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## Law Without Mind

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## CORRESPONDENCE

### Law Without Mind†

Steven D. Smith\*

Ye men of Athens, I perceive that in all things ye are too superstitious.<sup>1</sup>

A large part of the work done by lawyers and judges involves the interpretation of enacted law — primarily, statutes and the Constitution. Not surprisingly, legal scholars offer a good deal of advice, usually unsolicited, about how the task of interpretation should be performed. At present, such scholarly advice commonly recommends variations on an approach that may be called “present-oriented interpretation.” This approach discourages judges from equating a law with its historical meaning or “original understanding.” Instead, it urges them to construe statutes and constitutional provisions in a way that will render the law “the best it can be”<sup>2</sup> in light of present needs and values.

Of course, present-oriented interpretation also has its critics. One objection asserts that the approach is really a disguise for something else — for instance, that it is an excuse for judges (or law professors) to interpolate their own values into law under the guise of “interpretation.”<sup>3</sup> In this essay, however, I want to consider present-oriented interpretation as what it purports to be. Thus, I will assume that the approach *would* significantly and sufficiently constrain judges, that it is *not* merely a device for reading the interpreter’s values into law, and that it offers a genuine alternative to other common methods or theo-

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\* Professor of Law, University of Colorado. B.A. 1976, Brigham Young University; J.D. 1979, Yale Law School. — Ed. I thank Richard Collins, Kerry Macintosh, Robert Nagel, and Pierre Schlag for their valuable comments on earlier drafts of this essay. I also apologize to those individuals for my failure to pursue some of their questions and suggestions. As they correctly pointed out, the largely negative argument advanced here naturally generates a host of questions about how judges *should* interpret enacted law. My argument may also suggest additional candidates for the category of “mindless” law; Pierre Schlag observes, for instance, that the jurisprudence of “original intent” may itself fall into that category. But an attempt to address such issues would require a full-blown theory of interpretation, and presenting such a theory (even if I had one to present) would involve a major departure from my own “original intent”; *i.e.*, to write a short essay that makes essentially only one critical point (albeit, I think, an important one).

1. *Acts* 17:22 (King James).

2. See *infra* notes 12-26 and accompanying text.

3. Among those who have asserted this criticism I include myself. See Smith, *Why Should Courts Obey the Law?*, 77 *Geo. L.J.* 113, 158 (1988).

ries of interpretation. I will argue that even taken on its own terms (or, more accurately, *especially* if taken on its own terms), present-oriented interpretation is deeply flawed. Indeed, if present-oriented interpretation could actually be all that its proponents claim it is, the approach would be even less acceptable than if its critics' more skeptical depiction is correct.

The influence of the present-oriented approach is so pervasive that even a footnote merely listing its numerous variations and proponents might go on for pages. Rather than attempt any comprehensive treatment, I will focus on the positions of two important and articulate proponents: Professors Ronald Dworkin and T. Alexander Aleinikoff.<sup>4</sup> Nor will I attempt to survey the multitude of objections and responses which even those two scholars are likely to provoke (or, in Dworkin's case, have already provoked). Instead, I want to identify what seems to me the central but generally overlooked flaw in present-oriented interpretation: the approach would make law the product not of mind, but of accident.

## I.

Present-oriented interpretation, though familiar enough, is also strangely elusive. Perhaps the best way to understand the approach is to examine what it shares, and what it does *not* share, with its leading competitors. One competing view is commonly called "originalism," although Dworkin prefers to call it "historicism" or "speaker's meaning" interpretation, and Aleinikoff refers to it as the "archeological" approach.<sup>5</sup> "Originalism" comes in several versions,<sup>6</sup> but its essential contention is that in interpreting a statute or constitutional provision, a judge should try to determine what the law meant, or was intended to mean, at the time it was enacted. Originalists need not be naïve about the difficulty of that task. Indeed, they may concede that it is rarely possible to ascertain with certainty (and sometimes impossible to ascertain at all) what a law was originally intended to mean, and they differ in their prescriptions of what judges should do when dis-

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4. Dworkin's approach to interpretation is presented in various books and articles but is most cohesively explained in R. DWORKIN, *LAW'S EMPIRE* (1986). Aleinikoff's proposal is presented in Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988).

