Book Review

Smith, Tara. Judicial Review in an Objective Legal System. New York: Cambridge University Press, 2015.

Having provided the necessary moral and political groundwork in three books¹ and dozens of articles, Tara Smith is well placed to draw out the implications of Objectivism for legal philosophy and to challenge directly its main rivals. One can read her previous work to grasp more fully the underlying arguments for certain key premises, but *Judicial Review in an Objective Legal System* can stand on its own. Smith condenses the essence of prior work into clear, concise summaries that she builds on in order to defend her view that the "specific role of judicial review, within a proper [i.e., objective] legal system, is to ensure that it is the law that actually governs" (p. 275). This simple-sounding claim actually involves some astonishingly radical ideas that—if implemented—will revolutionize the field.

The book is divided into two parts: Part I's five chapters address the nature of an objective legal system and Part II's three chapters examine the implications of that view for judicial review. An important qualification that Smith makes at the outset is limiting the scope of her analysis to U.S. constitutional law. Even when she explores (in Chapter 8) how her view can function in non-ideal circumstances, that task is undertaken in the American context. (We'll see below the significance of this qualification.)

Prior to discussing legal philosophy in Part I, Smith sets epistemological groundwork in Chapter 1 by articulating Ayn Rand's theory of objectivity and concept-formation. Objectivity concerns "the basis on which a belief is held" (p. 25); one is objective when that "procedure is reality-oriented and logic guided" (p. 27). She defends objectivity against intrinsicism and subjectivism, clearing the way for its evidence-based method of forming our concepts about reality. Once Smith distinguishes objectivity from other phenomena that it is commonly confused with (such as neutrality, even-handedness, and transparency), she explains in Chapter 2 what is required in order to be objective in a legal system's network of rules, institutions, offices, and agencies. These requirements include properly understanding the content of law (the "what"), the administration of law (the "how"), and the grounds on which law is justified (the "why"). Chapter 3

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¹ See Tara Smith, *Moral Rights and Political Freedom* (Lanham, MD: Rowman & Littlefield Publishers, 1995); Tara Smith, *Viable Values: A Study of Life as the Root and Reward of Morality* (Lanham, MD: Rowman & Littlefield Publishers, 2000); and Tara Smith, *Ayn Rand's Normative Ethics: The Virtuous Egoist* (New York: Cambridge University Press, 2007).

explains how the Rule of Law—also often confused with objectivity—is not value-neutral and how its normativity does not lead to the subjective Rule of Men.

Chapters 4 and 5 explain moral and legal authority, respectively. Legal authority may be "the ultimate arbiter of legitimacy within a legal system" (p. 88, n. 1), but we must look *outside of* that system to locate the basis of its authority in morality. Law's moral authority to wield force can only be used for the purpose of protecting individual rights, a conclusion that Smith grounds in Chapter 4's five-step argument (itself condensed from two of her previous books). Since each person is "an end in himself," needs to use reason to discover and secure his objective well-being, and needs "freedom from others' initiation of force" in order to reason (p. 94), he thus "is entitled to freedom of action" so as to pursue his own happiness (p. 95). Given those claims, people thus need a government that protects individuals' rights in order to make possible such value-pursuit. Protection of rights requires not only punishing rights-violators, but also creating the conditions needed through legal rules so as to prevent or minimize rights-violations (pp. 107-8). That's where the crucial role of a constitution enters the scene. Smith argues in Chapter 5 that a written constitution is the sovereign "bedrock" of legal authority. She maintains that a significant "threat" to that authority comes from the common law, which emerges through judicial case precedent (as contrasted with statute law issued from the legislature) (pp. 113-14).

