The Language of Law and the Foundations of American Constitutionalism

For much of its history, the interpretation of the United States Constitution presupposed judges seeking the meaning of the text and the original intentions behind that text, a process that was deemed by Chief Justice John Marshall to be “the most sacred rule of interpretation.” Since the end of the nineteenth century, a radically new understanding has developed in which the moral intuition of the judges is allowed to supplant the Constitution’s original meaning as the foundation of interpretation. The Founders’ Constitution of fixed and permanent meaning has been replaced by the idea of a “living” or evolving constitution. Gary L. McDowell refutes this new understanding, recovering the theoretical grounds of the original Constitution as understood by those who framed and ratified it. It was, he argues, the intention of the Founders that the judiciary must be bound by the original meaning of the Constitution when interpreting it.

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The Language of Law and the Foundations of American Constitutionalism

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To

Walter Berns, Robert H. Bork, and Edwin Meese III;

and to the memory of

Raoul Berger, James McClellan, and Herbert J. Storing;

but, above all,

to

Brenda
And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who, for the time being, have power to declare what the Constitution is, according to their own views of what it ought to mean.

Justice Benjamin Robbins Curtis,

*Dred Scott v. Sandford* (dissenting)
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Preface and Acknowledgments

The debate over the proper role of judges in the Anglo-American legal system is as old as the system itself. Long ago, Thomas More summed it up in a way that could have been clipped from yesterday’s news, making clear there was no doubt in his mind about what Sir John Baker has called simply the “evil of judicial arbitrariness.”¹ More was unambiguous: “If you take away laws and leave everything free to the judges,” he argued, “…they will rule as their own nature leads and order whatever pleases them, in which case the people will in no wise be more free but worse off and in a condition of slavery, since instead of settled and certain laws they will have to submit to uncertain whims changing from day to day.” This is not a matter of regrettable personal excess, but of inevitable institutional inclination; without restraint, More concluded, “this is bound to happen even under the best judges.”²

Two and a half centuries later, Sir William Blackstone would make largely the same argument in his *Commentaries on the Laws of England*, arguing that “the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.” Blackstone knew, as More had known before him, that “law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce a most infinite confusion; as there would be almost as many different rules

of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.”

In the United States, Justice Joseph Story, in his capacity as Dane Professor of Law at Harvard University, reemphasized that early learning to his fellow citizens in their still relatively young republic. To assume that judicial power “embraced a jurisdiction so wide and extensive as...the principles of natural justice,” Story argued, would be a “great mistake.”

Were any court ever to possess such an “unbounded jurisdiction” as that of “enforcing all the rights...arising from natural law and justice...it would be...the most formidable instrument of arbitrary power, that could well be devised.” Its arbitrariness would be completely at odds with the most basic premises of the Anglo-American legal system itself. This would be especially true under a written constitution of limited and enumerated powers, the meaning of which was to be deemed “the same yesterday, to-day, and forever.”

Eventually, in American constitutional terms, the battle lines would come to be drawn over what would come to be called “originalism,” the belief that the only legitimate way to interpret the fundamental law is by recourse to the original and binding intentions of those who framed and ratified it.

The literature on this question grew dramatically after the publication in 1977 of Raoul Berger’s Government by Judiciary: The Transformation of the Fourteenth Amendment. A decade later, after the vote against the nomination of Judge Robert Bork to the Supreme Court of the United States, writing on both sides of the divide simply exploded.

There are those among the historians who insist that the compromises and concessions demanded of the Constitution’s framers and ratifiers mean that there is no easily

5 Ibid., I:9.13.
9 Not least among the most important books is Robert H. Bork’s own The Tempting of America: The Political Seduction of the Law (New York: The Free Press, 1989).
discernible original meaning or intention to be found. So, too, are there those who argue that language itself presents barriers to ever being able to know the original intention behind the words. There are also those who are generally sympathetic to the idea of turning to original intention but who believe it is an approach less historical than analytical. And then there are those with real power who insist that originalism, properly understood, is a judicial recourse to the original meaning of the text, thus avoiding any confusions about intentions that might be more subjective than objective.

What follows makes no effort to review comprehensively that sprawling literature, not even, as is often the case, in seemingly endless discursive footnotes designed to smuggle in a book within a book. Rather, the objective here is to take account of the origins and fate of originalism as a primary interpretive method with roots not only in the common law tradition but also in the philosophic sources of modern liberalism, in particular the theories of language and meaning and the abuse of words to be found in the works of Thomas Hobbes and John Locke. These are then traced through the influential writings of such thinkers as Jean Jacques Burlamaqui, Thomas Rutherforth, John Trenchard and Thomas Gordon, William Blackstone, Montesquieu, and the American Founders, and then through the constitutional jurisprudence of Chief Justice John Marshall and Justice Story. The

11 See, for example, Dennis J. Goldford, The American Constitution and the Debate over Originalism (Cambridge: Cambridge University Press, 2005).
12 See, for example, Keith Whittington, Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review (Lawrence: University Press of Kansas, 1999); and see also the same author’s Constitutional Construction: Divided Powers and Constitutional Meaning (Cambridge, MA: Harvard University Press, 1999).
14 For an important survey of the common law tradition and its principle that the duty of a judge is to follow the law of the land, see Philip Hamburger, Law and Judicial Duty (Cambridge, MA: Harvard University Press, 2008).

thesis of the book is that there is a moral foundation to originalism when it comes to the interpretation of a written constitution, the natural rights legitimacy of which rests upon the consent of the governed.