5. See R. DWORKIN, *supra* note 4, at 53-54, 359-61; Aleinikoff, *supra* note 4, at 21.

6. Perhaps the most important distinction is between originalists who believe that interpretation should try to recapture the "Framers' intent" and those who favor interpretation focusing on the original meaning of the text. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). The "intentionalist" and "textualist" versions may have significantly different implications, but for purposes of this essay, those differences need not be considered.

cernible original meaning runs out.<sup>7</sup> Originalists can also concede that statutes and constitutional provisions may sometimes adopt broad principles which must be applied flexibly in light of current conditions.<sup>8</sup> Nonetheless, the quest for original meaning defines, in this view, the essential function of legal interpretation.

A central concern of originalism is that judges be *constrained* by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless. Thus, the constraints imposed by originalist interpretation seek to realize within the judicial branch the venerable ideal of "rule of law, not of men." If "rule of law" denotes the approach's leading virtue, its principal perceived vice is captured in another slogan: "the dead hand of the past." Even if the original understanding can be ascertained, critics contend, adjudication that adheres to such an understanding will often be unresponsive to present values, concerns, and needs. Arguing that judges should not feel unduly restricted by an enacting legislature's intent even when that intent can be discerned, Aleinikoff asserts: "Law is a tool for arranging *today's* social relations and expressing *today's* social values; and we fully expect our laws, no matter when enacted, to speak to us *today*."<sup>9</sup>

A very different approach to adjudication, if not exactly to "interpretation," is sometimes called (mostly by its opponents) "result-oriented" jurisprudence. Dworkin refers to this approach as "pragmatism." As Dworkin describes it, the pragmatic approach holds that "judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake."<sup>10</sup> The pragmatic judge would not necessarily spurn traditional legal authorities, like statutes or constitutional provisions, in part because such authorities may prove to be useful tools, and in part because they may in fact have given rise to practices and expectations which the pragmatic calculus

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7. Some originalists would argue that in such situations a judge must attempt to guess what the enactors "would have intended" had they addressed the specific issue more directly. See R. POSNER, *THE FEDERAL COURTS* 286-87 (1985) (suggesting that the interpreter "should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him"). Others would contend that when original or legal meaning runs out, judges should fashion public policy according to their own best judgment. Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 17-22 (1977) (attributing a legal philosophy of this kind to positivists such as H.L.A. Hart).

8. My colleague Richard Collins suggests — correctly, I suspect — that Dworkin's theory of interpretation may be seductive in part because it can easily be confused with this kind of flexible originalism. *But see infra* note 19.

9. Aleinikoff, *supra* note 4, at 58 (emphasis added).

10. R. DWORKIN, *supra* note 4, at 95.

must take into account. However, the judge would not acknowledge (except as a “noble lie,” for public consumption only) any “duty” to obey a statute for its own sake, and would respect the statute only for its prospective usefulness.<sup>11</sup>

The principal virtues and vices of pragmatism are just the reverse of those attributed to originalism. Whereas originalism is arguably unresponsive to present needs and values, pragmatism is *exclusively* concerned with the present and the future; past legal authorities are relevant, if at all, only insofar as they implicate current concerns. Conversely, by freeing judges of the duty to obey enacted law, pragmatism dissolves the constraints constructed by originalism; it authorizes the judge to disregard an applicable statute or precedent whenever the claims of current policy so advise. In short, pragmatism promises responsiveness but not, arguably, “law”-like constraint.

Dissatisfied with both originalism and pragmatism, present-oriented interpretation seeks to appropriate the virtues of each. Like originalism, it would restrict judges to “interpretation,” thus forbidding free-wheeling judicial forays into the realm of policy creation. But the aim of interpretation would no longer be primarily historical. Instead, as in pragmatism, judges would become distinctly present-minded, interpreting the law to conform to present needs and values. In this spirit, Aleinikoff urges the judge to “treat the statute *as if it had been enacted yesterday* and try to make sense of it in today’s world.”<sup>12</sup> This approach prescribes “textual analysis” — but analysis “in a present-minded fashion.”<sup>13</sup>

To illustrate the method, Aleinikoff discusses an immigration law enacted in 1952 which excludes, among other persons, “[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect.”<sup>14</sup> Aleinikoff asks whether this provision should be construed to prohibit immigration by aliens who are homosexuals. When the statute was enacted in 1952, he observes, Congress almost certainly believed that the language covered homosexuals. The statute was enacted pursuant to a comprehensive study of the immigration system by the Senate Judiciary Committee, which had recommended the exclusion of “homosexuals and other sex perverts.” And the Senate Report accompanying the immigration bill had explicitly noted that “[t]he Public Health Service has advised that the provisions for the exclusion of

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11. See generally *id.* at 154-60 (elaborating Dworkin’s conception of pragmatic decision making).

