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The Special Kay Defence of Non-Originalist Judges: A Serial with an Unhealthy Final Ingredient

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Essay

The Special Kay Defence of Non-Originalist Judges: A Serial with an Unhealthy Final Ingredient

JAMES ALLAN

In this Article, the author considers Richard Kay’s views on constitutional interpretation, the rule of recognition and how best to conceptualise top courts in the common law world—courts that appear not to be engaged in constitutionalism, or giving the legal text the meaning its legitimate authors intended. The author notes that his views and Kay’s line up almost perfectly across these topics but, in keeping with these commemorative special issues, he manages to pick a couple of small fights with Kay’s views—one small quibble, a defence, and then a bigger quibble.
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The Special Kay Defence of Non-Originalist Judges: A Serial with an Unhealthy Final Ingredient

JAMES ALLAN *

INTRODUCTION

This Article is written in honor of my friend Richard (Rick) Kay as part of this special issue dedicated to, and celebrating, his career and writings. I am myself honored to have been asked to be a contributor, and I thank the editor(s).

I first met Rick just over a quarter of a century ago. A native born Canadian and not long married, I had gone from a large law firm in Toronto to working at the Bar in London, England when over lunch in Middle Temple I was offered a job at a brand new law school opening in Hong Kong. At that point I had not really considered a career in legal academia, but as something of a lark my wife and I opted to give it a go for a couple of years. That was late 1989. A little over a year later I met Rick. You see on my arrival at Hong Kong’s then City Polytechnic School of Law (subsequently rebranded as the City University) the Dean of Law handed me two compulsory law degree courses to teach, in all likelihood because it was me or no one and he had had to make a tough call. One of those courses was Hong Kong public law, which in a then colony of a jurisdiction like the United Kingdom with an unwritten constitution, translates more or less for Americans into the pre-1997 Hong Kong constitutional law course. The other course was jurisprudence or legal theory or legal philosophy (pick your favourite description), which was a compulsory final year course. Over the years since, because I never ended up going back to the practice of law, those two broad subject areas have lain at the heart of my law teaching and academic publications. More to the point of this introduction though, it was at some point during that very first year of teaching the compulsory jurisprudence course that my then-Dean of Law, Professor Derek Roebuck, called me into his office and told me that this brand new little law school of ours would be co-hosting in Hong Kong a rather grand law conference with the University of Connecticut School of Law. The theme would be “Comparative Legal Theory: A Meeting of East and West.” And despite what any observer would immediately have noticed about this particular young Canadian who had yet to have lived even a year in the Crown Colony of Hong Kong, the Dean informed me

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that as far as that upcoming meeting was concerned, I was to be in charge of the eastern side of things. Luckily, I soon had help in the form of a further recruit to our law school, David Campbell. Luckier still, it soon became abundantly clear that this top class U.S. law school—nominally our co-hosts but in reality the driving force behind the conference—had matters well in hand. My job entailed little more than recruiting some good speakers, a bit of housekeeping administration, and trying not to screw things up. The real brains and driving forces behind what turned out to be this really excellent legal theory conference were the two Connecticut law school professors politely described as being in charge of “their side of things.” They were Professor Mark Janis and Professor Richard Kay. And the result of that very fine meeting of east and west was published as a special issue of the Connecticut Journal of International Law.1

To give readers some context, that conference took place only shortly after the coming down of the Berlin Wall and the events in Tiananmen Square, with the collapse of the Soviet Union only months in the future. And on meeting Rick Kay way back then one of the first things that struck me was what a very nice man he was, a conviction that the many intervening years have only strengthened. Moreover, having met the man and read his conference article,2 I was spurred over the years to read more (indeed almost all) of the Kay oeuvre. That too has been a pleasure, and not just because I found (and continue to find) myself overwhelmingly in agreement with Rick’s views. I also stumbled on little secrets, such as the slow realization that Rick Kay is one of the best informed American legal scholars alive today as far as understanding the Westminster constitutional world is concerned.3 In fact, in my view he may well be tied for the best

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1 See generally Symposium, Comparative Legal Theory: A Meeting of East and West, 6 CONN. J. INT’L L. 295 (1991) (including authors Yash Ghai, Alice Erh-Soon Tay, C.G. Weeramantry, and various City Polytechnic and University of Connecticut contributors including both Rick and me, as well as the introductory remarks of the Attorney General of Hong Kong, the President of the Law Society of Hong Kong, and both law deans).

2 Richard S. Kay, Comparative Constitutional Fundamentals, 6 CONN. J. INT’L L. 445, 445–46 (1991) (beginning by considering H.L.A. Hart’s “rule of recognition” and the questions surrounding any jurisdiction’s ultimate test of legal validity. Kay agreeing with Hart (and me) that for any outside observer “it is a product of some kind of social acceptance”). I will return to Rick’s concern with these ‘constitutional fundamentals’ or rules of recognitions below.

