

IN HONOR OF A SIMPLE-MINDED
ORIGINALIST

**MORAL PUZZLES AND LEGAL PERPLEXITIES:
ESSAYS ON THE INFLUENCE OF LARRY
ALEXANDER.** Edited by Heidi M. Hurd.¹ Cambridge
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In May, 2017 the Yale Law School's Center for Law and Philosophy, together with the University of Illinois' Program in Law and Philosophy, co-hosted a conference at the alma mater of Larry Alexander, Yale Law School. The conference brought together eminent legal scholars in the areas of criminal law theory, constitutional law theory, jurisprudence and moral philosophy. They were there to honor Professor Larry Alexander of the University of San Diego School of Law, and the result of that celebratory conference, or *Festschrift* (in these more globalist times), is this very recently published Cambridge University Press book. And my, oh my, it is a very good book indeed. I mean that not just in the sense of it being good compared to the usual book-length edited collection of two dozen odd essays that have to be stuffed between two covers. I mean it is a really good book even by the standards of a well-crafted, sole-authored monograph. The editor, Heidi Hurd, has done an excellent job of fitting together into a coherent whole all 22 contributing authors' essays or chapters, together with her own introduction and a last-word-reply-to-everyone final say by Alexander himself.

The book has four Parts, namely (and in order) "Puzzles in Criminal Law," "Problems in Constitutional Law," "Perplexities in Jurisprudence," and "Paradoxes in Moral Philosophy." Given the usual interests of the readers of this journal, I will focus on just

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the middle two of those Parts, which in various ways elucidate important issues that bear on constitutional law—though, let me here say that any readers with more catholic tastes will find fascinating the Part I chapters on such things as desert-based punishment, whether failed criminal attempts are less culpable than those that succeed, and the best understanding of duress (with Alexander’s end-of-book replies) together with the Part IV chapters that raise such topics as threshold deontology and the difficulty in theorizing wrongful discrimination (with Alexander at the end doubting that any account of discrimination’s wrongfulness can succeed and defending deontology with thresholds). I suppose the prefatory point is that Alexander is a man of wide-ranging interests in law who brings a powerful analytical mind to bear on all sorts of theoretical legal issues. You learn from him even when you ultimately disagree with him (as this reviewer does as regards, say, the comparative attractions of consequentialism and deontology). Surely that’s one of the highest compliments one can receive.

In what follows, however, I will cleave to the book’s Parts II and III, the constitutional law-related contributions. And most obviously that brings me to the question of constitutional interpretation because Larry Alexander is a leading proponent of originalism, of the old school (and these days very minority) intentionalist variety. As a self-described “simple-minded originalist,”³ Alexander embraces his position firstly as a thesis about how language is used, secondly as one about the nature of all interpretation, and thirdly in normative terms about why in interpreting we *should* defer to the intended meanings of the authors of legal texts—so it is all three for Alexander, semantic, pragmatic and normative. In fact, in his end-of-book reply Alexander lays out an abbreviated step-by-step account of his position, one which I am here further condensing:

1. A text . . . is a set of symbols . . . that is meant by its

3. Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM* 87 (Grant Huscroft & Bradley W. Miller eds., 2011); see also Larry Alexander, *Telepathic Law*, 27 *CONST. COMMENT.* 139 (2010) (describing Originalist interpretation akin to telepathic communication); Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539 (2013) (arguing ignoring authorial intent undermines the endeavour the drafter undertook); Larry Alexander & Saikrishna Prakash, “*Is that English You’re Speaking?*” *Some Arguments for the Primacy of Intent in Interpretation*, 41 *SAN DIEGO L. REV.* 967 (2004) (distinguishing intentionalist from textualist interpretations of law).

