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REVIEW ESSAY

THE PAST AS THE SOURCE OF AUTHORITY IN CONSTITUTIONAL INTERPRETATION


SUE DAVIS

In the early 1970's I began graduate school with an extremely vague expectation that I would like to study some combination of constitutional law and political theory. I can remember well my feelings of confusion when I was told that "public law" was a declining and marginal area of political science. Moreover, much of public law appeared to consist of counting judges' votes, assigning "scores" and of Bloc Analysis and Guttman Scales rather than "traditional" doctrinal analysis. I recollect hearing (or perhaps reading) that when political scientists engaged in "traditional" analysis they were unnecessarily duplicating the scholarship produced by law professors.¹ C. Herman Pritchett's teaching and Walter F. Murphy's articles on constitutional interpretation in the late 1970's ² provided much needed reassurance and encouragement. Still, a number of years later the advice of several anonymous manuscript reviewers to the effect that my articles "would be more appropriate for a law journal" served to increase my doubts about the role of constitutional scholarship in the discipline of Political Science.

Fortunately, the times are changing. Both the quantity and quality of scholarship by political scientists during the last few years suggests that constitutional theory is in the process of resuming a prominent position within the discipline. For example, Walter F. Murphy, William F. Harris III, and James E. Fleming have recently published an extraordinary casebook.³ A number of important works on the role of the Supreme Court and constitutional interpretation have been written by political scientists including Soti­rios Barber,⁴ Lief Carter,⁵ and John Agresto.⁶ Two of the three works discussed in this essay were authored by political scientists. Moreover, some of the political science journals have become more amenable to publishing articles on constitutional theory.

The bicentennial of the Constitution (which constitutional scholars have been celebrating for at least two years) has enhanced political scientists' interest in constitutional theory. Additionally, the recent speeches by Attor-
ney General Edwin Meese have not only encouraged the academic debate regarding constitutional interpretation and the role of the Supreme Court but, by demonstrating that the debate is not "merely" academic, have captured the attention of millions of Americans.

The discourse regarding the Constitution revolves around three questions: What is the nature of the Constitution? How should it be interpreted? And who should do the interpreting — does the Supreme Court have the final say in resolving constitutional questions? The books discussed here are concerned with all three of the questions; the central issue upon which they converge, however, is that of constitutional interpretation.

Interpretive methods have been organized and labeled and then reorganized and re-labeled. The literature on the subject is voluminous. Briefly (and over-simplistically), one mode of interpretation searches for the meaning of the Constitution by ascertaining the intentions of those who adopted it. This mode has been labeled variously as "interpretivism," "intentionalism," "originalism," "textualism," "preservativism," and "positivism". An opposing mode of interpretation searches for constitutional meaning by identifying values that are essential to modern society and therefore perceived to be in the "spirit" of the Constitution. This mode is known variously as "noninterpretivism," "supplementalism", "nonoriginalism", "rejectionism," and "structuralism". Whereas the first mode purports to remain faithful to the words of the text, the second reaches beyond the four corners of the document for constitutional meaning. Also, the first mode presupposes that the meaning of the Constitution, determined by its adopters, is fixed and unchanging. The second is more consistent with the notion that the Constitution's meaning evolves in order to keep pace with the values and demands of modern society.

To speak of only two modes of interpretation is grossly misleading because there are many more than two ways to interpret. For example, it is possible to use the intent of the framers as a basis for discerning the meaning of the Constitutional meaning without attempting to discover their specific intent in particular clauses. One might, instead, attempt to discover a more general intent of the framers in light of the dominant political ideas of their time. Thus, the interpreter might appeal to the spirit rather than the letter of the Constitution but with reference to the intent of the framers rather than to contemporary values. A distinction must therefore be made between "general intentionalism" and "specific intentionalism".

For the purposes of the present discussion the crucial issue in interpretation is, to what extent should one rely on the framers as a source of authority for understanding the meaning of the Constitution? The authors of the three the books discussed in this essay are committed to what I have called "general intentionalism".

According to Gary J. Jacobsohn, who is a political science professor at Williams College, an understanding of the political-legal theories that informed the framing and early development of the Constitution provides the key to its proper interpretation. The theme of The Supreme Court and the Decline of Constitutional Aspiration is that the natural rights tradition, which
occupied a central position in the early constitutional experience, has been abandoned by modern constitutional theory.

In regard to the question of how the Constitution should be interpreted Jacobsohn has staked out a middle ground between the "specific intentionalists" and those who search outside the document for principles of justice. Jacobsohn finds his middle ground in the notion that principles of natural justice are not external to the Constitution; they are instead, contained within it.