3 By “Westminster constitutional world” I mean the constitutional arrangements of the United Kingdom, Canada, Australia, New Zealand, and other former Dominions and Colonies of Britain that inherited much from the constitutional arrangements centered on London’s Westminster Parliament. See Richard S. Kay, The Glorious Revolution and the Continuity of Law 12 (2014) (exploring the “law and revolution” created by the 1688-1689 Glorious Revolution and its enduring emotional appeal); James Allan, The Glorious Revolution & the Rule of Recognition, 30 CONST. COMMENT. 509, 509–11 (2015) (reviewing Kay’s The Glorious Revolution and the Continuity of Law and describing the three main ways—legal history; the importance of the law to the revolutionaries themselves; and “applied legal philosophy”—in which Kay’s book “works” well); Richard S. Kay, The Secession Reference and the Limits of Law, 10 OTAGO L. REV. 327, 327 (2003) (explaining the purpose
informed and most knowledgeable such American scholar (with Maimon Schwarzschild).

In this Article, in keeping with the general conventions that underlie these celebratory law review special issues and despite the truth that I agree with Rick on so many things and to such a significant extent, I am going to do my best to pick a couple of fights with him. One will be a small fight, no more than a quibble. The other one will be a slightly bigger fight. In between I am going to defend Rick (well, perhaps three-quarters defend him) on a minor matter related to his understanding of the Rule of Recognition. So quibble, defend, bigger quibble—that is the program for the rest of this Article.

I. THE QUIBBLE

Let me start with Rick Kay’s views on constitutional, statutory and indeed any sort of interpretation. Rick is an old school originalist, someone for whom the meaning of a text is found by seeking the empirical fact of what the actual author or authors intended. This is sometimes known as being an ‘original intended meaning’ (OIM) originalist to distinguish it from the other, newer, more populated branch or school of adherents often given the label of being ‘original public meaning’ (OPM) originalists – and for whom the task is to find what the hypothetical well-informed and reasonable person back at the time of writing would have taken the document or provision to mean. Larry Alexander, writing for Rick in this same celebratory special issue, gives a concise outline of

of the article as “to consider the best way to characterize what the [Canadian] Supreme Court did in the Secession Reference,” when it “issued . . . judgment on the legality of ’unilateral’ Quebec secession in August 1998”); Richard S. Kay, Sovereignty in the New Hong Kong, 114 LAW Q. REV. 189 (1998) (covering the post-handover of Hong Kong); Richard S. Kay, Judicial Policy-Making and the Peculiar Function of Law, 26 U. QUEENSLAND L.J. 237, 240 (2007) (noting that the United Kingdom is the exception to many modern legal systems where “public law is almost always enacted law”; instead in the U.K. “the legal system does not recognize a written, enacted, legally enforceable constitution that creates and defines the scope of the law-making power”).


5 See THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION, at ix (Grant Huscroft & Bradley W. Miller eds., 2011) (providing an excellent series of chapters on this split as well as on other aspects of originalism, the authors of which include Stanley Fish, Mitchell N. Berman, Larry Alexander, Keith E. Whittington, Lawrence B. Solum, and more).
the OIM interpretation thesis. In fact Larry writes that as he “read[s] Rick’s copious writings on the topic, [Rick] would agree with everything [Larry has] said [about the topic]”. Larry goes so far as to say that his own views and those of Rick’s as regards interpretation, including how judges ought to interpret legal texts, align “jot and tittle.” In other words, there is not the least difference between their two views in support of intentionalist interpretation.

And you could say virtually the exact same of me as regards to the proper goal of legal interpretation. I am undoubtedly in the Kay/Alexander OIM camp, in large part because of the powerful arguments put forward by Rick and Larry. I agree with virtually everything they assert. So in pith and substance, if not all the way down to the minutiae of jots and tittles, I am with Rick. But here is the quibble. It arises in instances where someone might have plausible grounds for thinking – say, for rule of law or the expense of conducting the historical search or other such policy reasons – that the search for evidence of authors’ intentions should in this case be restricted. And notice that even Larry Alexander accepts that something like this might on occasion be defensible, the choice being between i) interpreters use all the evidence there is of authors’ intentions in the quest to find the text’s meaning; and ii) a rule is laid down that restricts, for various policy-based reasons, some of the evidence that can be sought by the point-of-application interpreter. Of course, either choice you make will have costs as well as benefits. Opt for ii) and you are conceding that other things can matter too, not just a law’s meaning, especially where the lawmaker has plenty of scope to try again and this time be clearer. More to the point, option ii) has obvious costs in terms of the legitimate authority of law and why people should obey not the law but this cost/benefit evidence-restricting rule that will sometimes produce interpretive outcomes different from the intended law, from what those with legitimate


7 Id. at 15.

8 Id. at 11.

9 See id. at 1–2 n.2 (listing his, Alexander’s, own publications related to defending intentionalist (OIM) as the most persuasive theory of what the meaning of a legal, and indeed any, text is); Stanley Fish, The Intentionalist Thesis Once More, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 119 (Grant Huscroft & Bradley W. Miller eds., 2011) (providing yet another virtually identical view to those of Kay and Alexander stating “[t]he danger of irresponsibly subjective interpretation – the danger of permitting anything to go – is courted the moment you depart from the constraint of authorial intention and make something else, arbitrarily chosen, your target”).