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producer—the author(s)—to communicate a message to the intended audience

2. If there is no author—no person who produced the marks, sounds, etc. in order to convey a message—we do not have a text. The marks . . . may be a sign of something, much as smoke is a sign of fire Marks that might look like symbols, when we understand they are not—think of cloud formations that resemble the letters C-A-T—render certain questions nonsensical that would make sense were there an author
3. Texts are individuated by the messages their authors are intending to convey thereby. That is why the text of the US Constitution in Spanish can be the same as its text in English
4. When our interest is in the actual authors of a text and the message they intended to convey thereby, we are acting as “originalists.” . . .
5. The “conventional meanings” of words—what meaning dictionaries would assign them—are merely the meanings most people at a particular time and in a particular locale would intend to convey by those words. These meanings are therefore time and place bound, and can and do change over time and from place to place. But authors may, and often do, employ unconventional meanings. . . . If their intended audience understands [what the authors are unconventionally doing], then the authors can be successful in conveying their message to their intended audience
6. Authors rely on implicatures and implicitures in conveying their intended messages. They often mean more, and sometimes less, than they actually say. . . .
...
7. [Turning now explicitly to interpreting legal texts:] In whomever the authority to enact legal norms resides . . . then, when they decide which norms to enact and attempt to communicate those norms through a written or oral text, the job of the intended audience is to figure out what norms the authors enacted and intended to communicate. If the audience chooses legal norms that differ from those the authors chose to enact and communicate, the authority of the authors is undermined. Only originalism is authority-

preserving.

8. Any departure from originalism either transfers authority from the authors to someone else—for example, to judges—or to some mindless process, such as the process by which the meanings of words change over time
9. . . . [N]onoriginalist interpretation really represents a transfer of authority . . . from one body or person to another or to some mindless (nonplanning) process. . . .
10. Interpretation of texts is an empirical, not a normative, endeavor. The interpreter wants to know what norm the authorities intended to communicate through their text. It is often quite difficult to answer the interpreter’s question. The authorities may have expressed their intended norm poorly. Or the text may be old or ambiguous, and the context of its promulgation unclear or unknown. But, however difficult interpretation may be, it is unavoidable if the norms we are to be governed by are the norms those with authority to govern us intended.
11. Finally, interpretation must deal with the fact that some legal authorities are multimember bodies, and sometimes bicameral multimember bodies, and can enact legal norms only with the concurrence of majorities or supermajorities. What is *the* intended meaning of a legal text when the members who voted to enact it did not intend to convey the same meanings and, hence, the same norms by it? This is the aggregation problem. In my view, it cannot be avoided. And when there is no shared meaning that the requisite number of norm enactors endorse, then the text they enact is legal gibberish. . . . Perhaps that unfortunate result is rare. Perhaps it can be avoided by having those who vote for the text accept the meaning intended by some person or committee without having that meaning in mind themselves. I see no way, however, to make the aggregation problem disappear without at the same time undermining the authority of those who are supposed to possess it. (pp. 415-418).

That, at its core, is the strand of originalism often dubbed Original Intended Meaning or “OIM” originalism. Larry

Alexander, along with Richard Kay⁴ and (in his later works) Stanley Fish,⁵ are probably its best-known and most insightful proponents. At any rate, this OIM or “old originalist” camp is a small one, certainly much smaller than the other main strand of originalism, which most often travels under the moniker Original Public Meaning or “OPM” or even new originalism. And that takes us back to Part II of the book, because four of the seven chapters in this Part are by contributors who, in one way or another, attack OIM (or in Alexander’s own self-descriptive terms “simple-minded”) originalism. Connie Rosati (chapter nine), Fred Schauer (chapter twelve), Larry Solum (chapter eleven) and Jeff Goldsworthy (chapter ten) all take issue with Alexander’s OIM strand of originalism. Rosati, the most sweeping of the four in terms of her skepticism of the Alexander position, has the least seeming sympathy for any sort of originalist approach to interpretation. Though she nowhere in the chapter lays her own cards on the table, the reader will bet she is some sort of “Living Constitution” or possibly Dworkinian adherent. Be that as it may, she proceeds to catalogue a bevy of potential deficiencies as regards the OIM position. And yet, in his concluding response at book’s end, I think Alexander convincingly answers all of Rosati’s points—that his position is a semantic, pragmatic and normative one, all three; that OPM originalists also seek the author’s intended meaning, they just do so by restricting themselves to the publicly available evidence at the time of promulgation; that, yes, it is coherent to talk of “sentence meaning,” but that is nothing more than a shorthand for “what most speakers (authors) at a particular time and place would mean had they uttered (written) the text in question”⁶ (p. 419); and that the group intentions or aggregation problem is indeed a real one, but that it “is one not avoided by public meaning originalists.” (p. 419).

