The American Constitution and the Debate over Originalism

Located at the intersection of law, political science, philosophy, and literary theory, this work of constitutional theory explores the nature of American constitutional interpretation through a reconsideration of the long-standing debate between the interpretive theories of originalism and nonoriginalism. It traces that debate to a particular set of premises about the nature of language, interpretation, and objectivity, premises that raise the specter of unconstrained, unstructured constitutional interpretation that has haunted contemporary constitutional theory. The book presents the novel argument that a critique of the underlying premises of originalism dissolves not just originalism but nonoriginalism as well, which leads to the recognition that constitutional interpretation is already and always structured. It makes this argument in terms of the first principle of the American political system: By their fidelity to the Constitution, Americans are a textual people in that they live in and through the terms of a fundamental text. On the basis of this central idea, the book presents both a new understanding of constitutional interpretation and an innovative account of the democratic legitimacy and binding capacity of the Constitution.

Dennis J. Goldford is an associate professor of politics and Director of the Program in Law, Politics, and Society at Drake University, where he has been teaching since 1985. He received his A.B. in political science from the University of Michigan, an M. Litt. in philosophy from Oxford University, and an M.A. and a Ph.D. in political science from the University of Chicago. He teaches in the areas of political theory, American politics, and constitutional law.

The American Constitution and the Debate over Originalism

DENNIS J. GOLDFORD
Drake University

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
40 West 20th Street, New York, NY 10011-4211, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521845588

First published 2005

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Goldford, Dennis J., 1948–
The American Constitution and the debate over originalism / Dennis J. Goldford.
p. cm.
Includes bibliographical references and index.
ISBN 0-521-84558-0 (hardback) – ISBN 0-521-60779-5 (pbk.)
1. Constitutional law – United States – Philosophy. I. Title.
KF4550.G645 2005
342.73′01–dc22 2004062890

ISBN-13 978-0-521-84558-8 hardback
ISBN-10 0-521-84558-0 hardback

ISBN-13 978-0-521-60779-7 paperback
ISBN-10 0-521-60779-5 paperback

To Sharon, whose love is truly a gift.

Contents

Preface

This book originated serendipitously in the course of exploring what at first appeared to be two distinct and independent topics: the originalism debate in contemporary American constitutional theory and the question of how we properly understand the nature of law and constitutionalism. Writing separate papers on each topic, I began after a while to discover that I was developing the same argument implicitly in papers on both topics. While identifying and untangling that argument has been a difficult and time-consuming task, it has been nevertheless an exciting process as I learned that the two apparently independent topics are in fact related. Exploring the originalism debate in depth leads to important insights into the nature of law and constitutionalism, and those insights in turn illuminate – and, I believe, alter – the contours and premises of the originalism debate.

I offer this book, therefore, in the belief that it is indeed possible to say something original about the originalism debate. This project in one sense is a long way from my focus on the philosophy of Hegel during the early stages of my academic career, but in another sense it reflects two fundamental methodological perspectives I derived from that earlier work. First, what appears to be familiar to us usually stands most in need of careful reconsideration and analysis. As Hegel famously stated, "What is 'familiarly known' is not properly known, just for the reason that it is 'familiar.'"[1] Scholars of American constitutional theory are sufficiently familiar with the various dimensions of the originalism debate that it is perhaps time to be wary of the familiarity.

[1] G. W. F. Hegel, *The Phenomenology of Mind*, trans. J. B. Baillie (New York: Harper Torchbooks, 1967), 92. The German text reads: "Das Bekannte überhaupt is darum, weil es *bekannt* ist, nicht erkannt." *Phänomenologie des Geistes* (Hamburg: Felix Meiner Verlag, 1952), 28. Less formally, I would say that it's not what we don't know that gets us into trouble; it's what we think we know but don't.

The second methodological perspective I learned from studying Hegel is that when caught unproductively in the conundrum of two opposing arguments or intellectual positions, we should take an analytical step back and explore whether such an opposition actually stems from a shared structure of premises. In other words, rather than hit Position A over the head with the arguments of Position B or hit Position B over the head with the arguments of Position A, we should look to see what common assumptions might be responsible for generating their opposition in the first place. To do so results not in a victory of one position over the other, but leads rather to the possibility of transcending the shared structure of premises and thus getting beyond what becomes a less and less fruitful repetition of standard arguments from the opposing positions.

That is the goal I have set for myself in this book. I agree with originalism that the purpose of a constitution is to bind the future to the principles embodied in the text, but I present what I believe is the novel argument that the originalist approach to constitutional interpretation cannot accomplish that goal. At the same time, I do not offer a brief for what is inelegantly known as "nonoriginalism." Rather, I attempt to identify the structure of premises about constitutional interpretation that generates the debate between originalism and nonoriginalism precisely in order to move beyond that debate. And at the root of all of my analysis here is the attempt to understand the remarkable phenomenon of a people living in terms of a written text.

I wish to express my gratitude to the National Endowment for the Humanities Summer Stipend Program for supporting this work in the early days when I was just beginning to consider it as a book project. The Department of Politics and International Relations at Drake University provided a harmonious intellectual environment, and my colleague Arthur Sanders commented insightfully on key portions of the manuscript at various stages of its development. I am grateful to the University Press of Kansas for permission to quote extensively (3–7, 11, 14–15, 35–6, 40, 42, 47, 49–50, 53–62, 64, 68, 75–6, 84, 92, 94–9, 102, 104–5, 110–11, 162, 164, 176–7, 179, 181, 203, 210, 215–16, 218, and 236) from Keith Whittington's *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, KS: University Press of Kansas, 1999) in my detailed analysis of his argument for originalism. I also thank *Polity* for permission to reprint the following portions of an article of mine entitled "The Political Character of Constitutional Interpretation," *Polity*, Volume XXIII, No. 2 (Winter 1990): 262–6 in Chapter 3, 272–3 in Chapter 9, and 255–7, 259–60, and 277–9 in Chapter 10.

I am especially grateful to Lewis Bateman, my editor at Cambridge University Press, for his interest in this project during a long review process, and to the two anonymous reviewers for their support and constructive criticism of the manuscript. Reviewer B, in particular, twice wrote lengthy and detailed critical comments and suggestions that contributed immensely

to improving the complex structure of argument I present. Last, but not least, Helen Wheeler and Helen Greenberg provided welcome guidance in preparing the manuscript for publication. Any persisting errors remain, of course, my own responsibility.

Finally, I want to acknowledge my debt to my father, who taught me that some things are worth arguing about; to my mother, who taught me that some things are not; and, above all, to my wife, Sharon, who teaches me every day how to tell the difference.