law-making authority intended. Obversely, opt always and everywhere for i) and you will be setting your face against all those possible rule of law and ‘the expense of this search for intended meaning has simply gotten out of hand’ type benefits on the other side of the ledger that might tempt one to lay down such an evidence-limiting rule in the first place. And no doubt different people would be inclined to strike different bargains between i) and ii). Indeed, more than that, we know for a certainty that different jurisdictions did in fact strike different bargains between these two options, as the comparative historical differences in the allowed use of legislative history between the United Kingdom and the United States shows.\textsuperscript{11} Even Alexander and Prakash would restrict the search for evidence of authors’ intention in cases where that evidence looks likely to be unreliable.\textsuperscript{12}

So far I do not imagine Rick (or Larry for that matter) would disagree. So here is my attempted provocation or quibble. It goes back to the year 2000 when I wrote a piece for Legal Theory,\textsuperscript{13} arguing that in any cost-benefit analysis of when to put limits on the search for evidence of authors’ intended meaning that we can and we should distinguish statutory interpretation from constitutional interpretation.\textsuperscript{14} On this point I have not changed my mind in the intervening 17 years, though I have apparently convinced absolutely no one.

Still, my view is that if in the legal realm we are ever in the game of restricting the search for, or use of, authors’ intentions–because the costs of that search are outweighed by the benefits of the restriction–then we have to consider all the costs and benefits. And to my mind they differ as regards to statutory interpretation and constitutional interpretation. Hence,

\begin{itemize}
  \item \textsuperscript{11}See Pepper v. Hart [1993] AC 593 (HL) 614 (appeal taken from Eng.) (establishing that it was “appropriate for the courts to look at Hansard in order to ascertain the intention of the legislators as expressed in the proceedings on the Bill which has then been enacted in the statutory words requiring to be construed”), But see Robinson v. Secretary of State for Northern Ireland [2002] UKHL 32, [2002] NI (HL) 390 ¶17 (appeal taken from N. Ir.) (suggesting this case was a “very good illustration of the sort of case in which the limited departure permitted by the House in Pepper v. Hart . . . cannot properly be relied upon as an aid to interpretation”); Regina v. Secretary of State for the Environment, Transport and the Regions, Ex Parte Spath Holme Ltd. [2001] 2 AC 349 (HL) 408 (declining to extend Pepper v. Hart to this case). My understanding is that in the United States, by contrast, courts have never adopted an explicit rule governing the use of legislative history for the purposes of statutory interpretation.
  \item \textsuperscript{12}See Alexander & Prakash, supra note 10, at 973 (explaining that typically legislative intent is “highly unreliable”). I would add this gloss to the Alexander/Prakash unreliability concession. If some class of evidence A were reliable fifty-one percent of the time, and another class of evidence B were reliable eighty-five percent of the time, then it seems to me that the competing policy goals (including wanting laws to be relatively clear, not wanting to force litigants to troll through the legislative record at great expense every time a writ is issued, wanting to keep court costs from being unbelievably pricey, etcetera) will win out more often against A type evidence than against B type. Not all ‘reliable evidence’ is equally reliable, in other words, and so not all cost/benefit analyses will pan out the same.
  \item \textsuperscript{13}James Allan, Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of ‘Original Intent’, 6 LEGAL THEORY 109 (2000).
  \item \textsuperscript{14}Id. at 125–26.
\end{itemize}
to my mind, we can and should distinguish constitutional interpretation from statutory interpretation in situations where we are considering restricting the search for authors’ intended meaning on the basis of some other set of policy-related reasons. It is precisely here that Rick Kay does not agree; he sees no grounds for distinguishing constitutional and statutory interpretation in these admittedly peripheral cases. But I do. My view is that in the situation where we are asking questions about when to restrict “evidence of authors’ intentions,” that we should (and indeed I would) be more open to restrictions on that search vis-à-vis statutory interpretation than constitutional interpretation because the comparative costs of the lawmaker responding to the interpreter are so much lower with statutes. Or to make the same point slightly differently, the costs of sometimes overriding the authoritative and legitimate law-maker based on some policy-related search-restricting rule are just a lot lower with statutes. Put differently yet again, we should be much more open to restrictions in regard to 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 or costs-lowering presumptions. So, we have passed a new, clearer statute.”

With constitutional interpretation, by contrast, you basically can almost never do that; hence 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 evidence-restricting interpretive rule will not happen, or virtually never will happen. So the costs of using a “let’s advance rule of law or keep costs contained” rule will be much higher in constitutional interpretation. Obversely put, it will bite much less into the legitimate authority of law regarding statutes, where there is a realistic chance the legislature will and can reply, than it will as regards to the constitution. The no real life author, “mindless” law that restricting the search for authors’ intentions might occasionally throw up has some plausible prospect of being overridden when it comes to statutes (as the legislature has some room to respond to court decisions about the meaning of statutes), but no prospect of happening when it comes to constitutional interpretation. And that fact has to be thrown into the cost/benefit calculations. At least I think it does, even if Rick disagrees. Accordingly, I

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15 Or, one last time and for those who are sports fans, try this analogy to the NFL. In football games, in the last two minutes, they will review every play and do the best they can to get the call right. That’s constitutional interpretation for me. During the rest of the game they will check referees’ calls when a coach throws down a red flag, but there is a limit of three unsuccessful challenges per coach. That is statutory interpretation for me. Outside the last two minutes the league is prepared to sacrifice “getting the call right” to other concerns (such as limiting the length of the game, tactical use of flags, continuity, keeping viewers, etc.).
am more against limiting the search for the lawmakers’ intended meaning vis-à-vis written constitutions than I am as regards statutes. That is my quibble with Rick.