Schauer’s chapter is bifurcated, though both halves focus on

4. See, e.g., Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) (arguing for interpreters’ suspension of their own views in interpreting the Constitution); Richard Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1 (2017) (noting that intentionalism will lead to clearer outcomes in constitutional arguments).

5. See Stanley Fish, *The Intentionalist Thesis Once More*, in CHALLENGE, *supra* note 3, at 99 (arguing the intentionalism elicits the true meaning of constitutional text).

6. Indeed, Alexander goes on to note that “we can always ask what a text would mean had it been authored by someone other than its actual author.” (p. 419).

the lawmaker's intentions. The first half looks at Alexander's freedom of speech writings,⁷ Schauer here agreeing with Alexander that "the focus in evaluating the constitutionality of some speech-related state action or rule must be on governmental intent"—Is it seeking to limit speech based on its content only? and not on the effect of a governmental action" (p. 209). So in a world where virtually all governmental actions will have direct or indirect effects on who can say what, and when neither speaker's intent nor the consequences of the government action ought to be central considerations of constitutionality; the focus "must be on *why* government is taking the action under challenge" (p. 209). Schauer is very interesting here in setting out, and agreeing with, Alexander's position. He even moots the notion that "we might understand constitutional rights and constitutional adjudication generally as being more about disabling government than about empowering citizens ...[from which it is but a short step] to the conclusion that governmental motives ought to be the touchstone of the inquiry [not just as regards freedom of speech, but for freedom of religion, equal protection, and more.]" (pp. 212-213).

However, in the second half of Schauer's chapter, when he turns to the persuasiveness or otherwise of OIM, the agreement with Alexander goes out the window. Well, in fact, the two thinkers *do agree* that the core function of law—in a world of well-meaning people who unavoidably have reasonable moral and political disagreements amongst themselves—is to deliver a settlement of those disagreements, a sort of second-best solution in a world where that is as good as can ever be on offer. (pp. 218-219). Where they then most noticeably differ, and it flows from that agreed premise, is on whether 'going with the conventional meaning and forget about intended meaning, even when the two conflict'—what Alexander describes as "mindless law" (p. 425)—provides a desirable settlement function. Schauer says: "Or, to put it more bluntly, conventional meaning textualism might suck, but at some times and in some places and on some subjects it might

7. As does Brian Leiter in chapter seven, who agrees with Alexander that in essence the case for protecting speech boils down to a distrust of government. Both recognize that the content of speech can cause serious harms. But in any cost-benefit calculation, the dangers of handing too much regulatory say to those currently in power is such that you are better off [in Alexander's words] with "a heavy judicial thumb on the scale against the validity of certain types of regulations of the content of expression." (p. 427, Leiter's formulation being on p. 128) Leiter then takes the discussion into the realm of academic freedom, where again he and Alexander agree. (p. 427).

suck less than original intent originalism” (p. 219). Alexander replies that he “think[s] mindless law should be an anathema. The vision it conjures is of lawmakers choosing symbols but then some mindless process determining what they shall mean. . . . [like] consulting the entrails of an ox or the oracle of Delphi. For all the many imperfections of human lawmakers and of those seeking to glean the lawmakers’ intended meanings, I think we should prefer them to the mindlessness of non-existent⁸ conventional meanings.” (p. 425).

I side with Alexander on this issue of whether conventional meaning interpretation ought to act as the settlement function; it should not. And I side with Alexander, not just for the reasons he gives above, which boil down to the persuasive claim that a locked-in commitment to doing one’s best to find intended meaning will suck a lot less—on average, over time—than just applying dictionary definitions (or however it is you think conventional meaning can be cashed out), even when you know for certain no one intended them. I also suspect the Schauer defence of conventional meaning textualism, whether he intends it to be or not, can function as a sort of disguised vehicle for handing more power to those at the point-of-application of laws, the judges. Conventional meanings absent actual human intentions, at the very least, will deliver a lot more uncertainty which some living being today will have to reduce, remove or resolve. Likewise this textualism will force answers we know to be wrong. (When Snoop Dog describes something as “bad,” are we really going to insist, everywhere and always, that the evaluation is an unfavorable one?) Likewise again, when conventional meanings suck more than answers delivered by some other approach, do we not suspect, all of us, that the judges will abandon conventionalism? And, anyway, what sucks for one of today’s judges might not suck for one of today’s voters—so who made the judge the effective lawgiver, which he or she by default becomes when imposing the mindless law? And why should I as that voter feel there is any legitimacy to such judge-made or made-by-no-one law, to the extent of obeying it? At any rate, read the debate between these two deep thinkers, and sometime collaborators, and decide for yourself on this one.