12. Aleinikoff, *supra* note 4, at 49 (emphasis in original).

13. *Id.* at 47 n.117.

14. *Id.* at 48 (quoting 66 Stat. 163, 182 (1952)).

aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts."<sup>15</sup> Nonetheless, Aleinikoff goes on to explain how a present-minded interpreter could construe the provision *not* to cover homosexuals. The interpreter, he suggests, "ought to begin by noticing that the statute nowhere mentions homosexuality, and the phrase 'psychopathic personality' does not spring to mind as a ready category into which to place it."<sup>16</sup> In addition, interpreting the statute not to exclude homosexuals is consistent with what Aleinikoff regards as the more pertinent and sound legal practices of today, as well as with "the accepted view of the medical and psychiatric professions."<sup>17</sup> Thus, a construction that declines to apply the statute to homosexuals, although it concededly "violate[s] the clearly expressed intent of the enacting legislators,"<sup>18</sup> is faithful both to present values and to the statutory text.

Although Dworkin's theory of interpretation is more elaborate and thus more difficult to pin down<sup>19</sup> — indeed, his responses to criticism suggest that his critics have never yet quite managed to pin him down — his theory is closely analogous in essential respects to Aleinikoff's.<sup>20</sup> Where Aleinikoff insists on textual analysis, Dworkin demands interpretive "fit." The judge cannot just do whatever she

15. Aleinikoff, *supra* note 4, at 47 (quoting S. REP. NO. 1137, 82d Cong., 1st Sess. 9 (1951)).

16. *Id.* at 50.

17. *Id.*

18. *Id.* at 51.

19. One possible source of confusion may be noted here and, hopefully, avoided. In Dworkin's view, interpretation, while it does not aim primarily to recapture the framers' or enactors' intent, *does* give some weight to what legislators have said about the law they enacted; and there are passages in Dworkin, especially in his earlier writing, that if taken in isolation might even suggest that Dworkin advocates a kind of originalism in which the interpreter is bound by the general *principle* or *concept* adopted by the enactors rather than by their specific *conception*. See, e.g., R. DWORKIN, *supra* note 7, at 135-36. If this were Dworkin's position, then he would be advancing a particular version of originalism or the speaker's meaning theory of interpretation, rather than a criticism of and an alternative to that theory; in that case, this essay's analysis of present-oriented interpretation would not apply to Dworkin. But it is clear that Dworkin is *not* merely offering an improved version of originalism. Indeed, in his recent book he describes the theory of originalism just noted and expressly rejects it. Dworkin explains how Hercules, a mythical judge who begins by favoring originalism and then is forced by difficulties and criticism to modify his approach, might eventually conclude that he should "enforce the most abstract and general political convictions from which legislators act rather than the hopes or expectations or more detailed political opinions they have in mind when voting." R. DWORKIN, *supra* note 4, at 317. Such a view is at least very close to the version of originalism that Dworkin's discussion of "concepts" and "conceptions" might seem to endorse. But Dworkin promptly dismisses this view, observing that it is "only a poorly stated and unstable form of Hercules' own method, into which it therefore collapses." *Id.*

20. Aleinikoff observes that his own "approach is similar [to Dworkin's], although it is less concerned with Dworkin's dimension of 'fit' (that is, the telling of a story that harmonizes earlier interpretations into a coherent whole)." Aleinikoff, *supra* note 4, at 47 n.117. Aleinikoff's reference is to Dworkin's "chain novel" analogy. See *infra* note 24.

pleases, or whatever strikes her as sensible or fair; she must confine herself to "interpreting" the law. And a proper interpretation must "fit," or be consistent with, the text or practice that is the object of interpretation.<sup>21</sup> Similarly, where Aleinikoff urges the interpreter to be "present-minded," Dworkin requires "justification." By this Dworkin means that the interpreter should select the interpretation most compatible with current values and with the best available political and ethical theory.<sup>22</sup> Thus, the object of interpretation is to make the law "the best it can be" by present standards.<sup>23</sup> This presentist orientation rejects, or at least greatly de-emphasizes, the quest for framers' or authors' intent — a quest that Aleinikoff and Dworkin respectively belittle with the labels of "archeology" and "historicism."<sup>24</sup>

