.

The contradictions that Smith finds in a system of common-law-*sans*-brooding-omnipresence do not exist in a system of enacted law, properly applied. It is entirely logical for interpretation of an enacted text to be retroactive—applicable to conduct that occurred before the interpretation (but not before the enactment)—since the text *always* meant what the court said, just as in the pre-Holmesian system the

brooding omnipresence had always contained what the court “discovered.” As for giving precedential effect to prior decisions (*stare decisis*), that is merely an administrative and social convenience: Courts do not have the time to reconsider every legal issue anew, and citizens cannot confidently plan their actions if what the Supreme Court has said a statute means today is not in all probability what the Supreme Court will say it means tomorrow. (Some modern systems, of course, have not thought this administrative and social convenience worth the trouble, and, in principle at least, forgo the doctrine of *stare decisis*.) And since it is just an administrative and social convenience, the doctrine of *stare decisis* is not applied rigidly, as it used to be at common law. As for the fact that the “holding” of a case is difficult to determine: that poses no problem in principle, since the case is not the law but merely an interpretation of the law. Its indeterminacy may lessen the administrative and social convenience of *stare decisis*, but does not contradict any premise upon which the law rests.

I have said that the contradictions do not exist in a system of enacted law *properly applied*, because there are means of converting democratically enacted law (or democratically ratified constitutional provisions) into a sort of common law prescribable by judges. We have done this with the federal Constitution. One such means is simply reading text to say what it does not say—so that the assurance that no person shall be deprived of life, liberty, or property without due process of law becomes an assurance that fundamental liberties shall not be eliminated; of course, it is the judges who get to decide, in common-law fashion, what liberties are fundamental.

Another means consists of asserting that a text does not retain the meaning it had when it was adopted but, rather, changes meaning to conform with current practices, or current attitudes, or (as the Supreme Court has explicitly said with regard to the Eighth Amendment’s proscription of cruel and unusual punishment) whatever a majority of the justices thinks best. Thus interpreted, the Equal Protection Clause, for example, which at the time of its enactment plainly was understood not to prohibit a state from restricting marriage to persons of opposite sex, could now contain that prohibition. Depends on what the judges think. The constitutional “questions” that Smith says conventional legal discourse does not really answer—whether states can criminalize abortion, whether faith-based initiatives are permissible, whether public universities can adopt affirmative-action programs, whether a state military college can admit only men, whether there is a right to assisted suicide—are all questions that only arise if text is distorted or text is regarded as having an evolving meaning.

The portion of Smith's book I least understand—or most disagree with—is the assertion, upon which a regrettably large portion of the analysis depends, that it is a “basic ontological proposition that persons, not objects, have the property of being able to mean.” “Textual meaning,” Smith says, “must be identified with the semantic intentions of *an author*—and . . . without an at least tacit reference to an author we would not have a meaningful text at all, but rather a set of meaningless marks or sounds.” “Legal meaning depends on the (semantic) intentions of an author.”

To prove his point, Smith recounts a hypothetical case devised by Paul Campos:

While walking in the desert near the border between the United States and Mexico, you come across marks in the sand forming the figures “REAL,” and you wonder what these marks mean. Your first step will be to guess whether the marks were made by an English-speaking or Spanish-speaking agent. If you think the marks were made by an English speaker, you probably will interpret them to mean something like “real” in the sense of “actual” or “existing.” If you suppose instead that the marks were made by someone speaking Spanish, then you will understand them to mean something like the English term “royal.” But if you think the marks were made by no one, and were instead simply the fortuitous effect of wind on the desert sand, then you will not suppose that the marks actually mean anything at all; they are merely a strange accident devoid of meaning.

The example is inapt because it assumes a reader of the symbol who functions under two different symbolic conventions, English and Spanish. But when we approach the text of a statute or Constitution, we know what linguistic convention is in play. Try this hypothetical instead: Two persons who speak only English see sculpted in the desert sand the words “LEAVE HERE OR DIE.” It may well be that the words were the fortuitous effect of wind, but the message they convey is clear, and I think our subjects would not gamble on the fortuity.

Smith confuses, it seems to me, the question whether words convey a concept from one intelligent mind to another (communication) with the question whether words produce a concept in the person who reads or hears them (meaning). The bridegroom who says “I do,” intending by that expression to mean “I do not,” has not succeeded in communicating his intent; but what he has said unquestionably *means* that he consents to marriage. As my desert example demonstrates, symbols (such as words) can convey meaning even if there is no intelligent author at all. If the ringing of an alarm bell has been established, in a particular building, as

the conventional signal that the building must be evacuated, it will convey that meaning even if it is activated by a monkey. And to a society in which the conventional means of communication is sixteenth-century English, *The Merchant of Venice* will be *The Merchant of Venice* even if it has been typed accidentally by a thousand monkeys randomly striking keys.

Smith claims his assertion that "legal meaning depends on the (semantic) intentions of an author" is "a modest and commonsensical claim." It strikes me as an extravagant and nonsensical one. That is why Humpty Dumpty's statement of the claim ("When *I* use a word it means just what *I* choose it to mean—neither more nor less") has always been regarded—by all except Carroll's game-playing Logicians—as hilarious nonsense. Alice and I believe that words, like other conventional symbols, do convey meaning, an objective meaning, regardless of what their author "intends" them to mean—unless, of course, the text announces that it is departing from conventional meaning ("black shall mean white").