As his title suggests, Jacobsohn views the abandonment of natural rights doctrine as a major problem in modern constitutional interpretation — a "decline" in constitutional theory. He calls for a return to constitutional aspiration, which will consist of "an effort by judges to retrieve, where relevant, the constitutional aspirations of the framers" as a guide to interpreting, understanding and applying our fundamental law.

In separate chapters (some of which have been previously published in political science journals) Jacobsohn examines the theories of Roscoe Pound, Ronald Dworkin, Raoul Berger, Thomas Grey, and John Hart Ely. He contrasts their theories with those of the men who played leading roles in shaping the Constitution, including James Madison, Alexander Hamilton, John Marshall, and Abraham Lincoln in order to demonstrate the modern rejection of the natural rights tradition.

Jacobsohn effectively contrasts the old and the new constitutional theory in an early chapter by placing Roscoe Pound's notion of law (a science created by society for the purpose of realizing social interests and protecting social relations) alongside the eighteenth century conception of the law (based on self-evident truths). Pound, Jacobsohn explains, embraced a utilitarian "good" as what most people wanted at any given time, whereas James Madison envisioned a community with permanent interests separate from the totality of group interests. Pound's legal theory also revised the role of judge from the framers idea that judges would be guardians who would protect permanent legal-political principles to social engineers who would recognize that rights vary with changing mores and values.

Jacobsohn further demonstrates the departure of modern theory from the natural rights orientation of the eighteenth century in a critique of Ronald Dworkin's jurisprudence. Dworkin's divergence from earlier constitutional theory, Jacobsohn notes, can be found in part in his view of the Constitution as countermajoritarian and the consequent need for an activist, rights-oriented Supreme Court. For Madison, in contrast, the Constitution was a majoritarian document that built protection of minorities into the political process. Jacobsohn argues further that Dworkin's theory has also diverged from that of the framers in its substitution of moral philosophy for the intent of the framers. Dworkin has made the Constitution an "object of transvaluation" by focusing on the fundamental right to equality and has, moreover, effected a transvaluation of the function of the judiciary by requiring the Court to guarantee that equality.

Although Jacobsohn does not attempt to refute Raoul Berger's "specific intentionalist" approach to constitutional interpretation, he does seek to
demonstrate that the Constitution is not the positivistic document that Berger presents. Berger's portrayal of the Constitution, Jacobsohn asserts, is based on a misconstrual of the ideas of Alexander Hamilton, who "would have been comfortable with the implication that the Constitution incorporates immutable principles of natural justice within the confines of its positive law." 13

Raoul Berger argues that the natural rights tradition is irrelevant to constitutional interpretation. By contrast, Thomas Grey has claimed that the natural rights tradition of the eighteenth century created a set of legally bidding principles that judges could utilize as an unwritten constitution, supplementary to the written one. It is in this context that Jacobsohn most effectively illustrates his middle ground. In his view, the written Constitution was meant to embody commitment of the framers to the natural rights:

Therefore, judicial appeals to "higher law" are not justifiable when they lead to a distinction between written and unwritten constitutions, but they are justifiable insofar as they help explicate and illuminate the written words of the Constitution itself. 14

Jacobsohn's argument, to be successful, requires at least the following. First, he must persuade the reader that the natural rights tradition, was indeed central to the ideas of the men who shaped the Constitution. Second, he needs to demonstrate the modern rejection of that tradition. Finally, he needs to demonstrate the need to return to the natural rights tradition of the framers. Jacobsohn's method of drawing sharp contrasts between old and new constitutional thought is an effective means of fulfilling the first two requirements. His failure to fulfill the third requirement is the major shortcoming of the book. Jacobsohn neglects to provide a justification for relying on the political theory of the eighteenth century for our understanding of the Constitution. Indeed, he treats the authority of the framers as a settled issue in constitutional interpretation.