8. They are “non-existent” given Alexander’s point 2 above— i.e., his denial that marks on paper have any meaning, conventional or otherwise, “in the absence of the assumption of some author who means something by them.” (p. 424).

That brings me to Larry Solum and Jeff Goldsworthy, both of whom are themselves originalists. So here we move into the intra-family debates, where these two contributors' positions are in agreement with the Alexandrian one vastly more often than not, and where their competing interpretive approaches will overwhelmingly deliver the same outcomes as Alexander's. We are talking about disagreements at the outer margins of the known originalist solar system, in other words. Solum may well be America's leading OPM originalist, certainly he is one of them, and Goldsworthy is Australia's best known originalist, bar none. Start with Solum, who helpfully situates OIM within the wider originalist family (p. 191) after having noted that "[i]ntentions are essential for meaning, but this does not entail the conclusion that the meaning of a text must be the meaning the author intended to communicate." (p. 190). When I come to Goldsworthy in a moment, I will come back to this question of the meaning of "meaning," but Solum's idea is that a text can mean more than what its author(s) intended—as the "existence of conventional semantic meanings is entirely consistent with the notion that intentions must play a role in the production of meaning." (p. 196). In other words, conventional meanings are a function of intended meanings, which is why Solum's OPM strand and Alexander's OIM strand of originalism, "are likely to produce identical [interpretive] results except in cases where there was a failure of constitutional communication." (p. 192). Authors' intentions are crucial to both, it is just that Solum wants to stake out the position, in contrast to Alexander, that "conventional semantic meanings are not identical with or reducible to individual communicative intentions, nor are they supervenient on such meanings." (p. 197), so that the "public meaning of a constitutional provision is the meaning that the provision had for the public at the time the provision was framed and ratified." (p. 199). Hence, under the Solum framework, you potentially have public meaning as well as author's meaning, and while "author's meaning and public meaning may differ, there are good reasons to believe that they will converge most (or almost all) of the time." (p. 199). Still, "there are situations where the two meanings can diverge." (p. 199). When they do, says Solum, "a choice must be made" (p.200), with the moniker OPM being a big clue as to how he thinks you should choose. There are some even more minor quibbles between Solum and Alexander, but that claim, with OPM's preference for public meaning when they diverge, is the

core dispute,⁹ and at the heart of the back and forth debate between them.

That said, I want to take up this debate between OIM and OPM originalists, not least because I am one of the rare few who has changed his mind in the unusual direction (after reading the likes of Alexander and Kay) and moved away from OPM to thinking OIM is the more persuasive branch. And I want to do so by focussing more on Goldsworthy's chapter, though truth be told readers will struggle to put a piece of paper between the core Solum and Goldsworthy positions. I think I just find Goldsworthy's terminology easier to use for the non-aficionado, as he talks in terms of subjective intentionalism ("SI"), objective intentionalism ("OI"), and public meaning originalism ("PMO")—while noting that "[PMO] . . . is often a version of OI[.]" (p. 182) with Goldsworthy earlier stating explicitly that, in his view, "Larry Solum's public meaning originalism [is] a version of the [OI] position." (p. 170). Accordingly, the debate that interests Goldsworthy is between OIs like him, and SIs like Alexander (and, full disclosure one more time, like me). It is, as I said, an intra-familial dispute and Goldsworthy sees it as one where "SI maintains that judges should seek the lawmaker's actual subjective intentions, whereas OI holds that those intentions are relevant only insofar as they were publicly manifested, in that sufficient evidence of them was made readily available to the public or at least to legal advisers." (p.175).