By combining elements of both competing approaches, proponents of present-oriented interpretation hope to capture the virtues of those competitors while avoiding their debilitating vices. Present-oriented adjudication would be constrained, and thus "lawful," because judges would be confined to "interpretation." Aleinikoff insists that his recommended approach is "not *nontextual* . . . [T]he fact that the statute is written . . . provides a significant restraint."<sup>25</sup> Likewise, Dworkin emphasizes that Hercules, his mythical ideal judge, cannot just render any decision that he regards as fair or desirable; the requirement of "fit" may eliminate results that Hercules might have preferred.<sup>26</sup> At the same time, because interpretation seeks conformity not with historical meaning or intent, but rather with present values and needs, it would be responsive to current concerns.

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21. See R. DWORKIN, *supra* note 4, at 66, 230, 338-39, 380.

22. *Id.* at 231, 350, 380.

23. *Id.* at 52, 62, 337.

24. See *supra* note 5. Dworkin and Aleinikoff offer captivating analogies to explain their recommended approach. Dworkin uses the analogy of the "chain novel." In interpreting a statute or constitutional provision, a judge is like a writer involved in a multi-member project in which one author writes the first chapter of a novel, then passes it on to another author who will write the second chapter, and so on. The judge does not write on a clean slate; his product must maintain continuity with the chapters already written by his predecessors. With that qualification, however, the judge must write his own chapter as well as he can, rather than guessing what earlier authors might have expected him to do. R. DWORKIN, *supra* note 4, at 228-38.

Aleinikoff employs a "nautical" metaphor for statutory interpretation. "Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail." Aleinikoff, *supra* note 4, at 21. In this view, the "dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board." *Id.*

25. Aleinikoff, *supra* note 4, at 60.

26. R. DWORKIN, *supra* note 4, at 379-80.

## II.

As presented by its supporters, present-oriented interpretation seems well-nigh irresistible. By incorporating the virtues of its competitors, the approach offers us the best of both worlds. Or does it?

Start with the question of constraining judges. As noted, proponents of present-oriented interpretation claim that the approach would place significant constraints on judges. One objection, which I will simply note and then set aside, contends that this claim is false; the requirement of "fit" is so loose that the judge will usually be presented with a virtual smorgasbord of eligible interpretations, and she will be able to select an interpretation that suits her own moral and political tastes. Thus, present-oriented interpretation is nothing more than closet pragmatism.<sup>27</sup> This is an important criticism, but for the moment I want to assume that it is unfounded; *i.e.*, that present-oriented interpretation *would* significantly constrain judges.<sup>28</sup> Taken on its own terms, present-oriented interpretation provokes an even more fundamental objection.

That objection can best be presented in stages. Begin by considering more closely the notion of "constraint." It is true that originalism values "constraint," but not just any kind of constraint. Judges might be "constrained," after all, by a rigid requirement that all cases be decided in favor of the party whose surname has alphabetical priority.<sup>29</sup> Or, if reading the entrails of birds were reduced to a method that produced uniform results, we might severely constrain judges by insisting that they decide cases according to that method. Such requirements would "constrain," but they would not thereby possess even the slightest appeal. Nor has it ever seemed a cogent response to those who, like the Legal Realists, argue that law is indeterminate, to say: "Aha, you contradict yourselves! First you say that the judge has wide discretion, but then you turn around and admit that the judge *is* constrained — by what he ate for breakfast."

If such an argument seems fatuous, that is because the point worth

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27. Roscoe Pound expressed such a view with a metaphor that was less complimentary than Dworkin's "chain novel" analogy or Aleinikoff's "nautical" metaphor; Pound chose the metaphor of the juggler or sleight-of-hand artist. He condemned "spurious interpretation" whose object is "to make, unmake, or remake and not merely to discover. It puts a meaning into the text as a juggler puts coins . . . into a dummy's hair, to be pulled forth presently with an air of discovery." Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382-83 (1907).

28. For those who find the criticism persuasive, therefore, much of the following discussion will have a distinctly hypothetical character. Neither the advantages claimed by proponents of present-oriented interpretation nor the difficulties which I will describe will seem real, since constrained present-oriented interpretation will be regarded as merely illusory anyway.

