

What Is the Law? A Response to Sandefur¹

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Timothy Sandefur's lengthy article raises an array of issues.² I've decided to go for depth over breadth and focus primarily on the question: What *is* the law? Law is what judges are supposed to uphold, after all, and we seem to have some serious differences over this.

What is the law? Is it, as Sandefur claims, a promise? An abstraction? An understanding? A process? A becoming? At different stages, he characterizes it as all of these things.

Sandefur writes:

[I]t is not *necessary* to a promise or a law that they be written down, and even when they are, the promise, not the words on the paper, is the promise. The written words . . . are only *evidence* of the law. The law itself is an abstraction—a promise or proposition—which can be determined even in the absence of written materials. (p. 16, emphasis his)

¹ An earlier version of this article was presented in January 2017 at an Author-Meets-Critics session of the Ayn Rand Society held during the Eastern Division meeting of the American Philosophical Association. The focus of the session was my book *Judicial Review in an Objective Legal System* (New York: Cambridge University Press, 2015). This article retains the character of oral remarks delivered under time constraints, most notably in the select choice of topics addressed, the relative brevity of its treatments of these, and its informal style and tone.

² Timothy Sandefur, "Hercules and Narragansett among the Originalists: Examining Tara Smith's *Judicial Review in an Objective Legal System*," *Reason Papers* vol. 39, no. 2 (Winter 2017), pp. 8-36. Hereafter, all references to this article will be cited parenthetically in the text.

Contrary to Sandefur's first claim, I think that it is necessary that a law be written down. For a legal system of any size, we must write down the rules so as to make them objectively knowable by all the people governed by them. Such writing is important for providing advance information about the rules, that is, fair notice. Indeed, the last part of Sandefur's same sentence suggests why: "the promise, not the words on the paper, is the promise."

That claim is plausible, I submit (not necessarily true, but plausible), "*When it's you and me, Greg* [Salmieri, who chaired the panel where this paper was presented]," because we've known each other a long time, fairly well, and can read between the spoken lines. That is, people who know each other very well can sometimes "get" things being communicated without saying them aloud; they can understand what is being said or promised. They don't need to spell everything out.

Not so with people one is less familiar with or with mere acquaintances. This wouldn't be the case between me and everyone on this panel, for instance—between me and Tim or me and Mark (who I have previously met only a few times), let alone between any of us and all the conferees at this convention, or between us and our legislators in Washington.

It's true that "*Between you and me*" (imagining two close friends), an appeal to precise statements can sometimes be a copout, a way to weasel out of a commitment of what you *had* promised, had given me every reason to believe I should expect, *and* what you had in fact intended. Not so with a legal system, however. I never met the people who ratified the Constitution, or the Second Amendment, or the Fourteenth, or my current Senators or Governor. Here, it isn't "personal" and laws' meaning isn't identically "understood" by both sides. It can't be, and cannot reasonably be expected to be for the millions of people subject to these laws. This is why formalities that include requiring a written statement of laws make sense. Formalities are appropriate—indeed, imperative—in order for laws to be understood objectively and to govern objectively.³

³ It is exactly where people are least likely to understand one another that reliance on formalities can be most useful. When players in pickup neighborhood football games frequently play together, for instance, they don't need to re-announce their rules (about foul lines, penalties, rushing the passer, etc.) at the start of every game. When they mix with others whom they play with less regularly, however, such statements are necessary.

Let's also look at the second part of Sandefur's claim in the above passage: "The written words . . . are only *evidence* of the law. The law itself is an abstraction. . . ."

Here, I would say: Yes and no. Yes, law is an abstraction in this sense: There's a rule that we (the relevant lawmakers) want to make, and these words (voted into law) are our best attempt to make it. What is true is that those two things aren't identical; they don't necessarily match. That is, lawmakers' words might not do a good job of expressing the rule that they have in mind and mean to convey. Given that, however, an important question emerges: What, then, is the law? Is it the ideas in lawmakers' minds? Or the rules that they wrote and the laws they enacted? That which they put on paper and formally approved?