Remember, both SI and OI put much weight on authors' intentions. Indeed, both camps agree that non-originalist interpretive approaches, from "Living Constitutionalism" to "moral readings" on to "Dworkinian best-fit approaches," transfer authority from the author to the point-of-application interpreter (or to some mindless process). And recall that Alexander and his fellow SI types think that intended meaning is the uptake an author wants to produce in his or her audience, which OI does not seem to dispute. Or put differently, texts are the messages authors intend to convey.

9. Though one key reply Alexander offers to one of these peripheral disputes is that "it is quite possible to intend another's intended meaning[.]" (p. 424) such that there is nothing incoherent in holding the view that some or many ratifiers might have intended whatever meaning the authors of the Constitution intended—just as "I might intend to convey whatever she intends to convey by that text" might be the stance one takes "when voting in a faculty meeting on a proposal drafted by a committee that [one is] too lazy or uninterested to read, much less understand." (p. 424).

Accordingly, the nub of the *theoretical* disagreement between OIs and SIs centers on situations in which an author or authors fail to communicate the meaning he, she, or they intend to communicate. There is misunderstanding. There is miscommunication. Suppose, for instance, that in uttering a statement you intend to communicate to your chosen audience message X, but most or all of that audience (based on the publicly available evidence) understands Y. Now, one can at this point ask the theoretical question of whether the meaning of the statement was X or Y. And that depends, as it were, on the meaning of “meaning”—is it *a*) what you as author intended them to take you to have meant by your statement, or is it *b*) what your audience is likely to take you to have meant by your statement? Goldsworthy says, and I think Solum concurs, that it is *b*). “[W]hen your utterance fails to communicate your meaning to your intended audience (through your fault not theirs), but communicates some other meaning to them instead, that other meaning—and not your meaning—*must* be the meaning of your utterance.” (p. 178) (emphasis added).

But to my mind there is no “must” about it. Alexander’s reply is that Goldsworthy “seems to . . . trade on a confusion between what is said and what is meant. Or, to put it in terms that I think are more apt, “Goldsworthy’s distinction is between what your audience is likely to take you to have meant by your statement and what you intended them to take you to have meant by it.” (p. 420). I would put it this way: this debate about the best or preferable understanding of “meaning” is not a dictionary dispute; it is not a definitional matter. Just as H.L.A. Hart makes clear in chapter 9 of *The Concept of Law*,¹⁰ when urging readers to adopt a wider rather than a narrower understanding of “law” (i.e., one that includes the morally egregious), this is not an “is” matter but an “ought” one. How *should* we understand law? And Hart gives a list of utilitarian reasons for adopting the wider understanding.

Likewise here. The debate between OIs and SIs is on the “ought” level: how *should* we understand what counts as the meaning of a text? Because it seems clear to me that a person could, if he or she wished, specify or announce or designate that the dictionary understanding of “meaning” henceforth would be

10. H.L.A. HART, *THE CONCEPT OF LAW* 181–207 (1961).

either *a*) or *b*) above. Similarly, pointing to what courts presently do (as Goldsworthy does to buttress his side of the argument (pp. 171-172)) is on the “is” plane. At most, it tells us what judges today treat as falling within the aegis of “meaning,” but that is not an answer on the theoretical plane of how “meaning” should be understood. There, on that theoretical plane, the question is which understanding is preferable. Here are some of my own grounds for siding with Alexander and Kay (and in a way with that well-known SI Humpty Dumpty) and saying it is *a*)—that meaning *should* be understood as being what you, the author, intended it to be; it *should not* be understood as being what the audience took it to be, however justified in doing so that audience may have been.