29. Cf. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 609 (1963) (ironically proposing a similar rule of decision for choice-of-law cases).



discussing deals not with the existence of “constraints” in the abstract, but with whether the law can impose the *proper kind* of constraints. And what is the proper kind of constraint? At this point, the contrast between originalism and present-oriented interpretation is subtle but critically important. Both the originalist and the presentist may offer seemingly identical answers: the judge is properly constrained by “statutes” and by the Constitution; *i.e.*, by enacted law. But these answers are in reality quite different because when the positions speak of “statutes,” or enacted law, they mean different things.

Just as “man” can be defined as a “featherless biped,” a “rational animal,” or “the offspring of deity” — and each of these divergent definitions might conceivably be correct — so a statute can be understood in critically different ways. Viewed one way, a statute or constitutional provision is just a collection of words — words with a special diction and tone, perhaps, but in the end not all that different from the words one might find in a technical treatise, a law review article, or even a science fiction novel. The same collection of words that appears in a statute might be written by anybody — a doodling political hack, a scribbling reformer, a law student practicing legal drafting — without acquiring any special credentials or claim to legal authority.

Viewed another way, however, the statute is not just a collection of words, but rather the expression of a collective decision: a decision made by the established political authority and expressed in a form recognized as conferring legal force and validity upon the decision. In maintaining that judges should be constrained by statutes, originalism adopts this latter view of what a statute is. Originalism, in other words, insists that judges should be constrained to obey enacted law *not* because constraint is good for its own sake, nor because there is anything magical about the way words are arranged in a statute, but because a judicial obligation to obey enacted law is the means by which the power of the political community to make effective group decisions is realized.

The whole thrust of present-oriented interpretation, by contrast, is to reject or resist a view which understands statutes primarily as the expression of particular decisions made by specific, temporally situated political officials. On the contrary, the presentist insists that to be bound by the statute does *not* entail being bound by the actual human understanding or collective decision that brought the statute into being. But this view effectively separates the statute from the source of its authority. To be sure, the words of the enacted law may continue to constrain the judge. But the essential fact that made *those words* (and not a science fiction novel, or even a law review article) effica-

scious to bind the judge — *i.e.*, the fact that the words express a specific collective decision made by the designated political authority — is now de-emphasized or dismissed. The legal text is methodically dissociated from the phenomenon upon which its power to constrain depends.

The important question that emerges from this new perspective is not whether the statute, so viewed, *could* constrain judicial choice. Perhaps it could. But the critical question is why a statute, so understood, *should* constrain judges. If the statute is understood not as the expression of a collective decision by the established political authority but rather as a kind of thing-in-itself, a free-floating text, then why is its right to command any greater than that of, say, the political treatise or the science fiction novel?

The point is easy to miss, or to misperceive, in part because we suspect that the severing of the statutory words from the human understanding that initially produced them is never completely effective. To be sure, we can hypothesize a situation in which words come to mean something totally different from what they were originally intended or understood to mean. But it is questionable whether in the law such a drastic transformation ever really occurs. It seems that *something* — the ingrained habits and perspectives of the legal profession, perhaps, or the continuity of language, or the obstinate underlying nature of humanity or of the cosmos — will ensure that legal words uttered decades ago will continue to carry for us something like the meaning they held for those who first spoke them. Hence, the status of words in a statute never quite degenerates to the level of words in a science fiction novel; the senselessness of severing words from the understanding that produced them, and then of treating those words as authoritative constraints, never fully appears.

But it would be unseemly for a proponent of present-oriented interpretation to take refuge in the observation that presentist interpretations will probably correspond pretty closely to the original meaning anyway. After all, the presentist proposal offers a meaningful alternative to originalism only insofar as present interpretations *do* depart from original understanding. Insofar as continuity obtains, such that original understanding and present interpretation coincide in their conclusions, the presentist attack on originalism is a mere academic exercise without practical consequence. Hence, the essential presentist contention is — and must be — that at least in some instances original understanding and present-minded interpretation *will* substantially diverge, and that when such divergences appear, the present-oriented interpretation should prevail over the original understanding. And in

assessing this proposal, we should struggle to suspend our sense of inevitable continuity, and to judge the proposal by the stark case in which present-minded interpretation produces a result wholly contrary to the statute's original meaning and intent. In that (perhaps imaginary) case, the severing of the statutory words from the understanding and decision that produced the words is complete; the statutory words become a disembodied artifact, not the expression of a discrete collective decision.

Viewed in this way, the words of a statute have no more authority to constrain than do the words of a science fiction novel. In neither case are the words treated as expressing an actual, conscious decision of the political community or its established authorities. And in both cases, therefore, the pertinent question is not whether the words *can* constrain, but rather why in the world they *should*.