My thought is: When it comes to law, part of what makes a law *the law* is its having been put on paper, including the words being used to state the rule. Without that step, what is in lawmakers' heads isn't law. Their ideas, intentions, and convictions, however clear and strong they may be to them, are not the law of the land.⁴ As Article 6 says: "This Constitution . . . shall be the Supreme Law of the land."⁵

The answer, then, to the question "What, then, is the law?" is that the law is not what is in their heads.⁶ The law is what's on paper.

Separately, also note that for the purposes of a proper legal system, what constitutes objectivity depends, in part, on the needs of the people governed, those who will be bound by the law.

⁴ Note that Sandefur himself observes that law reflects a combination of reason and fiat (p. 24).

⁵ U.S. Constitution, Article VI. Note, too, that this gives the lie to Sandefur's claim that the people are sovereign: "according to our Constitution it is the *people* who are sovereign, not the Constitution; the people, after all, promulgate the Constitution, and choose judges to interpret and apply it" (p. 20, emphasis his). Indeed, recognition that the people's will is not supreme seems implicit in Sandefur's argument in Section 1 of his article that judicial deference to majority will is not consonant with the Rule of Law.

⁶ Indeed, who "they" are becomes a question: The "promise"-makers? the "promise"-enforcers, that is, the courts? Sandefur later gives the courts a lot of leeway, suggesting that their ideas are critical. Either way, once the law is severed from its written expression, we need a clear account of its new residence. Where are people to look to find it?

Thus, if *that* is our alternative, I would stand by the written word. Yet at the same time, words on paper do not have meaning and cannot have meaning apart from authors' thoughts; words cannot signify, entirely independently of such thoughts.⁷ Nonetheless, it doesn't follow from that that the words' meaning *just is* the thoughts in some men's heads, that the *law* just is the thoughts. Written text's objective meaning depends, in part, on word users' beliefs and intentions, but it is not reducible to those beliefs and intentions. It is not simply *one and the same thing* as those beliefs and intentions. "Dependent on" does not mean "the equivalent of."⁸

Now consider this passage in Sandefur's article:

[P]romises can be changed by circumstances, even if there is no writing to memorialize those changes. What counts is the *promise*, not the memorialization; the letter of the statute is not the law. The law is the abstract proposition that the letter is meant to convey. If that abstraction changes, then the law has changed, even if the meaning of the writing has not. (pp. 24-25)

Consider: "If that abstraction changes." What does this mean? What is it for an abstraction to change? Change how? In what ways? Does it mean that a majority of lawmakers have changed their minds about what rules they want to have govern? Or, alternatively, something akin to their new knowledge of biology shuffling classifications of certain mammals and fish? Or something else? And isn't the answer likely to make a difference to whether "the meaning of the writing" has changed (as Sandefur denies)? Because one might be inclined to think, at least initially, that if the meaning of the abstraction changes in *certain* ways, then the meaning of the writing *has* changed. For instance, with what the word "fish" refers to. More exactly: If how we understand what a particular (written) rule *does* has changed, then we understand its meaning differently than we previously had. That is, seemingly, its meaning *has* changed.

Even more basically, however, what this probing of Sandefur's claim should help us to realize is that *meaning* doesn't in fact change.

⁷ This is a major qualification, which I explain in depth in my *Judicial Review in an Objective Legal System*, particularly in my critique of Textualism.

⁸ For a much fuller explanation of these and associated points, see *ibid.*, pp. 151-62 and 165-75.

A dolphin is what it is. It is our *understandings* of meaning that can change—our understanding of phenomena in reality and correlatively, of the meaning of words, of the referents of those words—of the nature of dolphins, fish, mammals, or (in more typically contested legal concepts) of “persons,” “speech,” “searches.”

Obviously, my claims here depend on a broader epistemological theory, including an account of the meaning of “meaning” (some of which I elaborate in the book). For now, the take-away is that I’d re-characterize the situation described by Sandefur. What has taken place is that our understanding of *the* meaning of the law has changed. This is why objective judges may enforce this newer understanding without thereby being guilty of changing the law.