Having provided substantial accounts of an objective legal system's "what" and "why" and a sketch of its "how," Smith is ready to explore more deeply in Part II the "how" of the judicial branch. Chapter 6 reviews and critiques at length five prominent theories of judicial review: Textualism, Democratic Public Understanding Originalism, Deference/Popular Constitutionalism, Perfectionism/Living Constitutionalism, and Minimalism. These five theories have significant differences, but they share in common misidentification of legal authority and (direct or indirect) subjective methods of legal interpretation. Such errors unleash legal power to serve illegitimate ends by non-objective means, with individual rights being the casualty. After exposing those theories' flaws, Smith outlines in Chapter 7 her view of objective judicial review in ideal circumstances. When cases are brought to court, judges must identify what the law is, make sure that no government agency (itself included) exceeds its authority, determine whether a specific action or item is covered by the relevant law, be clear about valid legal presumptions (e.g., innocence, individual liberty), and courageously avoid all irrelevant considerations (e.g., personal preference, majority will, foreign law) that might derail objective judicial review. Since actual U.S. law is non-ideal, Smith explains in Chapter 8 how objective judicial review should be modified-albeit, "only minimally" (p. 254). She calls for the judiciary henceforth to reject the current practice of three-tiered legal scrutiny ("strict," "intermediate," and "rational basis"). Instead, it should employ the only one consistent with the U.S. Constitution: strict scrutiny. Realizing that this alteration in judicial practice will upset a vast array of citizens' expectations,

she "counsel[s] a gradual transition back to a fully objective application of the relevant law" (p. 267).

Judicial Review in an Objective Legal System has many merits. I cannot here do justice to all of them, but five should be pointed out as especially insightful: (1) explaining the objective nature of concept-formation, (2) articulating the moral value of the Rule of Law, (3) defending the U.S. Constitution over common law as the legal bedrock, (4) exposing the false dichotomies involved in five rival theories of judicial review, and (5) suggesting that the courts enforce one uniform standard of strict scrutiny. Each of these has significant ramifications for philosophy of law and jurisprudence.

It might seem unusual to begin a book on legal philosophy with a chapter on epistemology. However, judicial review concerns the meaning and interpretation of legal concepts, so Smith wisely starts there. The best way we have of getting reality right is by cultivating good epistemic methods. Too much philosophy of law begins mid-stream with stipulated, vague, or conventional meanings of legal language. Fundamental conceptual and logical errors have profound implications for subsequent analysis of increasingly complex, higher-level abstractions that exist in metaphysics, ethics, politics, and law. A mistaken view of, say, the concept "person" could lead unjustly to excluding individuals who deserve legal protection or diverting resources to protect beings that do not warrant such protection. Among the several traits needed to be a good judge are conceptual analysis, logical reasoning, and categorization-in short, "thinking in principle" (p. 33). It takes an immense amount of intellectual labor and legal expertise to discern what the relevant law is and means as well as to figure out whether something is a case of, say, an exercise of religion or speech.

Such intellectual activity, though, does not entail judges' fabricating legal concepts. Another aspect of the book's first merit is showing how Objectivism avoids the false dichotomy of intrinsicism and subjectivism. Intrinsicism holds that objective truths exist "out there" and we need only passively receive truth in our minds, and subjectivism holds that our beliefs about something make it true (pp. 40-43). The former thus has metaphysics mysteriously determining epistemology, while the latter has epistemology relativistically dictating metaphysics. Objectivism, instead, is "relational," in that it strives to achieve a certain relationship—via the proper epistemic method-between the contents of one's mind and mind-independent reality (p. 41). This method, in principle, allows concepts formed objectively to be "open-ended," in that they are rationally revisable in light of further experience, expansion of one's context of knowledge, and integration across levels and domains of understanding (pp. 34-39). Well-formed concepts are thus not held hostage to any person's beliefs about the world at a particular time, nor are they unmoored from the world they seek to reflect. (As we'll see below, avoiding this false dichotomy here provides Smith with ammunition against the five rival theories of judicial review examined in Chapter 6.)