II. THE DEFENCE (OR PERHAPS THREE-QUARTERS DEFENCE)

Rick has written extensively on what (way back in that 1991 Connecticut Journal of International Law article of his) he dubbed “constitutional fundamentals” but what most readers will think of in H.L.A. Hart’s terminology as a jurisdiction’s “[R]ule of [R]ecognition.” This is the label Hart gave to a jurisdiction’s ultimate test of legal validity; what separates a society’s legal rules from the non-legal rules; what Rick sometimes calls its “preconstitutional rule,” which sits at the point where law runs out and which can itself be used to give a legal justification for why, say, some speeding fine or criminal statute or common law tort rule is valid (i.e., legally valid), but which itself cannot be justified in legal terms. One can only justify, or criticize, a jurisdiction’s Rule of Recognition in moral or political terms. There is no legal test above it to which appeal can be made in the attempt to claim the Rule of Recognition is itself legally valid or invalid. Legal explanations and justifications have run out.

Of course, this notion of a Rule of Recognition—that from which all a jurisdiction’s laws ultimately obtain their legal credentials or legitimacy—is just a label that Hart invented to help in part conceptualize the concept of law, or perhaps more aptly the concept of a legal system. And if some imaginary visitor from Mars were to land on earth at an unknown point of time and in an unknown jurisdiction how would that visiting Martian establish what the Rule of Recognition was in that particular jurisdiction, which might happen to be the Roman Republic, the feudal kingdom of William the Conqueror, the ancien régime in France, Iran after Khomeini or North Korea or the United States today? For Hart the answer is wholly empirical. The Martian would simply look to see what the officials in the jurisdiction treated as a valid source of law. Yes, this being Hart there will always be a few penumbral or open texture or highly debatable cases. Nevertheless, in the final analysis it depends completely on what happens to be accepted today as a valid source of law, which is contingent and can

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18 See Kay, Preconstitutional Rules, supra note 16, at 189 (defining preconstitutional rule).

19 See HART, supra note 17, at 94–95 (defining the rule of recognition).

20 Id. at 126.
change. For Hart, the people whose acceptance matter are that jurisdiction’s officials. Rick agrees with Hart. I too agree with Hart, and so with Rick. By contrast, Larry Alexander, also someone I am lucky to be able to call a friend, disagrees on this very narrow, almost picayune, point.21

Here I will briefly defend Rick against Larry.22 At the big picture level, coming to terms with the concept of the Rule of Recognition will throw up many difficult questions, not least in trying to specify what counts as such for any particular jurisdiction.23 But the narrow question I focus on here is whether this source-based empirical test that lets us distinguish legal rules from non-legal rules is better understood in terms of what officials happen to accept, or alternatively in wider terms by looking at what citizens as well as officials would accept. Rick and I say the former. Larry says the latter.24 Now, to my mind a hugely attractive thing about Hart’s rule-based concept of law with his account of the rule of recognition, recounted as it is from the outsider’s vantage,25 is that it can be applied to any legal system, ever. Application of the Hartian framework is not restricted to some nice benevolent Western legal system. You can apply it to feudal systems, Stalinist Russia, North Korea, the United States today, anywhere. The same goes for Hart’s focus on officials in giving his source-based test of legal validity. Compare that to Ronald Dworkin, with his theory of law built out of a theory of how best to interpret, who offers a legal theory of next to no application in non-democracies, or indeed in any jurisdiction without an independent (and possibly a common law based) judiciary. Dworkin’s theory of law can be applied only to a miniscule fraction of the legal systems the world has seen. Hence this far greater, indeed near universal, applicability of Hart’s theory is, to my way of thinking, a big advantage his has over Dworkin’s.

Yet when we turn to how best to conceptualise the Rule of Recognition Larry points out a problem for Hart. “One would think, however, that