1. Alexander’s view makes “meaning” an empirical question. Goldsworthy’s makes it in part a normative or value-laden (or added value-laden) question. Goldsworthy seemingly concedes that his “meaning is what the audience understands” view entails the fact that there can be different meanings for different audience members (p. 185). “If this is a bullet . . . then OI must bite it” (p. 185) concedes Goldsworthy, with a proviso that SI can lead to the same utterance having different meanings for different listeners as well if that is what the author intends—think of coded messages to spies in occupied Europe. But that proviso is weak. The author’s meaning for the Gestapo should they come upon the message is intended by the author to be X and for the French Resistance it is intended to be Y, and for the same marks on the same paper. For Alexander, the search for meaning is empirical, what was intended by real life humans. For OI adherents, author’s intentions are not always ultimately determinative, by their theory’s stipulation in fact. So sometimes meaning depends, for Goldsworthy, on identifying a representative member of the intended audience. And at that point I further agree with Alexander and Kay that such an identifying task is an unavoidably arbitrary process, despite Goldsworthy’s claim that “[t]his seems to [him] an exaggeration.” (p. 185). Actually, it is arbitrary in one sense, and in another sense we know before we start the “let’s identify some representative member of the audience” task that it is a process that is overwhelmingly likely to deliver up a “representative audience member” who, when uncertainties arise, will look a lot like the interpreter who went in search of him or her in the first place—a lot like Scalia or Solum or Goldsworthy

or whomever it is that happens to be doing the interpreting through the prism of the “representative member of the audience.”

2. Goldsworthy, as just noted, thinks the force of this “arbitrary” point is over-stated. We should ask “what a well-informed, intelligent and, competent lawyer at the time of enactment would have understood the law to communicate.” (p. 185). Presumably Goldsworthy believes that will get rid of most of the range of possible “OI meanings.” But I think Goldsworthy is wrong. For instance, take any of the handful of statutory bills of rights at the State level in my country of Australia. Off the cuff, I can immediately think of a law professor (in favor of such instruments where I am not) who would disagree with me about what those statutes mean. So either one of us is not competent, intelligent, or well-informed, or one of us is not basing his or her views on the publicly available evidence of legislative intent. Or—my position—the views and beliefs and value-judgements and even sentiments of the interpreter, even one who is a “well-informed, intelligent, and competent lawyer” (p. 185) matter. Sometimes they matter a lot. There is a range or spectrum of people who fall under the aegis of being reasonable, smart, competent, and well-informed, and picking between them is, well, arbitrary. (Nor would that fact surprise a Humean non-cognitivist like me.)¹¹ Moreover, we see this all the time, even with judges who disagree, even with judges who claim to be originalists. So I think both the arbitrary point and the “too many alternative possible meanings” point are persuasive factors in deciding how we should understand what meaning is. They push you towards thinking SI is preferable to OI.

3. Here is another difficulty for Goldsworthy and the OI position. I refer to the notion of “fault.” Goldsworthy makes clear that OI is only supposed to kick in when the miscommunication is the fault of the author, not when it is the fault of the listener or listeners.¹² I take it that if the miscommunication is the fault of the

11. See, e.g., JAMES ALLAN, *A SCEPTICAL THEORY OF MORALITY AND LAW* (1998) (arguing for moral scepticism and a functional relationship between law and morality); James Allan, *Jeremy Waldron and the Philosopher's Stone*, 45 *SAN DIEGO L. REV.* 133 (2008) (responding against Waldron's assertion for the use of international law for American legal reasoning). For what it is worth, my guess is that Goldsworthy is also, broadly speaking, a Humean non-cognitivist.

12. Goldsworthy makes this explicit: he says “through your fault not theirs” (p. 178). “Your” refers to the maker of the utterance, and “theirs” the intended audience.

intended audience, then for Goldsworthy the statement means what the author intended it to mean. Hence, for OI adherents, only if it is the author's fault does the miscommunication result in the statement meaning something other than what the author intended. But this fault-based divide is obviously a problematic distinction. Imagine a ninety-nine person audience. The author intends his message to mean X. Fifty take it to mean X. Forty-nine take it to mean Y. All base their choice on publicly available evidence. So the OI meaning is X, and by numerical luck that happens to line up with the SI meaning. Of course if it were 49-50 the other way, then the meaning would not be what the author intended for Goldsworthy and the OIs. It would be what fifty out of ninety-nine understood it to be based on the publicly available information. For Alexander and the SIs, the meaning would still be X, but the author should have done a better job communicating. Put differently, the meaning would be stable for Alexander, even if one audience member changes her mind about what the author was trying to convey. What can vary for SI adherents is whether the author's intended meaning was in fact successfully communicated, not the meaning itself.