Smith should also be applauded for providing a moral defense of the Rule of Law. The Rule of Law is typically held to be the *sine qua non* of state legitimacy on the ground that its (allegedly) value-neutral, formal proceduralism is "fair." After all, the Rule of Men amounts to arbitrary dictatorship that fails to provide the order, stability, evenhandedness, and transparency of the Rule of Law. Smith does not dispute that the Rule of Law is an important aspect of a justified legal system; and she rejects the Rule of Men as antithetical to individual rights. She asks, though: How "fair" is it to impose the same promulgated law on all in a system where the content of the law is unjust, such as in a theocracy whose religion regards some people as inferior (p. 79)? She argues that legal "[f]orm cannot be severed from function" (p. 81). On the one hand, a legal system's Rule of Law is only as good as its moral underpinnings. On the other hand, apart from the more fundamental purpose of a state that the Rule of Law serves, the elements of the Rule of Law (versus the Rule of Men) are themselves normative. The reason why "deviations from those formal conditions" (p. 83) of the Rule of Law-such as being written, clearly formulated, broad in scope, general in nature, mutually consistent, etc.-are morally bad is that they (directly or indirectly) cause rights-violations.

It's difficult to know which of Smith's radical ideas may draw the most fire, but the third strong point of her view is a likely target. Since U.S. legal practice carried over its reliance on the British common law tradition from the colonial period to independence, Smith's view that common law threatens proper legal authority pushes back against longstanding legal practice. Not only that, such practice has been defended across the political spectrum. From those claiming that common law is the judicial avenue to "progressive" practice in advance of slow legislative change to those who defend it as the spontaneous-order mechanism for local legal practices to emerge/evolve to those claiming that it is the way for local jurisdictions democratically to maintain "community standards," common law has many advocates.

Smith explains the understandable appeal of looking to common law, for it has been used to address deeply unjust wrongs, including rightsviolating racism and sexism (pp. 117-21). However, relying on common law to right these wrongs is bad in several ways. First, it allows the judiciary to overstep its proper constitutional function: "A court's role is interpretive. A court is not to add to the law or to alter the law, but to ascertain its meaning so as to illuminate its proper application in practical use" (p. 146). There already exists a constitutional legislative mechanism for legal reform. Second, creating law through the courts yields conflicting rulings and makes the law indeterminate, which in turn makes it impossible *ex ante* to know what the law *is* or to be able to follow it consistently (pp. 124-27). Third, common law's defenders "cherry-pick" their favorite cases in order to cast the practice in a positive light (p. 127). Common law has often been used to oppress individuals by its appeal to legal precedent and social practice, as, for

instance, in segregation and sodomy laws. Following precedent or practice, however, does not make law right—only a good moral argument can do that.

The best way to protect individual rights is to develop properly "a written constitution [that] translates the mission and moral commitments of a government into legal practice by using those commitments to establish the government's specific powers and the boundaries around those powers" (p. 113). Once established, it is the judiciary's role to see to it that the law governs and to serve as a check on the other branches, whether they overreach or abdicate their legal responsibilities. "[W]hile the common law can be a useful auxiliary in clarifying the demands of a legal system" (p. 140), the Constitution's legal authority cannot be shared with common law. Smith notes that "*final* authority cannot be divided" (p. 138). Divided authority would always need either some other, higher unitary principle or some *ad hoc* mechanism by which to choose between them. Either of those options lacks the moral authority needed to ground legal authority, leaving such a system open to rights-violations that vitiate its purpose.

Smith's defense of objectivity in Chapter 1 reemerges in Chapter 6 to provide the fourth merit of her book: explaining how the five rival theories of judicial review lapse into false dichotomies. I cannot here comment on all of Smith's careful argumentation in Chapter 6's densely packed, seventy-page demolition of those five views. To the extent that she succeeds (and I think she does) in placing these views into either the intrinsicist or subjectivist method categories, she has already made the epistemological case against them in Chapter 1.