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23 See Alexander, supra note 21, at 642 (“[W]hat is our rule of recognition? I regard that question as one of the two most difficult questions in legal philosophy.”); Larry Alexander, Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay, 52 CONN. L. REV 1513 (2021).
24 See Alexander, supra note 23, at 1518 (“[T]he content of the rule of recognition is an empirical question, it is a complex, messy, difficult empirical question. It will be a function, not just of the attitudes of a discrete group of officials, who are only officials because of their attitudes, but of the attitudes and beliefs of a much wider population.”). For additional discussion, see id. at 1520–21.
25 On this and other aspects of the role of vantage in understanding various aspects of law, see JAMES ALLAN, THE VANTAGE OF LAW: ITS ROLE IN THINKING ABOUT LAW, JUDGING AND BILLS OF RIGHTS (Ashgate Publ’g Co. 2011).
citizens as well as officials would have to accept those criteria, lest the officials would be nothing more than ‘the gunman writ large’ vis-à-vis the citizens.” Put more bluntly, Larry’s gravamen is that any rule of recognition test focused on what officials accept seems vulnerable, in plenty of jurisdictions, to being collapsed into the gunman writ large scenario—the very one Hart tried to evade by moving to a rule-based concept of law. In other words, the widespread applicability of Hart’s understanding of the rule of recognition comes at a cost, some would say a hefty cost. This is Larry’s criticism, and it has force. However, Larry’s alternative—to look at what criteria “citizens as well as officials” would accept—has drawbacks and costs as well. Most importantly, Larry’s alternative seems to me to take us back to a theory of Dworkin-like levels of applicability. In a nice, benevolent, democratic, Western jurisdiction, such as the United States, we can ask what the people (as well as officials) have accepted as determinative of legal validity. I doubt, though, that such a question is worth asking in North Korea today. Or was in the Stalinist Soviet Union. Or in any feudal system ever. Or in any theocracy. Or during the Roman Empire. Indeed, the list of jurisdictions where such a “what do citizens accept” question would not be worth asking goes on and on. Where it would be worth asking is limited to very recent historical times in liberal democracies. Or at least that seems to me to be true unless one trades on the ambiguity in the notion of “accept” between (A) “accept because one largely approves of” and (B) “accept out of fear or other solely prudential reasons.” Hart says you can have a legal system where the obedience of citizens is largely a function of fear and prudence and even when the officials who accept and apply the legal rules are similarly motivated. It will not be pleasant. One would not wish to live there. The similarities with the gunman writ large scenario may be too many for comfort. But a legal system it will be. And you would discover its Rule of Recognition by looking to what officials accept as a valid source of law (quite possibly it being “whatever Mr. Stalin says”), citizens largely having to accept what they are told or be sent to the gulag.

Accordingly, Larry’s Rule of Recognition focus on what citizens accept, as well as what officials do, also comes at a cost, an even heftier one in my view, in terms of its range of application. In other words, there

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26 Allan, supra note 21, at 642 (internal footnote omitted). Alexander then reminds readers, in a footnote, that Hart had attacked Austin’s (and I might add, perhaps indirectly, also Bentham’s) command theory of law not least because it “could not distinguish laws from the threats of gunmen.” Id. n.106.

27 See Alexander, supra note 21, at 642.

28 And for what it is worth, in my view, Hart himself at times in The Concept of Law shifts back and forth between these two understandings of what it is “to accept” a legal rule and to be prepared to apply it as an official or obey it as a citizen.

29 HART, supra note 17, at 117.
are problems with both the Hartian and the Alexandrian variants of how best to conceptualise the Rule of Recognition. No doubt this is just one of those “pay your money and pick your poison” situations where you are choosing between least-bad alternatives. However, if forced to choose on this one, I am with Rick, not Larry. On balance I prefer Hart’s understanding, though as I have conceded and outlined above, both choices carry costs as well as benefits.

I hinted above that I was with Rick on this, but possibly only three-quarters so. That is because Rick at times suggests that the only officials whose views and acceptance matters in determining a jurisdiction’s Rule of Recognition are the top judges.30 If so, that is plainly wrong in all jurisdictions lacking an independent judiciary and pretty solid democratic credentials—in other words most jurisdictions that have ever existed! Indeed, even if we limit our focus to today’s well-established liberal democracies, say the United States, even there it is not just the views of the top judges that count. If enough other officials disagree with the judges, the non-judges are likely eventually to prevail. Perhaps the judges will back down and soon thereafter over-rule the contentious precedent. Perhaps the ranks of the judges will gradually be restocked and replaced. But in empirical terms the test of what counts as a valid legal rule will ultimately be a function of more than just what the judges think; other officials will matter too and this is the case even though only the judges have been afforded the final authoritative power to say what the law happens to be. At least that is my view, as well as my take on what Hart thought. If Rick (or at least the early Rick) thinks otherwise, consider my defence of him here to be but a three-quarters one.

III. THE BIG QUIBBLE

Assume, like Rick and Larry and me, that you believe that originalist interpretation of the intended meaning variety is “the only game in town if one purports to be interpreting the Constitution.”31 And assume, too, that you believe the content of a jurisdiction’s Rule of Recognition to be a contingent, empirical question of what happens to be accepted as a valid source of law (be it of the Hartian or Alexandrian variety). If you hold both those beliefs then, as Larry Alexander powerfully argues in his contribution to this special issue, you should realise that there is a

30 Kay, Preconstitutional Rules, supra note 16, at 190–91; See Alexander, supra note 23, at 1517. I equivocate here because subsequent to that 1981 article, Kay offers a much more nuanced view that suggests it cannot just be judges’ views that determine a jurisdiction’s Rule of Recognition. See also Richard Kay, Constitutional Change and Wade’s Ultimate Political Fact, 35 U. QUEENSLAND L.J. 31, 34 (2016).