Or go back to our ninety-nine person audience where fifty of ninety-nine misunderstand the author and think Y rather than the intended X. And now assume in my above scenario that the audience's median (or indeed any single person's) IQ was 120, and then start lowering it one IQ point a minute. Just when, precisely, does the meaning of the author's utterance change? Because as you lower the median IQ or a single person's IQ at some point the miscommunication will become the fault of the audience, at which point we are to suppose that the meaning reverts to the SI one of author's intended meaning. Meaning, in other words, becomes hostage to the intelligence of the audience, or at least to the author's ability to discover that intelligence and craft his method of communicating his intended meaning accordingly. Or, we could cut through all of this and just say "meaning" is stable, and whether an author is able to communicate it successfully is variable and dependent upon a host of factors.

At any rate, those are some of the grounds for why on the theoretical plane I some time ago moved over to agree with Alexander and prefer SI to OI. Or, if you would like to think of it this way, the SI/OI difference comes down to there being, in rare

situations, a serious problem for each position. In cases where the difference matters (which Alexander, Goldsworthy, and Solum all agree is seldom)—i.e., when there has been a mistaken communication—once the mistake has been convincingly discovered, SI calls for the enforcement of the “until recently inaccessible” law that we now believe was intended (subject to compensating reliance interests, of course, and not doing so if the costs would now be catastrophic). OI avoids this problem, but at the price of wanting to continue to enforce a law that no lawmaker ever adopted or intended or legitimately brought into being. So it is a kind of pick-your-poison situation. I am with Alexander and Kay and Fish and a few others in the SI camp rather than with Goldsworthy, Solum, and the more numerous OI/OPM strand of originalism. That said, I also agree that, in practice, on the plane of real-life interpreting, there is virtually nothing in it. The two approaches overwhelmingly deliver the same outcomes, because both look to what authors intend to convey.

Of course one can understand what is bothering many OIs in terms of rule of law values. Alexander hints at this himself when he gives this caveat: “Let me also put aside the possibility that a legal system might have rules limiting legal interpretation to only certain types of evidence.” (p. 422). If there were such rules, they would flow from having done a cost-benefit analysis of when the benefits of restricting the search for authors’ intended meaning outweighed the costs. That, as I just said, is what seems to be motivating the qualms Goldsworthy is feeling in the legal realm about legislators’ subjective intentions. And that is all perfectly understandable. Yet, in my view, it remains a mistake to say that because of such concerns, and in some ineffable way, the “meaning” of the legal text is not what the authors’ intended. I think what is a better characterization is to be blunt and just say that, for rule of law and other policy reasons in law (and as regards legal interpretation), one might choose to lay down a rule (or rules) that sometimes restricts the search for evidence of authors’ intentions. Alexander himself does not deny that such a step might be defensible. Indeed, back in 2004, he and Saikrishna Prakash made plain that in their view the only two plausible games in town—and I am talking now specifically about legal interpretation—are **i**) interpreters use all the evidence there is of authors’ intentions, and **ii**) we restrict some of the evidence that can be sought for various policy-based reasons (of the sort

Goldsworthy focuses upon).¹³ Moreover, you can make that choice between **i)** and **ii)** without undergoing some partial, limited Damascene conversion that shifts your allegiance from SI to OI in the legal realm. Rather, you just concede that other things matter too, not just a law's meaning, especially (or perhaps, only) where the lawmaker has plenty of scope to try again, and this time be clearer. Yes, there will be a cost in terms of authority and why people should obey not the law, but instead this cost/benefit rule that once in a blue moon gives us something different from the intended law. But there will be rule-of-law benefits too. And no doubt different people would, and do, strike different bargains between **i)** and **ii)**. At any rate, that is how I would characterize what is going on and where the competing trade-offs lie.¹⁴

Returning to Part II of this fine book, the final two contributions are by Laurence Claus and Alon Harel. Claus focuses on interpretation in federalism disputes, and rightly argues that enumeration of Congress's legislative powers by itself would never provide much, or at least enough, certainty. Such grants of powers simply do not deliver rule-like determinacy. This is a very interesting chapter, and Alexander agrees with Claus. In Alexandrian terms, this is because "enumerated powers function as standards, not rules. They must be given determinacy by further lawmaking [by the court]." (p.426). Meanwhile Harel agrees with the Alexander/Schauer line that the basic function of