More interestingly, Smith shows how even those views that take themselves to be objective in eschewing subjective "judicial activism" namely, Textualism and Public Understanding Originalism—inadvertently smuggle "subjectivism through the back door" (p. 159). She does this by scrutinizing their views of meaning. Textualism holds that "meaning resides in the plain words of the text" (p. 149) and Public Understanding Originalism maintains that the written law means what "speakers at the time would have taken it to represent" (p. 163). Both views err in thinking that writing down words make them objective anchors for law. Words hold no intrinsic meaning that will leap off the page into one's mind. We need context—not the social context of other people's beliefs, but the context of the world and our active, logical reflection about it—to discern meaning. Without reality as the check, legal interpretation is chained to the beliefs of those who wrote the law—and that is subjectivism.

Of the various strengths of Smith's book, perhaps the fifth one offers the most hope for how her ideas can be used to make a positive difference now and in the long run. Understanding the proper epistemology and moral justification of the law gets one only so far. Going forth with the motto "Be objective in the legal system" is not immediately action-guiding. One still needs to figure out specifically what to do with that knowledge. Smith knows well that concrete prescriptions for action "cannot be reduced to a mechanical procedure," but can emerge only from "a process of abstract thought" akin to

the judgment employed in Aristotelian *phronesis* ("practical wisdom") (p. 248). At best, one can provide an example—along with its justification—to illustrate the kind of action that can be taken. This is exactly what Smith does in rejecting three-tiered judicial scrutiny.

Smith's suggestion that the judiciary enforce one uniform standard of strict scrutiny is concrete, clear, and far-reaching. It is also constitutionally warranted. As Smith explains, "[t]here is no basis for granting more or less protection to any of the different ways in which an individual might choose to exercise his rights. . . . [A]ll laws serve the same, single vital interest: the protection of individual rights" (p. 264). The idea that some individual rights are more important than others is a notion that has crept into the legal system over time-and it finds no basis in the Constitution. For example, on the three-tiered legal scrutiny model, people are less protected in their "freedom to engage in economic activity" than in their "freedom to pray" (pp. 230-31). Regulation of the former to serve a "legitimate state interest" needs to meet only "rational basis scrutiny," while attempts to regulate the latter to serve a "compelling state interest" must meet a "strict scrutiny" standard. Courts have created this uneven protection of rights at the behest of the legislature, which itself claims to reflect the will of the people. However, individual rights are not justified—but only destroyed—by leaving them to popular vote.

In short, with this one example, Smith shows us how objective law can "be restored brick by brick" (p. 273). It's all too easy to throw up one's hands in despair in a large country, thinking that one person cannot make a difference. Carefully planned, strategically powerful choices, though, done enough times by enough people can make a palpable difference in the quality of life.

While *Judicial Review in an Objective Legal System* offers great positive value, I have two sets of concerns. One pertains to what should be done when moral authority and legal authority come apart. The other has to do with what comprises a legal system and the role of philosophy in that system.

As already noted, Smith believes that one should not conflate moral and legal authority, since legal authority is "the ultimate arbiter of legitimacy *within* a legal system" (p. 88, n. 1). That "ultimate arbiter" is the state's constitution. Wanting to distance herself from the classic Natural Law view that "an unjust law is not truly a law," she states that "whether a legal system exists in a given area... is a simpler, non-normative matter of fact" (p. 89, n. 2). This leaves open the possibility that a state's constitution can lack proper moral authority without the state lacking a legal system.

Smith's aversion to standing with Natural Law theory on this issue, though, is in tension with other claims that she makes. For example, she says: "The system must be morally justified in wielding its power" (p. 61); "When a legal system is nonobjective, force is used without warrant and individual rights are not protected" (p. 66); and "The propriety of . . . people's obedience is entirely determined by the government's activities being in service to protecting individual rights" (p. 92). These statements indicate not only that

unjust law lacks moral authority, but that people are not obliged to obey it. This is consonant with Natural Law theory, at least on this one issue (though Smith disagrees with it on other counts [see pp. 89-90, n. 2]).