### III.

Present-oriented interpretation, it seems, fails to achieve the objective of originalism; it constrains judges, perhaps, but it does not constrain them to respect collective decisions actually made by the political community. Neither does present-oriented interpretation realize the objectives of pragmatism. It counsels judges to be present-minded. But the judges' ability to promote present values and objectives will be hampered by the requirement that they confine themselves to "interpreting." Thus, Dworkin assures us that in some cases Hercules will not be able to reach the result that current values or theories of justice would prescribe because that result would require an interpretation that does not plausibly "fit" enacted law and established practice.<sup>30</sup>

To the pragmatist, such a limitation must seem like pure, irrational traditionalism; the limitation insists upon loyalty to the past even when that loyalty serves no present purpose.<sup>31</sup> Hence, just as present-oriented interpretation may appear to the originalist to be closet pragmatism, to the pragmatist it may seem a kind of closet originalism. But the equation is imperfect. In fact, the present-minded judge faces a predicament which is worse in one way than that which confronts the originalist.

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30. See *supra* text accompanying note 26.

31. As noted above, a pragmatic orientation *may* supply reasons for applying statutes and constitutional provisions, and it may even provide reasons for construing the text according to its meaning in present ordinary usage. Insofar as parties have actually formed expectations and have acted in reliance upon their understanding of the text, for example, a pragmatic judge devoted to doing present justice might be more concerned with the *parties'* understanding of the text than with the enactors' understanding. See Smith, *supra* note 3, at 136.

Suppose the pragmatist poses the following challenge: Let us assume that in a given case, result A would be the "best" result as measured by *present* values and needs; it would be the fairest result, or the result that best promotes sound public policies. But result A cannot be squared with any plausible interpretation of an apparently controlling statute, which was enacted some decades ago. Instead, by all plausible interpretations, the statute appears to command result B, which runs contrary to current notions of fairness and to public policies that are now widely accepted (though not, of course, reflected in the older statute pertinent to *this* case).<sup>32</sup> In such a situation, it seems, both originalism and present-oriented interpretation would require the judge to choose result B. But what sense is there, the pragmatist demands, in such a course? Indeed, to argue for such a conclusion seems almost self-contradictory, like arguing that it is better to choose the worse result.

The pragmatist's challenge may be embarrassing for either the originalist or the present-minded interpreter. But the originalist at least has a plausible response. Interpreting enacted laws according to the understanding of those who adopted them is a way of conferring upon the political community the power to make collective decisions. To be sure, those collective decisions may sometimes be misguided, or they may become outdated. In such cases, originalist interpretation may inhibit judges from promoting present interests and values; a judge may be forced to respect a past decision, and thus to reach result B even though result A is admittedly more consistent with present values. The originalist can argue, however, that this is a cost worth bearing in order to preserve the power of collective self-determination.

By contrast, how does the proponent of present-oriented interpretation respond to the pragmatist's challenge? Having already divorced statutory meaning from the legislative understanding or intent that produced the statute, she cannot now argue that result B is required on the basis of respect for a collective community decision. For all she knows, such a result is *not* in any meaningful sense required by an actual, conscious decision. Or, to put it differently, the present-minded judge would feel perfectly free to reach result A if exactly the same original collective decision had been expressed in different language which, with the passage of time and the evolution of values and

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32. Of course, in practice the ability of a judge to say with any confidence that result A is preferable to result B, despite the legislature's thus far unaltered decision to the contrary, is questionable. Thus, an originalist might well reject the hypothetical altogether on the ground that by assuming that result A is known to be best, the hypothetical adopts an assumption that will rarely if ever obtain in the real world.

language, could now plausibly be read to support that result. For the presentist, the obstacle to reaching the pragmatically “best” result is grounded not in the collective *decision*, but rather in the *words*: the present-minded interpreter cannot reach the desirable result because the legislature happened to use words that cannot be read to support that result. She is inhibited from realizing present justice not by a decision made by conscious human beings, but instead by an inanimate text.<sup>33</sup>

#### IV.

This conclusion suggests that the criticisms discussed thus far are merely preliminary. For example, a moment ago I asserted that present-oriented interpretation, by severing the legal text from the understanding of the officials who produced and adopted that text, cuts the connection between the text and the political authority to which the text owes its power to constrain. But it now appears that this objection understates the problem. Present-oriented interpretation not only cuts the connection between text and *political authority*; it severs the link between text and *mind*. The interpretations rendered and the results reached by presentist judges will turn (at least in those cases where the method of present-oriented interpretation makes a difference) less on mind — on conscious human thought expressed through actual decisions — than on historical accident.