As a matter of style, archaic spelling, punctuation, capitalization, and italicization have been changed to conform to contemporary conventions, in most cases.

This book has been a long time in the making and, as a result, the debts I have incurred are many. At various times along the way the research was financially supported by the Smith Richardson Foundation, the Earhart Foundation (on several occasions, in fact), the Lynde and Harry Bradley Foundation, the John M. Olin Foundation, and by a fellowship from the National Endowment for the Humanities. Institutions that provided homes away from home to carry out the research and writing include the Woodrow Wilson International Center for Scholars at the Smithsonian Institution, the Center for Judicial Studies, the Institute of Advanced Legal Studies in the University of London, and a generous three-year stint as a visiting scholar at Harvard Law School. Among the individuals who made this support possible, I owe special thanks to Michael Greve, Hillel Fradkin, James Piereson, William Voegeli, Antony Sullivan, Richard Ware, David Kennedy, Terence Daintith, Robert Clark, and the late James McClellan. My time at Harvard was made even more rewarding by the opportunity to teach in the Department of Government, an opportunity made possible by the limitless generosity of Harvey Mansfield.

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I am also grateful to the students through the years who have patiently allowed me to work out these arguments in my classes on American constitutional law and history at Harvard, the Institute of United States Studies in the University of London, and the University of Richmond. So, too, is my debt great to my remarkable colleagues who make Richmond the most collegial and supportive university one can imagine.

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Preface and Acknowledgments


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Alongside the great libraries and the attentive librarians in providing assistance have been three notable booksellers. Jordan Luttrell of Meyer Boswell Books, Robert Rubin of Robert Rubin Books, and Herb Tandree of Herb Tandree Philosophy Books have assisted me in various bibliographic
queries – as well as supplying shelves of books to feed an undiminishing habit of collection. Their knowledge of the literature of the law is extraordinary.


Books often have distant beginnings, and this one began on a cold Tuesday morning in January 1977 in room 302 in the old Social Science Building at the University of Chicago. It was there and then that Professor Herbert J. Storing convened his graduate course on “The American Founding” for the final time. I was blessed to be among those who would be led through the moral, political, and legal intricacies of the creation of the American republic by that most masterful of teachers before his untimely death later that year; like all the others, I would leave his class with an abiding appreciation not only for the American founders but especially for their magnificent Constitution – an appreciation, like that of so many of those who were fortunate enough to have learned from Professor Storing, that has never waned. That is not to say that he would necessarily have agreed with all or even any of what follows. But it is to say that I hope that he might at least have appreciated this effort as a small, if inadequate, token of gratitude for the ways in which he touched and transformed my life.

Nearly a decade later I was privileged to serve in the United States Department of Justice under Attorney General Edwin Meese III. For anyone with an interest in the American Founding, it was a magnificent time to be in government service as the nation prepared to celebrate the bicentennial of
the Constitution. No one contributed more to that celebration than did
Attorney General Meese with his call for a return by the courts and the
nation to “a jurisprudence of original intention,” a call that echoes still in
our national politics. It is an honor to have been part of his administration,
and his friendship has continued to be a constant source of support.

President Reagan’s commitment to the Constitution was made manifest
by three of his nominees to the Supreme Court of the United States, each of
whom subscribed to originalism. Not only was he able in 1986 to elevate
Justice William H. Rehnquist to the chief justiceship of the United States,
and to appoint federal judge Antonin Scalia as Rehnquist’s replacement as
an associate justice, but when the retirement of Justice Lewis Powell was
announced in 1987, the president turned to Judge Robert H. Bork to fill
Powell’s seat. Judge Bork was, of all the jurists, the one most committed to
the idea of originalism. Although he was denied confirmation to the highest
court, his jurisprudential views have not faded, his intellectual followers have
not vanished. His principled stand in defense of the Constitution continues
to inspire.

In addition to Professor Storing, Attorney General Meese, and Judge
Bork, my scholarly debts in the first instance include three others. Over the
years my learning about constitutional matters has always been deepened by
the writings of, and by conversations with, Walter Berns. It was, in fact, one
of his most impressive scholarly efforts that first gave rise to the idea that
1982 (Chicago: University of Chicago Press, 1983), pp. 49–83.} During the early years of researching
and writing this book, I was – it is not too much to say – adopted by Raoul
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and meet me for a weekly luncheon to discuss my work (nearly always at
the splendidly scruffy Three Aces restaurant), but he read and commented
upon every word I presumed to write on the subject of originalism in con-
stitutional interpretation until his passing at the age of ninety-nine in 2000.
So, too, was my thinking deepened and directed by the sturdy friendship
and constant scholarly attention and encouragement of James McClellan.
His encyclopedic knowledge of legal literature generally and the American
constitutional tradition in particular was both an inspiration and a guide.
And on more than one occasion he fearlessly undertook to protect me from
myself. Had he lived, this book would have been far better than it is. To
say that Jim, like Raoul, is missed daily is to sorely understate the case. The
scholarly world is a lesser place without them.

This book is dedicated to these six men with gratitude for the ways in
which they have enriched my life, both personally and professionally. This
book simply would not have been possible without them – gentlemen all,
constitutionalists all.
There are two final debts to acknowledge. The first is to my best friend, Travis McDowell. His patience on our early morning walks in listening to the arguments of this book unfold was remarkable. I never doubted his support, in his own quiet way, even as he often tried to tug me in new and unfamiliar directions.

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