Even if one concedes that bad law is still law, what is one to do when one lives under a legal system that has bad laws? Smith is absolutely clear that it is not the U.S. judiciary's role to reform law (see, e.g., pp. 146, 200, and 237). What if there is legislative inertia or the majority will thwarts individual rights? Is civil disobedience off the table, then, as Smith nowhere discusses this topic? Perhaps not. Under the U.S. Constitution, citizens who think that the legislature has passed laws violating individual rights can choose to break those laws. Smith hints as much in tethering "the propriety . .

. of people's obedience" to the law to whether it is protecting their rights. "[C]ourts are not free to initiate judicial review unilaterally" (p. 216), but conscientious citizens can trigger such review and face the legal consequences as they wait to see whether the judiciary will do its job. This is a risky strategy, but sometimes worth it, especially if citizens are able to secure good constitutional lawyers to represent them. Under wholly nonobjective political-legal systems, civil disobedience may need to be replaced with some sort of revolution.

My second set of concerns has to do with what comprises a legal system and the role of philosophy in that system. Smith defines a legal system in general as "the formal institution . . . through which government serves its function. It consists of rules that will coercively govern social relationships . . . , along with all of the practical apparatus necessary to establish and implement those rules" (p. 46). Such rules are most fundamentally embodied in the constitution, with others left to emerge from constitutionally circumscribed statute and case law. Smith keeps this view of a legal system firmly in the forefront when rejecting Ronald Dworkin's Perfectionist theory of judicial review.

According to Dworkin, the judicial review process is like a "chain novel." The judge as "author" should make rulings that "fit" previous chapters and move the story forward by making law "better" according to moral principles in the larger legal system (pp. 188-89). Smith rejects Dworkin's theory, in part, because it turns judges into "philosopher kings" who usurp "law*making* authority" when they make law "better" (p. 199). She says that laws might be "inconsistent with a nation's underlying political philosophy," yet "consistent with its bedrock law" found in the constitution (p. 199). She also states that "the only end that courts should 'aspire' to is accurate, objective interpretation of the Constitution and the specific moral judgments therein; nothing more, nothing less" (p. 237). Such claims sound as though any moral and political principles that do not make it into the Constitution should not be considered during the judicial review process.

However, when articulating the way in which courts should engage in judicial review, Smith holds that "the law is philosophical . . . and judicial review, correspondingly, must be philosophically informed" (p. 233). If what Smith means here is that the judiciary needs to employ objective

epistemological methods in concept-formation and interpretation of legal texts, then that would be compatible with her rejection of Perfectionism. She adds, though, that the "Constitution did not emerge in a vacuum. It is 'backlit by the Declaration [of Independence]'" (p. 233). She also points to the *Federalist Papers* to shed light on judicial interpretation (p. 234). Are extra-constitutional documents in moral and political philosophy now allowed to be part of the legal system, contrary to what Smith argues when critiquing Perfectionism? If so, which ones and why?

Realizing that these claims sound dangerously like Perfectionism, Smith spends three pages explaining how her view does not collapse into Perfectionism. She makes a subtle distinction between the judiciary looking to extra-constitutional documents to see how certain clauses are "informed" or "animated" by "noble aspirations" and courts using "such wider aspirations" to change law (pp. 235-36). It's true that it is not the courts' place to change law and that "to make existing law *better* [per Perfectionism] is to make the law different" (p. 237). However, the point that Smith introduces here about the role of extra-constitutional documents in judicial interpretation makes it unclear whether a state's "underlying political philosophy" (p. 199) is part of its legal system. She could develop her reasoning here so as to bolster her account of the parameters of the legal system as well as philosophy's proper place in it.

All people holding positions in the legal system—especially ones seated on a judicial bench—would do well to read *Judicial Review in an Objective Legal System*. The responsibility of the judicial branch of government is immense, for it is in the unique position of being tasked with "watching the watchers." What's at stake in getting judicial review right is nothing less than upholding the proper purpose of the state: "the protection of individual rights" (p. 7) against unwarranted uses of government's coercive power. That's something in which we all have an interest.

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