Aleinikoff’s discussion of immigration law provides a valuable example of just this kind of accident. As Aleinikoff presents the situation, it is as clear as such things can be that the enacting Congress intended to prohibit immigration by homosexual aliens and used language that, in Congress’ understanding, expressed that decision. But it is also true that three-and-a-half decades later the language chosen by Congress would probably *not* be commonly understood as referring to homosexuality; if a statute employing such language actually had

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33. Nor do the “nautical” and “chain novel” metaphors, *see supra* note 24, have much force to deflect the pragmatist’s challenge. In response to the “nautical” metaphor, the pragmatist can simply ask, “What sense does it make to stay on board a ship that is not, at least in this instance, taking us where we want to go?” Likewise, the pragmatist can dismiss the “chain novel” metaphor as manifestly inapposite to the judge’s task. After all, the only reason why the writer of a later chapter in a chain novel has a responsibility to maintain continuity with earlier chapters is that he is involved in producing a work that is intended to be, and *will be*, read *as a whole*; readers normally do not pick out chapters in the middle and read them without reading what came before and what comes after. But the judge may be dealing with persons who know little (and care less) about what the law was like decades ago; those persons are concerned that the law be “the best it can be” *now*. Past chapters of the legal story had their own readers, of course, but those readers are long since dead. In short, it is not at all clear why the “chain novel” analogy has any relevance for judges. In this respect, the analogy of the business manager, for whom what happened last year is a “sunk cost,” seems more apt.

been enacted yesterday (as Aleinikoff asks us to suppose of the real statute), we probably would not read it as excluding homosexuals. A nonexclusionary construction, Aleinikoff goes on to say, is more consistent with present pertinent legal practice than is a construction adhering to the original legislative intent. Thus, a judge can promote present values and preferred legal practices while remaining faithful to the statutory text (though not, Aleinikoff concedes, to the understanding of the enacting legislature).<sup>34</sup>

Aleinikoff's assertions about historical intent and current usage seem plausible enough. The trouble is not with what Aleinikoff says, but with what he fails to say: *i.e.*, that his analysis makes everything hinge on an historical accident. When it enacted the statute, Congress used words that were evidently understood as referring to, among other things, homosexuality. Congress might just as easily have *said* "homosexuality"; it did not use that precise word only because it apparently believed that it had used a somewhat more inclusive but essentially synonymous term. If Congress had used the word "homosexuality," then Aleinikoff's construction would collapse; a present-minded interpreter could no longer "begin by noticing that the statute nowhere mentions homosexuality."<sup>35</sup> On the contrary, even if enacted yesterday, a statute so worded would clearly cover homosexuals, and the homosexual alien would apparently be out of luck. But because Congress happened to use different words to express the same decision, a diametrically opposite result obtains. The alien's fortunes turn on a fortuity.

The difficulty is hardly unique to Aleinikoff's particular illustration. Legislators, like other human beings, can often express the same idea in more than one way. In many situations, therefore, at least two ways of expressing a public decision may, at the time of enactment, seem almost synonymous; the formulation that is in fact chosen will depend largely upon stylistic preferences, or upon mere chance. Years later, however, the possible readings of those alternative formulations may come to diverge. To the originalist, the enactors' choice of formulations should in principle make no difference because the judge is expected to implement the statute according to its original meaning, not its meaning at the time of subsequent application. Neither will the choice of formulations have great significance for the pragmatist, though for a different reason; seeking to further present interests, the

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34. See *supra* notes 14-18 and accompanying text. It should be noted that Aleinikoff's *conclusion*, though neither his reasoning nor his particular version of present-oriented interpretation, might be compatible both with pragmatism and with some versions of originalism.

35. Aleinikoff, *supra* note 4, at 50.

pragmatist will not feel bound to obey the statute, however it happens to be worded.<sup>36</sup> But if one “treat[s] the statute as if it were enacted yesterday”<sup>37</sup> and then, with that fictitious qualification, continues to insist on respect for the text, the different formulations may have vastly different legal consequences. Thus, for the present-minded interpreter the enactors’ choice of formulations — a choice that may have turned largely on chance — proves to be dispositive.