31 See Alexander, supra note 23, at 1527.
connection between those two views or beliefs.\textsuperscript{32} And one aspect or feature of that connection is that when judges in a liberal democracy opt to employ some other, non-originalist mode of constitutional interpretation they are in fact, case by case, altering that jurisdiction’s Rule of Recognition (however minisculely that might happen to be). They are forswearing constitutionalism, to put it in terms Rick might use.\textsuperscript{33} Put more bluntly, such non-originalist judges have effected a small revolution by not being faithful to the intended meaning of the written constitution. Take away the empirical search for finding the meaning of what some (considered-to-be) legitimate and authoritative lawmaker in the past laid down as pre-established legal rules, and what you are left with are judges who are engaged in a law-making exercise. At the constitutional level, that amounts to a judicial exercise in changing some component of the Rule of Recognition. It delivers you some degree or other of juristocracy or kritarchy.

Rick agrees with all that (as does Larry). So far, then, so much consensus between Rick and me. But what happens if the world we live in does not happen to look much like one where our top judges are in fact doing what constitutionalism demands they do? That is, they are not upholding the intended locked-in meaning laid down by some authoritative and legitimate lawmaker in the past but instead are treating the document as a “living Constitution” or are affording it a moral reading or a Dworkinian best fit one—what then? This is precisely what Rick believes is the case, as a matter of empirical fact, as regards today’s United States (and indeed Canada and elsewhere). In one of Rick’s most recent publications he made this abundantly clear: “[A] fair examination of actual constitutional judgements is unlikely to convince many observers that those decisions closely match up with the rules in the constitutional text.”\textsuperscript{34}

\textsuperscript{32} Id.

\textsuperscript{33} For Rick’s defense of constitutionalism, see Kay, American Constitutionalism, supra note 4, at 35–39 (Larry Alexander ed., 1998) (citations omitted). In brief, Rick’s claim is that constitutionalism amounts to opting to give up some flexibility and the possibility of a more optimal response to change in favour of more certainty and security, so arguably gaining you more liberty and less likelihood of the infringement of rights. See id. at 25 (“Constitutional obstacles to state flexibility may be valuable even in a state premised on the achievement of collective objectives. Long-term social objectives might be better approximated by adherence to more or less permanent rules than by a series of infinitely revisable decisions.”). On this mooted choice between greater flexibility in the form of parliamentary sovereignty-type arrangements and greater locked-in outcomes in the form of a U.S.-type written constitutional arrangement, I have argued that the former is preferable. See, e.g., James Allan, Why Politics Matters: A Review of Why Law Matters, 9 Jurisprudence 132, 132, 135 (2018) (arguing that, despite the risks of being at the “mercy of the legislature,” a parliamentary sovereignty with an unwritten constitution is ideal); James Allan, Against Written Constitutionalism, 14 Otago L. Rev. 191, 193 (2015) (arguing that unwritten constitutional-setups are better than written ones).

\textsuperscript{34} Richard Kay, Democracy, Mixed Government and Judicial Review, in Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy 199, 212 (Lisa Burton Crawford et al. eds., 2019) [hereinafter Kay, Mixed Government and Judicial Review]. See also id. at
And again, I agree with Rick. Gaze around the common law world and, as he says, top judges look largely (nay, overwhelmingly) to be doing something very different to what OIM constitutionalists like Rick (and I) say honest interpretation demands. So still, Rick and I agree.

But here comes my big quibble with Rick. You see, at this point, if you accept that the preponderance of top judges are doing something that looks nothing like what both Rick and I (and Larry) think they should be doing as honest interpreters working in a jurisdiction with constitutionalism at its core, you might ask a different question. You might ask whether this new task the top judges are performing can be justified and defended. Rick says it can.\(^{35}\) He thinks we can understand and then endorse this sort of “living Constitution” judiciary as a sort of Super Senate, tricameralism-type check and balance.\(^{36}\) And hence it is here, and only here, that Rick and I part company. I do not think Rick’s very recent attempt to “reconceptualis[e] . . . constitutional courts as discretionary decision-makers in a mixed government”\(^{37}\) is persuasive or successful. So this is my big quibble with him.

Let me quickly sketch the gist of Rick’s argument in his *Mixed Government and Judicial Review* chapter and then say why I find it unpalatable and unpersuasive. In effect, Rick’s argument there is that democracy is not all that it is generally cracked up to be. In the first part of that chapter, Rick (as he puts it) “raise[s] some difficulties associated with the decision-making competence of voters, difficulties which may have been exacerbated in recent decades.”\(^{38}\) He reminds readers of the distrust the American founders had for unconstrained democracy, their worry that for many people passion would override reason,\(^{39}\) not to mention just how limited the franchise was back at the time of the adoption of the Constitution.\(^{40}\) He wonders about voter ignorance and incompetence. If not quite offering a paean of praise to the role of experts and expert opinion in modern life, Rick certainly comes down on the side of giving them and it a big role. He even finishes this first part of his chapter by reminding readers that Winston Churchill’s famous quote—“that democracy is the worst form of Government except all those other forms that have been tried from time

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213 (“In a significant number of cases, the courts act not on the basis of pre-existing rules but according to their own evaluation of public welfare. This is implicit in the historical experience of many jurisdictions and is explicit in much of the academic commentary including the extrajudicial writing of constitutional judges.”).

35 See Kay, *Mixed Government and Judicial Review*, supra note 34, at 220–21 (describing “attributes [of modern constitutional courts] that might qualify them as a valuable counterweight to the enlarged power of the electorate”).