13. See Alexander & Prakash, *supra* note 3.

14. And in line with that characterization of mine, I argued back in 2000 (in an article that seems to have convinced absolutely no one) that there are solid grounds for making different cost-benefit analyses as regards statutory interpretation and constitutional interpretation. See James Allan, *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of "Original Intent"*, 6 LEGAL THEORY 109 (2000). In other words, I would be more open to restrictions vis-à-vis statutory interpretation than constitutional interpretation, because the comparative costs of the lawmaker responding to the interpreter (of over-riding the authoritative and legitimate source of law based on some policy-related search-restricting rule) are so much lower with statutes. Put differently, we should be much more open to restrictions as regards statutes, because there is much, much more scope for the legislature to respond and say "you got our meaning wrong by using these rule-of-law enhancing presumptions, so we have passed a new, clearer statute." With constitutional interpretation, by contrast, you basically can never do that; we know going in, indeed, the top judges doing the constitutional interpreting know going in, that constitutional amendments correcting an erroneous imputed "meaning" that results from some policy-related interpretive rule will not happen, or virtually never will happen. Hence the costs of using a "let's advance rule of law or keep costs contained" rule will be considerably higher in constitutional interpretation while biting much less into the authority of law as regards statutes, where there is a realistic chance the legislature will and can reply."

law is settlement, and indeed with Alexander's position that the Supreme Court has to provide such settlement domestically. (p. 221). Harel then argues for there being a sort of intrinsic value to constitutional settlement. (p. 228). Alexander at that point demurs. (p. 426). My disagreement with that sort of Kantian/intrinsic line of argument is much more fundamental, as I have set out in a recent review of Harel's book, *Why Law Matters*.¹⁵

That brings me to Part IV of the book, which I can cover much more quickly. Mitch Berman attacks Alexander's claim that there are no such things as legal principles. Emily Sherwin, Leo Katz, and Alvaro Sandroni all discuss Alexander's well-known elucidation of what he dubs "the gap"—referring to the fact that well-meaning and reasonable lawmakers have good grounds to lay down general rules that their subjects will at some point have good reason not to comply with. In utilitarian terms, so not Alexander's, Rule Utility will give good reasons for there being rules that, if always followed by everyone, will deliver more utility/welfare/happiness than if people make individual calculations on their own on a case-by-case basis, and yet situations will arise for all citizens when Act Utility points them towards not following the rule, however much they factor in other people's reliance, the fact having the rule rather than not is optimal, the criminal penalties for disobedience, everything. There will always be this gap. Alexander says this dilemma is insoluble. I think he is right. Meanwhile the whole discussion of this problem, by the contributors and with Alexander's take at the end, is fascinating. That leaves the final two chapters in Part III, one by Steven Smith and one by William Baude. Smith's chapter is excellent and funny, arguing that, in a way, Alexander is a closet anarchist. Or rather, that is where Alexander's relentlessly analytical arguments—not least on the elusiveness of authority—take him. Smith's contribution is very sympathetic to Alexander, and yet very convincing indeed as regards some of the implications of the Alexandrian *oeuvre*. As for Baude, let me just say that it is very seldom indeed that I read someone get the better of an argument with Larry Alexander. In my view Baude does just that in his chapter, even after considering Alexander's reply. Both are a treat, but Baude's claim that Alexander cannot have

15. James Allan, *Why Politics Matters—A Review of Why Law Matters*, 9 JURISPRUDENCE 132 (2018).

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both the cake of judicial supremacy while also eating the truth of originalism, convinced me, and I recommend the exchange to all readers.

Let me conclude in an unusual manner. I have read many, many of these sort of “compilation of different contributors’ chapters” type books. Not only is this one of the best of the lot; it is also without doubt the book that, in my view, has the most sympathetic, touching, classy, and just downright beautifully articulated introduction I have ever come across. Heidi Hurd is to be congratulated, not just on putting together this very fine book, but in giving us the new high watermark when it comes to introductions. Suffice to say that I would pay big money for her to write one for me.