Next, consider Sandefur’s claim that “the understanding of the text can change, and it is then *that understanding*, not the text, that is the law” (p. 22). Let’s look at this carefully: “The understanding of the text can change.” Yes. “[A]nd it is then *that understanding*, not the text, that is the law.” No. I reject the claim in its *entirety* (as a package) because it frames the alternatives in an erroneous way.

My contention (maintained throughout the book) is that the text has no meaning apart from men’s understandings. So it is not that a new, revised understanding trumps the meaning of *the text*, as if that text had a meaning apart from people’s understandings. It doesn’t. It never did. There *is* no meaning nestled inside words, hidden like a nut within a shell, which passively rests there, independently of the thinking of human beings. Meaning is a manmade phenomenon.⁹

Let’s move on to other aspects of our differences about what the law is. Sandefur charges that my critique of Ronald Dworkin’s view that the law is “ever in-progress” fails for two reasons (p. 20). On the first, I think he misunderstands my point. Sandefur writes, “A thing that is in the nature of becoming rather than being—a process—does have identity,” and he offers examples to support this (fire, life, a play performance) (p. 20). I agree, but I didn’t deny that a process can have an identity. My claim is that at any given time, *the law* is not a “process” and is not a “becoming.” It is a rule (or set of rules) with a

⁹ It may be worth pressing some questions about exactly what Sandefur means by a “text’s meaning” here. When he claims that when the understanding of a text changes, it is no longer the text that is the law, what exactly is it that he is rejecting? What alternative is he differentiating his view from? In other words, what was it (or what would it be) for the text to be the law? The text, in some non-understood way? What would that consist of?

definite, knowable identity. It is a fixed rule, enacted to govern until such time as it may be altered through legally authorized means. Obviously, we have processes for changing laws, and some laws themselves may specify and require that certain processes be followed in order to effect certain results—for example, “If you want a marriage license, you must do thus and such”—but a law is not a process.

Bear in mind also that “fixed” does not mean immutable. Having a fixed identity *at time t* does not mean that that identity might never be different. (A redhead can dye her hair black and no longer be a redhead.) My point was that a law conceived as “*ever* in-progress” (à la Dworkin) would have no knowable identity for the people subject to it.

Sandefur’s second charge is meatier, namely, that I “conflate the written text, which is only evidence of the law, with the law itself” (p. 20). “Conflate,” of course, is fightin’ words to a philosopher, so I may be overly defensive here, but let me try to be clear-eyed. I should also say that *some* of our differences in this terrain are about rather fine distinctions.

One question for Sandefur: If the written text is merely evidence of the law, then what is the law? What does it consist of? That needs an answer. Sandefur claims that it is something more than what’s on paper, but the question is: What? *Intentions*? *Beliefs* about what our government rules should be? Something else? And for any of these: Whose? The intentions or beliefs of legislators? Of judges? Of future judges or future legislators? The wishes of the people, who sometimes espouse changes in law before legislators do? (Think about the evolution of many people’s thoughts about gay marriage.) It’s also worth asking: *Any* such beliefs or intentions, be they enlightened or retrograde? Liberal or racist?

In a nutshell: What *is* this “something more”? If it is the law, we need to know what it is. Surely, the fairness and notice that Sandefur touts as elements of promises (p. 17) demand this.

These questions for Sandefur aside, what about his charge about my view? *Am* I confusing the written word with the law? I agree that the written text and the law aren’t identical in the specific sense that the meanings of words (of noises, scratchings, pixels configured on a screen) always depends on certain of the surrounding thoughts of the speaker and audience. The words “show me your hand,” for example, mean different things in a doctor’s office and in a poker game.

Again, meaning is not reducible to words. Yet throughout my account in the book, I've understood and defended the meaning of written law in a more robust way than Sandefur portrays. That is, his charge of a conflation presupposes a thinner, intrinsicist notion of written text's meaning than is mine. Such a thin notion *would* need to be supplemented by a thicker, more "human" sense of meaning, and thus create two different senses between which one might equivocate. In other words, if you mistake my position by shaving it of what I've said about objective meaning—that it depends on ideas as well as physical markings—then I may seem to hover between two different senses of 'meaning'. But in fact, I never embrace the thin, intrinsicist view that "words *by themselves* signify" that such a conflation requires.¹⁰

Let's return to Sandefur's larger claim: Law is an abstraction. Yes, it's an abstraction in the sense that it reflects a conceptual level of thinking on the part of human beings who make a law. It isn't a proper name, like "Spot" for this dog or "Baltimore" for this city. Yet law is not an abstraction *in the particular way that Sandefur seems to have in mind*—as something floating "above" the law as a vague, shifting, indeterminate "something." (Above the law that we're told about, that is, which is specified in writing and was formally approved.)