If the Supreme Court were to adopt Jacobsohn's view of the Constitution, how would it resolve the current disputes over such issues as the exclusionary rule, capital punishment, abortion, and the application of the Bill of Rights to the states? To be sure, judges who appeal to principles of natural law would not be considered to be abusing their discretion because they would remain faithful to the framers intent. Jacobsohn, however, declines to enter the realm of particular issues. He goes only so far as to assert that the application of his natural rights Constitution would involve an orientation "that expresses a broad commitment to the type of polity the Constitution aspires to have." 15

Jacobsohn contends that his Constitution, properly understood, provides the intellectual context for finding what is permanent in our fundamental law. But questions of the way that Constitution would apply to particular cases remain unanswered. In short, even if we accept Jacobsohn's assertion that the legal theories of the eighteenth century should serve as a guide to interpreting the Constitution today, we are left with little insight into what that actually means.
Christopher Wolfe’s *The Rise of Modern Judicial Review* is a lengthy history of the Supreme Court’s view of its function as interpreter of the Constitution. His thesis is that the judicial function and the nature of constitutional interpretation have undergone a profound transformation. The judiciary now exercises judicial “will” rather than “merely judgment” and has usurped legislative power. Like Jacobsohn, Wolfe perceives the change from old theories and practices to new as an unwelcome and unfortunate deterioration of the original understanding of the nature of the Constitution, how it should be interpreted, and who should do the interpreting.

Wolfe, who teaches political science at Marquette University, divides the history of judicial review into three eras. He portrays the first, the era of traditional or moderate judicial review from 1789 until 1890, as a time when there was major agreement on the principles of constitutional interpretation. During the traditional era, according to Wolfe, justices usually followed the rules of interpretation provided by Sir William Blackstone in his *Commentaries on the Laws of England* published in 1770 utilizing the five basic signs: “the words, the context, the subject-matter, the effects and consequences, or the spirit and reason of the law.” According to Wolfe, such rules were so widely accepted by American lawyers at the time of the framing that the issue of interpretation was not discussed. Wolfe asserts that Chief Justice John Marshall followed those rules in his decisions that were so crucial to the development of judicial and congressional power.

While the traditional era was dominated by John Marshall’s correct understanding of the Constitution, during the second era, which lasted until 1937, judges began to depart from early principles of interpretation and to expand the role of the judiciary. The transitional era was dominated by judicial activism to overturn legislative attempts to regulate business. Still, the justices continued to relate their decisions to particular provisions in the Constitution. Moreover, during the transitional era judges’ “self-understanding” allowed them to maintain a belief that they were adhering to the original principles of judicial review.

In the third, or modern era the judiciary has expanded constitutional provisions beyond all recognition. Locating the roots of the transformation in legal realism, Wolfe argues that the realists were mistaken in their attempt to dispel the myth of mechanical jurisprudence. Judges, at least during the traditional era, did not base their decisions on extra-legal factors but rather on widely accepted principles of interpretation. Indeed, Chief Justice John Marshall was faithful to the original intent of the Constitution. Thus, Wolfe places the responsibility for the transformation of judicial review on the legal realists who suggested that judges did not merely discover the law but created it out of their own experience.

Wolfe urges a return to a traditional judicial review that would result in a Constitution “fairly interpreted to faithfully express the meaning it was given by its authors and understood by those who gave it authority by ratifying it.” He urges us to reexamine our foundations, to renew our acquaintance with the political philosophy of the men who established the Constitution, so that
we may appreciate and understand it and apply their approach to constitutional interpretation.

The Rise of Modern Judicial Review fills 356 pages. One of the reasons the book is disappointing is that a major portion of it consists of familiar case analysis of little value to any reader who has read even one general book on the history of the Supreme Court. It is not clear for whom the book is intended. While academic readers will be annoyed when they encounter an outline of the Bill of Rights, only the most patient undergraduates will be willing to wade through all the material that the book includes.

There are, however, more serious substantive problems with the book. Cut to the essentials, Wolfe’s thesis consists of the following assertions:

1. The proper method of interpretating the Constitution consists of applying rules of interpretation that keep it faithful to the intent of the framers.
2. That method was dominate until 1890.
4. The traditional approach should serve as a model for modern constitutional review.

The reader needs to be persuaded that the first assertion is true before the argument can proceed. Wolfe, unfortunately, does very little to explain exactly why it is that the principles of interpretation he urges are the proper ones. We are essentially told only that they are proper because the were the original principles. His attempt to demonstrate that those principles were, indeed, the original ones over and that there was very little disagreement over them is, moreover, unconvincing. Thus Wolfe fails to secure the foundation for his indictment of modern judicial review.

It may be that modern readers (including this reviewer) have so thoroughly absorbed legal realism that we cannot believe that John Marshall did not engage in some creating of law. Perhaps our experience with the post-1937 Court has imbued us with a devotion to the idea that the judiciary should protect personal rights. We may, in short, have so thoroughly departed from our original judicial tradition that we can no longer even believe in it. It is possible that traditional judicial review was proper and its modern version is an aberration. Nevertheless, for this reviewer Wolfe’s contention that judicial review in the nineteenth century was fundamentally different and superior to what the Supreme Court has been doing since 1937 borders on the incredible.