In this respect, present-oriented interpretation presents a striking contrast to *both* originalism and pragmatism. In those views, the law evolves out of discrete acts of mind; it is the product of human beings who deliberate about problems and then make conscious decisions about how those problems may best be addressed. The locus of such acts of mind differs as between the theories. The originalist assigns responsibility primarily to *legislators*, who ordinarily make and express their decisions in the form of statutes. The pragmatist, conversely, encourages *judges* to decide what policies and results will advance justice and public policy. In either case, however, law originates with, and is developed by, acts of mind.

Present-oriented interpretation, by contrast, makes law substantially the product of historical accident. To be sure, legislators continue to study problems and make decisions — decisions that are expressed in statutes. But the whole point of present-oriented interpretation’s attack on “historicism” and “archeology” is to cut the tie between the legislative intent, or the legislators’ understanding of what they have decided, and the statute itself. The connection between the statute and the act of mind that produced it is thus in large measure dissolved.<sup>38</sup> Likewise, judges will continue to consider cases and render decisions. But the whole point of the presentists’ attack on pragmatism is that a judge must *not* simply study a problem and then render the decision that seems most just or useful. Instead, the judge is supposed to reach a decision by the distinctly different process of “interpreting” statutes — statutes which the presentist has deliberately and methodically unmoored from the acts of mind in which they originated.

The result comes close to achieving, at least in aspiration, a law that is in the most literal sense “mindless.” Of course, the law would

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36. Of course, to the extent that the original choice of wording has influenced present practices and expectations, the pragmatist’s decision will be indirectly affected by the legislature’s initial choice.

37. Aleinikoff, *supra* note 4, at 49 (emphasis omitted).

38. Cf. R. DWORKIN, *supra* note 4, at 316 (“[Hercules] takes note of the statements the legislators made in the process of enacting [a statute], but he treats them as political events important in themselves, not as evidence of any mental state behind them.”).

still be the product of mental processes, just as decisions based on interpreting astrological configurations or on reading palms or tea leaves are the result of (perhaps very intricate) mental processes. But such decisions are not, at least not in the most important sense, based on "mind." Similarly, when statutes are understood as "texts" but not as the expression of actual, conscious, temporally situated decisions, the connection to "mind" is cut; the statute becomes a kind of Rorschach blot; it constrains—there are thousands of things that an observer just can't see in a Rorschach blot—but its constraints are fortuitous, not the product of conscious deliberation. And the critical question, more vexing now than in its earlier appearances, is not whether such a statute *can* guide judges, but whether there is any conceivable reason why it *should*. A person might search for answers to vital personal questions in a Rorschach blot; he might even *find* answers there. But who wants to turn his life over to a Rorschach blot?

## V.

Until the early thirteenth century, those indicted were put to an ordeal. In the ordeal of water, for example, a priest would conjure the water not to accept a liar, the accused would swear to his innocence, and then he would be lowered in: if he floated his oath was shown to be perjured, and he was therefore guilty of the offence. The whole mechanism turned upon the invocation of the priest; and after long and anxious inquiry, the church in 1215 decided that it was all superstition and forbade priests to take any part. The decree was promptly obeyed in England, and the mode of trial of centuries was brought to an end.<sup>39</sup>

The elimination of trial by ordeal is regarded as an important advance in the development of law. But that specific advance was only part of a larger achievement by which law has come to be seen as the product not of natural or historical fortuity, but of mind.<sup>40</sup> More than seven centuries after the abolition of the ordeal, however, the widespread appeal of present-oriented interpretation suggests that this larger achievement remains insecure. Ironically, perhaps, the achievement seems *especially* insecure among legal scholars.

At this point it may be reassuring to recall an objection that I earlier noted and set aside. The objection asserted that present-oriented interpretation is really just a disguised form of something else, that it is really just closet originalism or closet pragmatism. As it turns out, there is comfort in the supposition that present-oriented interpretation

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39. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 358-59 (1969).

40. For a valuable exploration of the importance of "mind" in law, see J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).



is not what it purports to be. Letting legislators make collective decisions has its risks, after all, but there is much to be said for such a system. Letting judges fashion the law according to their understanding of justice and sound public policy may be even more worrisome; still, arguments favoring that kind of system are also available. But it is hard to think of any recommendation for a regime of law created by the "interpretation" of disembodied words that have been methodically severed from the acts of mind that produced them. Such a regime would represent a step back in the direction of the rule of fortuity.