What is needed for a symbol to convey meaning is not an intelligent author, but a conventional understanding on the part of the readers or hearers that certain signs or certain sounds represent certain concepts. In the case of legal texts, we do not always know the authors, and when we do the authors are often numerous and may *intend* to attach various meanings to their composite handiwork. But we know when and where the words were promulgated, and thus we can ordinarily tell without the slightest difficulty what they meant to those who read or heard them.

Of course, even if I could persuade Steven Smith that words do have meaning apart from their author, he would still reject textualism—for the same reason that he rejects the positing of a hypothetical author who is "the normal speaker of English": Merely giving English words their normal meaning would not enable law to perform its "more ambitious functions," such as "establishing social policy."

But in a democracy, it is not the function of law to establish any more social policy than what is fairly expressed by legislation, enacted through prescribed democratic procedures. It troubles Smith, but does not at all trouble me—in fact, it pleases me—that giving the words of the Constitution their normal meaning would "expel from the domain of legal issues . . . most of the constitutional disputes that capture our attention," such as "Can a macho military educational institution dedicated to what is euphemistically called the 'adversative' method admit only men? Is there a right to abortion? Or to the assistance of a physician in ending one's life?" If we should read English as English, Smith bemoans, "these questions would seemingly all have received the same answer: 'No law on that one.'"

That is precisely the answer they should have received: The federal Constitution says nothing on these subjects, which are therefore left to be governed by state law. Smith's response is revealing: "We have not been content with this sort of modesty in our law." The antecedent of the pronoun is unspecified, but I fancy it refers to the legal academic community which establishes the permissible boundaries for Smith's thinking, or at least his writing. Many Americans outside that community *yearn* for this sort of modesty. Indeed, it was something of an issue in the last election. Smith's complaint is that the judges will not have the degree of power "we" would like them to have. Long live the common law!

If the notion that language means whatever its author intends it to mean is strange, stranger still is the notion that the author need not be a *real* author but can be a *hypothetical* one. This portion of Smith's discussion brings to mind the doctrine of "hypothetical jurisdiction" invented by the United States Court of Appeals for the Ninth Circuit. Where the question of the court's jurisdiction to decide the case was difficult, but the merits question presented by the case was quite simple (and produced a denial of relief just as a decision of no jurisdiction would), the court would simply *hypothesize* jurisdiction *and go on to decide the merits*.

The Supreme Court put an end to this doctrine with the statement (among others) that hypothetical jurisdiction can support nothing but a hypothetical judgment. So also, it seems to me, with law whose meaning depends upon a hypothetical author. The problem is not simply, as Smith thinks, that we cannot posit an *adequate* hypothetical author. It is that, even if we could, the law that would result would be a hypothetical law (whose violation would presumably be punishable by hypothetical incarceration).

If, as Smith contends, a hypothetical author is not up to the job of resolving law's quandary, neither, it turns out, is Smith himself. His book describes what he believes to be the quandary but does not resolve it, examining and rejecting various solutions—except, of course, the classical one, which is out of bounds because it violates the "norm prescribing that religious beliefs are inadmissible in academic explanations." The book's last paragraph acknowledges that "perplexity is not a resting place" but concludes that "we would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of."

Hmmm. Richer *realities* and greater *powers* than our *modern* philosophies have dreamed of. Could there be a subversive subtext here? Why does Smith bring in at the outset of his book a third ontological category—religion—which he immediately disclaims, not because it is

wrong, necessarily, but because it violates academic ground-rules? And why does his book repeatedly point out how the “classical school”—premised, alas, upon religion—*was* coherent where modern jurisprudence is not? And why does his penultimate chapter describe at length (though with the academically correct acknowledgment that it is “foreign to prevailing ontological assumptions”) the work of Joseph Vining, which speaks of a hypothetical author who “would need in some sense to be actually *present*,” and “to display qualities of caring, and of mindfulness”? Lawyers, Vining says, either “must believe what they do with legislation is often foolish and deceptive; or they do believe and confess a belief in *an informing spirit* in the legislated words that is *beyond individual legislators*.” Holy cow! Could it be that . . . ?

Steven Smith is a diligent observer of academic correctness. This is evident in the fact that his book has at least as many *shes* as *hes* (“So the hiring partner said, ‘I’ll call you,’ did she?”)—excluding, of course, those pronouns referring to antecedent proper nouns that are masculine, for which Smith can hardly be blamed. One would never expect Smith to violate the “norm prescribing that religious beliefs are inadmissible in academic explanations.” Vining (with appropriate disclaimer) is about as far as one can go without offending the proprieties. Could it be, however, that Smith is inviting, tempting, seducing his fellow academics to *consider* the theological way out of the quandary—the way that seemed to work for the classical school?

As one reaches the end of the book, after reading Vining’s just-short-of-theological imaginings followed by Smith’s acknowledgment of “richer realities and greater powers in the universe,” he (she?) is sorely tempted to leap up and cry out, “Say it, man! Say it! Say the G-word! G-G-G-G-God!” Surely even academics can accept, as a hypothetical author, a *hypothetical* God! Textualists, being content with a “modest” judicial role, do not have to call in the Almighty to eliminate their philosophical confusion. But Smith may be right that a more ambitious judicial approach demands what might be called a *deus ex hypothesi*.