36 Id. at 220.

37 Id. at 221.

38 Id. at 200.

39 Id. at 202.

40 See id. at 207 (indicating the suspicion of some Founders “regarding democratic government”).
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to time”—was spoken by the great man “in opposition to a [B]ill . . . which would have reduced the power of the [wholly unelected] House of Lords to delay legislation passed by the [wholly elected House of] Commons.”

Then, in the second part of that chapter, Rick offers up his defence of strong judicial review where it takes place not as part of the traditional understanding of OIM judging that underlies constitutional government but rather one with what I would call an aristocratic element with that role now being filled by the top judges. Rick sees this sort of strong judicial review as resembling a form of “mixed government” with the judges playing the role of some sort of Super Senate or tricameralism-type check and balance, and he prefers that to raw, no strong judicial review at all democracy. Then, in Part III of the chapter, Rick makes clear that for him this mixed-government type role for judges is a second-best form of judicial review—not as good as a constitutional state (and indeed, probably not as
good as a properly constituted “mixed government” arrangement).

That is a rough and ready account of what in the title to this article I dub Rick’s “Special Kay Defence of Non-Originalist Judges.” You start with a hefty dollop of skepticism as regards the value of majoritarian democracy, leaven that by pointing to similar such concerns amongst America’s Founding Fathers, and then opt for giving a sort of overseeing role to the lawyerly caste from which judges are chosen rather than opting to try to rein in the judges and veer towards a more vigorous majoritarian or New Zealand-style parliamentary sovereignty path (which, once the OIM constitutional state is forsaken, are really the only two choices left on the table).

Here is my brief response to Rick’s defence of that sort of non-originalist judging: first off, the whole “voters are ignorant” grievance against voters is to my mind far less telling than Rick pre-supposes. Not long ago, Ilya Somin wrote a whole book setting out this type of grievance or argument against democratic decision-making. I did not find Somin’s case ultimately to be convincing, as I made plain in my review of that book. The main weaknesses I there noted with these “assertions about the ignorance and incompetence of the [voting] population” inspired attacks on democracy included: (i) the overblown trust in experts such arguments

41 Id. at 211 (internal quotation marks and citations omitted).
42 See id. (stating that popular opinion, while important, is laced with ignorance and must be checked by those with expertise).
43 Id. at 199, 211, 212–13, 219.
44 See ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 224 (2d ed. 2016) (making the “central argument . . . that widespread political ignorance . . . should lower our confidence in the effectiveness of the modern democratic state as a tool for making important policy decisions”).
exhibit, without much if any empirical support for that trust; (ii) the flaws inherent in trying to pigeonhole social policy differences in society into mere questions of “fact” rather than ones where people come to the particular debate with different underlying sentiments or values or preferences—thereby simply assuming away Humean-type claims that we humans live in a fact/value dichotomy world and hence implicitly elevating the importance of expertise when it comes to the sort of issues that reach a top U.S.-style written constitution and bill of rights common law court (issues like who can marry, when life should be understood as beginning, how to treat those claiming to be refugees, the most desirable scope for protecting speech, what limits to put on gun ownership, how best to draw district or electoral boundaries, the list going on and on into the distance);47 and (iii) the insouciance about accountability concerns displayed by such attacks on democracy, remembering that one of the core virtues of democracy is that it lets us “throw the bums out” while in a Benthamite way,48 going some small distance towards aligning the interests of the elected politicians (who, to keep their jobs, need the votes of more than half of those who go to the polls) with those of the voters—an imperfect alignment, no doubt, but perhaps a least-bad one and better than just trusting judges (or anyone else) who cannot be removed from office.49

47 And it is not just the assumption that differences of opinion in society are overwhelmingly “fact-based” rather than “value-based” (contra David Hume-type thinking); also seemingly at work here is a needed implicit acceptance that Kant’s account of human reason is preferable to Hume’s. See, e.g., id. at 5–6 (discussing voters’ reasoning for their political choices). I much prefer Hume here to Kant. See JAMES ALLAN, A SCEPTICAL THEORY OF MORALITY AND LAW 1–4 (1998) (discussing Hume’s philosophy).


49 Which, after all, is the sentiment that lay behind Churchill’s famous quote that “democracy is the worst form of Government except all those other forms that have been tried from time to time.” Kay, Mixed Government and Judicial Review, supra note 34, at 14 (citation omitted). Now Rick mentions this Churchillian quote and then reminds the reader that it was spoken in opposition to a Bill that “would have reduced the power of the [wholly un] House of Lords to delay legislation passed by the [wholly elected House of] Commons.” Id. at 14. But to put that in further context still, the Parliament Act 1911 had limited the unelected House of Lords’ power to delay Money Bills to only one month and non-Money Bills to two years (assuming passage by the House of Commons in three successive sessions). The Parliament Act 1949 reduced the latter of those delaying powers in the hands of the unelected House of Lords down to one year (assuming passage by the House of Commons in two successive sessions). Now Churchill made his quote about democracy as the least-bad system, as Rick says, in the context of opposing the shrinking of the Upper House’s delaying power by one year. Id. at 14. My response would be this. We must remember the context. This is a British system under which the Prime Minister can at any time threaten to have (and if pushed actually have) the Monarch appoint as many new Lords as needed to enable passage of any Bill being blocked by the Lords. Indeed, this was exactly what Prime Minister Asquith threatened to do to force through passage of the Parliament Act 1911. Again, this was recently mooted or threatened if the Lords became difficult over Brexit
Secondly, any defence of what amounts to an aristocratic element in one’s constitutional arrangements (and be clear that on Rick’s “mixed government,” tricameralism-like defence of strong judicial review that will be precisely the role that top judges play) always looks better—or so say I—when one is himself part of that aristocracy. Take away the widespread view that the judges are interpreting and enforcing rules that have been legitimately locked-in and laid down in the past and my bet is that the vast preponderance of citizens (the ones not part of this lawyerly caste that will be deciding based solely on what they happen to think best) will find this a rather unappetising prospect. Antonin Scalia certainly agreed with me on this point:

The people are not stupid. When the primary function of the Supreme Court was thought to be interpretation of text and identification of legal tradition, the people were content to have justices selected primarily on the basis of legal ability. But they know that Harvard Law School, Stanford Law School—yea, even Yale Law School—do not make a man or woman any more qualified to determine whether there ought to be a right to abortion, or to homosexual conduct, or to suicide, than Joe Six-Pack. 50

Robert Nagel does too. 51

This leads to a third problem for Rick’s “mixed government,” tricameralism-like defence of strong judicial review. You could never sell it to people upfront and openly. Rick more or less concedes as much when he says:

If constitutional courts were to respond to this problem [i.e., the disjunction between what these courts say they are doing and what they actually do] by candidly aligning their rhetoric

legislation. Hence, Churchill’s support for keeping the Lords’ delaying power at a maximum of two years rather than just one year hardly looks in any way like support for a “mixed government” strong judicial review set-up under which unelected ex-lawyer judges can and do regularly gainsay the elected branches on a vast array of matters where there is nothing the latter can do in response. Put differently, I do not think Rick can plausibly call in aid Mr. Churchill, even in the most enervated way, as some sort of implicit supporter of his “mixed government.” See James Allan, The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?, 18 King’s L.J. 1, 2 (2007) (discussing a leading British constitutional case that centered on the Parliament Acts of 1911 and 1949).

50 Antonin Scalia, Romancing the Constitution: Interpretation as Invention, in CONSTITUTIONALISM IN THE CHARTER ERA 343 (Grant Huscroft & Ian Brodie eds., 2004).
51 See ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 6–7 (1989) (explaining the skepticism surrounding the idea that constitutional principles are consistent throughout time). Nagel does wonder, though, why anyone would expect those trained to find uncertainty and loopholes in rules to be good at upholding constitutionalism’s “locked-in” values. Bob Nagel made this clear to me in an email correspondence on file with the author.
with their practice, a different problem would arise. Such an approach would subvert the legitimacy that these institutions enjoy in the eyes of the public.\textsuperscript{52}

Hence Rick sees his “reconceptualisation of constitutional courts as discretionary decision-makers in a mixed government [as] a post hoc explanation.”\textsuperscript{53} In more straightforward terms, the Special Kay defence of non-originalist judges requires the public to be kept in the dark. If you put such a role for the judiciary to all of us voters in a referendum or at some sort of constitutional convention it would be defeated and be defeated badly. Of course, I concede that in theory best consequences can diverge from the path of honesty and of openness and of any realistic ability to sell the proposal to one’s fellow citizens. But having conceded that, I also think most of us would be more than a little skeptical of the worth of constitutional arrangements that can never honestly be revealed to one’s countrymen. For me there is just too much whiff of “elitism piled on aristocracy” about such arrangements. It smacks to me of the European Union and much of the (to me, inevitable) voter backlash flowing from the paucity of democratic credentials of that supranational body’s institutional arrangements.\textsuperscript{54} So that is my big quibble with Rick. Give me majoritarian democracy any day\textsuperscript{55} over a set-up with unelected top judges who are openly acting as a checking-and-balancing third chamber holding up the decisions of the elected branches against their own policy druthers, and having the last word power to gainsay anything they happen not to like (although admittedly the fact that this is what they are actually doing might have to be kept secret from the uninitiated). Of course, both Rick and I agree that this “mixed government” type role for judges, this reconceptualization of how one might defend and justify what all of us can observe many of them are in fact doing today, is a second best form of judicial review. We agree it flat out is not as good as “the constitutional state.” Indeed, we agree it is not even a particularly good type of “mixed

\textsuperscript{52} Kay, Mixed Government and Judicial Review, supra note 34, at 25.

\textsuperscript{53} Id. at 24.

\textsuperscript{54} I detail some of this in James Allan, Democracy, Liberalism, and Brexit, 39 CARDozo L. REV. 879, 900–04 (2018).

government” arrangement. Where we differ, at core, is that I am a noticeably bigger fan of democracy than Rick, by which I mean a thin, majoritarian understanding of democracy.56

But I had to look hard to be able to pick that fight with my good friend Rick. In the greater scheme of things, there is just so much overlap in our views. I was lucky that all those years ago my then-Dean decided to co-host a legal theory conference that led to my meeting the man we are honouring with this special law review issue.