At times, it sounds like the law (in Sandefur's view) is a Platonic form, such as in his reference to *Hamlet* as an analogue to the law, and then identifying *Hamlet* with "that ideal thing which the perfect performance, were it possible, would enact."¹¹ The law is like that, Sandefur holds: an unrealizable something. Recall also from the first quoted passage above that "[t]he law . . . can be determined even in the absence of written materials." How? In the absence of written materials, I seriously wonder: How?

Sandefur invokes James Madison as supporting a more forgiving conception of law—specifically, the idea that we should sometimes respect legal precedents, despite believing them mistaken (mistaken, by the standard of the Constitution) for the sake of stability

¹⁰ For more on intrinsicism, see my *Judicial Review in an Objective Legal System*, pp. 41-42, 158-60, and 240-43.

¹¹ [Editors' Note: Smith is here responding to the original version of Sandefur's article, as delivered at the conference. Sandefur has amended his claim in the published version in order to address Smith's concerns; see Sandefur, "Hercules and Narragansett among the Originalists," p. 21 n. 30.]

and predictability (p. 25). However, the quotation that he cites from Madison portrays the alternative as surrender to political passions and heated legislative agendas.¹² This is misleading, for the alternative that I have defended is quite different. It is simply: adherence to the Constitution, properly understood.

The problem with obedience to precedent is simple: Repetition of a mistake—of a misinterpretation—does not alter its being a misinterpretation.¹³

Also notice that the choice of examples makes a big difference to how reasonable Sandefur's view seems. The Madison case involved re-charter of the Bank of the United States and, on reading it, one may easily think, "Okay, yeah, whatever *that* has to do with anything." In other words, the stakes, what hinges on this, seem remote. Suppose, instead, that Madison was speaking of a law governing Southern miscegenation laws, or the treatment of Jews, Japanese-Americans, or Muslims. In these cases, the fact that a legal action at odds with precedent would "introduce uncertainty and instability" (Madison's words, quoted by Sandefur, p. 25) seems hardly so intolerable a price to pay.

My principal contention is: What a judge should *not* do is pretend—pretend that the Constitution is something other than what it is. He should not wink at departures from the Constitution, renege on his sworn responsibility to uphold it.

At one point, Sandefur worries that perhaps he has gone too far: He wonders whether the view that he is defending is a kind of Living Constitutionalism (p. 26).¹⁴ Does it run the risk that "the criteria

¹² Sandefur speaks of (and the internal quotation here is from Madison) an "interpretive method that allows 'the opinions of every new Legislature, heated as it may be by the spirit of party, eager in the pursuit of some favourite object, or led astray by the eloquence and address of popular statesmen, themselves, perhaps, under the influence of the same misleading causes,' to alter the understanding of the nation's fundamental law" (pp. 25-26).

¹³ I address the value of stability in law in my *Judicial Review in an Objective Legal System*, pp. 122-24, and appropriate considerations when overturning precedent in *ibid.*, pp. 265-70.

¹⁴ Sandefur's reference to "Constitutional moments" is an allusion to the theory of Bruce Ackerman, a leading proponent of Living Constitutionalism. See Bruce Ackerman, *We the People: Foundations*, vol. 1 (Cambridge, MA: Belknap Press, 1991).

. . . become so malleable” that almost any significant groundswell of popular support will suffice to constitute a change of the law?¹⁵ Here, I submit, the problem is not that the criteria of lawfulness will now be *too* malleable. That ship has sailed. Rather, the problem is that Sandefur doesn’t have criteria left. Once one says that the law is “our understanding” rather than the objective meaning of the text (p. 18) and that the law is what “everyone knows” (about pigeons, about takings, you name it) (p. 19), one has got no standard by which to hold claims of legality to account. One has relinquished the basis for identifying anything as a “departure” or a “violation.” These are strong charges, but in principle, I think, this is what one has committed to.