Wolfe’s portrayal of John Marshall as a judge who, unlike modern jurists, was faithful to the established principles of constitutional interpretation and indeed to the original meaning of the Constitution is appealing but ultimately unconvincing. Wolfe’s analysis of modern judicial review, however, is not even appealing. It is, in fact, predictable and stale. For example, Wolfe says of the Court’s decision in Craig v Boren (striking down on equal protection grounds an Oklahoma law that allowed 21 year old males and 18 year old females to purchase beer): “The Court...was striking down the law under the influence

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of elite intellectual hostility to the notion of important sex differences that are legally cognizable." Moreover, his comparison of *Roe v Wade* to *Dred Scott* can only be described as offensive:

In each case major support for the Court came from "pro-choice" sentiment ("popular sovereignty" in regard to slavery and the territories, a women's "right to privacy") in regard to abortion.²⁰

Such inappropriate comparisons add nothing to the serious debate regarding the constitutional right to privacy.

Michael Kent Curtis' *No State Shall Abridge* provides a much more specific treatment of constitutional interpretation than either of the other two works reviewed here. Rather than advocate an approach to interpreting the Constitution, Curtis simply applies his method and does the interpreting himself. Curtis, an attorney for a Greensboro, North Carolina law firm, presents the thesis that the framers of the Fourteenth Amendment intended to make the Bill of Rights applicable to the states.

Curtis's method of discerning the meaning of the Fourteenth Amendment is to examine the intent of the framers "in light of the anti-slavery crusade that produced" the Amendment. Although the intent of the framers of the Fourteenth Amendment has been thoroughly examined numerous times, Curtis offers some fresh insight by including in the framework of his analysis principles of Republican constitutional theory. These include the Republican convictions that the Thirteenth Amendment made blacks citizens; that the Bill of Rights applied to the states before the Fourteenth Amendment; that the Privileges and Immunities of Article IV of the Constitution protected fundamental rights against state action; and that the Due Process Clause of the Fifth Amendment protected people from enslavement in Washington, D.C.

In order to take Republican theory into account, Curtis extends his examination of the historical materials beyond the debates on the Fourteenth Amendment to the congressional debates on the Thirteenth Amendment, on Reconstruction, and the Civil Rights Bill. He also avoids one of the pitfalls of "intentionalism" by defining, at the outset, "the framers" as the proponents of the Fourteenth Amendment, primarily the Republicans who were members of the committee that reported the Amendment to Congress such as Representative John Bingham, the author of the Amendment, and Senator Jacob Howard who managed the Amendment in the Senate.

*No State Shall Abridge* considers many questions about the Fourteenth Amendment that have been addressed previously, including the relationship between the Civil Rights Bill and the Amendment, Bingham's understanding of the law at the time including his understanding of the privileges or immunities clause of Article IV, what Bingham meant when he referred to the Bill of Rights, and the significance of the change in language from Bingham's initial proposal.²²

Charles Fairman and Raoul Berger, who both argued that the framers of the Fourteenth Amendment did not intend to make the Bill of Rights applicable
to the states, are Curtis’ prime targets. For example, Curtis rejects Fairman’s assessment of Bingham. According to Curtis, Bingham was not confused about the law and did not mistakenly believe that the Bill of Rights already applied to the states; he was, in Curtis’ judgment, well aware of *Barron v Baltimore* but strongly disagreed with it. Additionally, Curtis refutes the argument that because the Framers of the Fourteenth Amendment said very little about the applicability of the Bill of Rights to the states they did not intend it to apply. He offers the alternative explanation that they did not discuss the issue at length because they assumed the Bill of Rights would apply, which certainly makes sense if they believed that it *should* apply.

Curtis’ argument is appealing and clearly more convincing than that of either Fairman or Berger. Curtis’ research is careful and thorough. He is innocent of the misleading omissions in his selective quotations such as those that can be found in Berger’s *Government by Judiciary.* Curtis makes sense out of the statements of the proponents of the Amendments, in contrast to both Berger and Fairman who contended that leading Republicans were confused and muddled about the law and that their statements, therefore, should not be taken seriously. With his careful analysis Curtis provides a valuable rejoinder to those who argue that the framers of the Fourteenth Amendment did not intend to make the Bill of Rights applicable to the states.