A few final words on dolphins (which Sandefur updates with discussion of pigeons and rock doves) (p. 19). Basically, Sandefur asks: What if a law restricting “fishing” was meant—intended—to include dolphins and was originally understood that way, but strictly, no longer does, because of our contemporary knowledge that dolphins are not fish (contrary to what was thought at the time the law was enacted)? Also imagine that we, today, still want it to include dolphins and think of it as including them, “but nobody has bothered to update the statute” (p. 18). Wouldn’t it be ridiculous, he asks, for a court to release a person who was arrested for violating the law by having caught a dolphin? After all, “the law is not the *text*, but the *understanding*” and “[t]he understanding was that it covered dolphins, and only accident or inattention . . . has left the text of the statute unchanged” (pp. 18-19, his emphasis).

Three points very briefly, in response.

One: If and when what certain terms are understood to refer to has changed, we should update the law to reflect that (be it a law about fish, pigeons, pollutants, whatever). Insofar as the published law is what is broadcast, announced as “the law, the rules,” it would be unjust to hold people to something other than that. For there to be a second, *secret* meaning that is legally enforced—hidden, unspoken, but “understood”—brazenly violates the elementary Rule of Law prescription that a legal system tell people what the rules are.

Two: I sympathize with not wanting people to get off on technicalities—more exactly, with not wanting people deliberately to

¹⁵ He is quoting Michael McConnell, “The Forgotten Constitutional Moment,” *Constitutional Commentary* vol. 11 (1994), p. 142.

exploit a seeming technicality.¹⁶ But notice Sandefur's assumption (in the sentence following the above quoted passage): "Assuming the fisherman knew this, . . ." That is a major assumption. Indeed, it seems to beg the question.

Laws are written (and should be written) so that everyone subject to them can know the rules. Imagine a variation on the case Sandefur has offered. Suppose, instead, we are considering a fisherman who is just off the boat from Vietnam. This person studiously informs himself of all the laws about fishing because he wants to ensure that his activities are legitimate. But, unlike the man Sandefur imagines, he does not understand that the fish spoken of in the law *really* means fish *and a few other things*. Nor does he have any knowledge of the background conventions of how laws are applied in this country; he innocently believes that the published laws are the relevant rules he must comply with.

My claim is that it *would* be unfair to prosecute him for catching something that the law didn't tell him he couldn't catch. (That is, for an action that the law had not declared forbidden.)

Here again, the choice of example colors the complexion of Sandefur's broader conclusions. In a particular case, our being cavalier about the law might seem harmless, but the principle involved is not. If we contemplate a fine for a canny, conniving fisherman who we imagine is knowingly "playing" the system, we're inclined to go along with convicting him ("Get the bastard!") and think it okay to treat the law as looser than what is written. Also, it is easy to think, "Fines and fish? No big deal." If we imagine certain other sorts of victims of unstated laws, however, or laws whose stakes are larger, our sympathies may well fall in other directions.

The deeper point (regardless of sympathy-tugging examples) is that a legal system's reliance on what "everyone knows" is dangerous. And it is wrong. Bear in mind that it is a legal system we're talking about; it governs many people and it governs them *by force*.

Accordingly, and this is point three: My view is that lawmakers should say what they mean—if sometimes, simply by adding clauses such as "and birds commonly called pigeons but actually belonging to the genus *Colomba*."

¹⁶ What constitutes a technicality, and exactly what we mean by that term in the legal realm, are themselves legitimate and significant questions that I leave aside here.

Is my position likely to secure victory in court next week? No. But that's not what I was attempting to offer—a playbook for winning cases in contemporary conditions. Sandefur is confident of what “we all understand” and casually dismisses mere “accident or inattention” or the fact that “nobody has bothered to update the statute.” My thought is: When we are talking about law—about force—we should bother. If we aspire to a just legal system, we have a responsibility to bother.