The shortcoming of *No State Shall Abridge* is that it fails to provide a compelling justification for its method. Curtis makes no effort to overcome the numerous objections to “intentionalism”. One problem with that mode of interpretation in general and with Curtis’ analysis in particular is that an examination of the statements made by framers leads — apparently unavoidably — to second-guessing and psychologizing. For example, what did Senator Howard really mean when he asserted that the privileges (of Article IV) should include

> “the personal rights guaranteed and secured by the first eight amendments to the Constitution; *such as*” freedom of speech and press, the right to assemble, the right to bear arms, not to have troops quartered in private homes during peacetime, to be free from unreasonable searches and seizures and from unreasonable bail, to be tried by an impartial jury, to be informed of the nature of an accusation, and to be free from cruel and unusual punishments.”

Did “such as” mean “illustrative of the all of the Bill of Rights”? Or did it mean “here is a list of all the rights that are applicable”? What did he really mean? Who can ever say for certain? Walter F. Murphy wrote in 1978 that “the difficulties that confront any painstakingly thorough and intellectually scrupulous researcher who tries to establish legislative intent are typically insuperable.”

In that same article Murphy suggested that the framers probably did not intend “their specific interpretations of the sweeping language they used to bind future generations. They would have recognized that the future would bring problems that the framers had never encountered or foreseen.”
Jefferson Powell has elaborated on the same objection in a recent article in which he argues persuasively that the framers did not believe that examination of the intent of specific individuals was an appropriate method of interpreting the Constitution.27 Curtis would have done well to address such problems.

Jacobsohn, Wolfe, and Curtis all simply assume that "intentionalism" is the proper mode of interpreting the Constitution; thus, none of them seem to perceive a need to provide a compelling justification for it. The arguments for "intentionalism" most often include the following. The Constitution is the supreme law of the land; "intentionalism" will not only enable us to keep our commitment to that supreme law but it will also assure consistency in its meaning. "Intentionalism" is consistent with the institutional arrangements provided in the Constitution insofar as it limits the activity of the judiciary, and thereby allows more room for the political process to function in a democratic manner. Judicial power is not legitimate unless judges adhere to the intent of the framers and thereby eliminate the possibility of imposing their own values on constitutional decisions. The framers were correct in their vision of republican government; thus, modern interpretation must not deviate from that vision. The framers intended that future interpreters would rely on their intent.

All three of the authors discussed here treat the argument for "intentionalism" as settled when, in actuality, it is at the center of an intense debate. Lief Carter has affirmed the intensity of the debate by asserting that, "The case for constitutional interpretation bound strictly to text and history is only slightly stronger than the case for the proposition that we inhabit a flat earth." 28

Each of the three works discussed here provides a significant contribution to the discourse concerning the nature of the Constitution, how it should be interpreted, and who should interpret it. Still, it is important to note that Jacobsohn, Wolfe, and Curtis represent only one side of multifaceted discourse.
It is quite possible that a law professor was the source of this statement.


See, Murphy, Harris, and Fleming, American Constitutional Interpretation.

Rather than fill several pages with references to works on constitutional interpretation, I have decided to refer to just one that I have found particularly helpful: William F. Harris II, "Bonding of Word and Polity: The Logic of American Constitutionalism," American Political Science Review 76:34-45(1982).


Brest identifies "moderate originalism," as a method whereby, the text of the Constitution is authoritative, but many of its provisions are treated as inherently open-textured. The original understanding is also important, but judges are more concerned with adopters' general purposes than with their intentions in a very precise sense. (Ibid., 205)

Jacobsohn, p. 140.

Ibid., p. 38.

Ibid., p. 71.

Ibid., p. 75.

Ibid., p. 141.

The judiciary may truly be said to have neither Force nor Will, but merely judgment."

Alexander Hamilton, Federalist 78 as quoted in Wolfe, p. 357, n. 5.

As quoted in Wolfe, p. 18.

Ibid., p. 354.

Ibid., p. 306.

Ibid., p. 308.


Bingham's initial proposal provided that the Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Article IV, section 2); and to all persons in the several states equal protection in the rights of life, liberty, and property (5th Amendment) (as quoted in Curtis, p. 57).

Curtis points out, for example, that Berger credited Bingham with the following statement: The care of the property, the liberty, and the life of the citizen...is in the States, and not in the Federal Government. I have sought to effect no change in that respect...I have advocated here an amendment which would arm Congress with the power to punish all violations of the bill of rights...I have always believed that protection...within the States of all the rights of person and citizen, was of the power reserved to the states. (Government by Judiciary, pp. 143-44, as quoted in Curtis, p. 123)

What Bingham actually said was: The care of the property, the liberty, and the life of the citizen under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the Bill of Rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. (Cong. Globe, 39th Cong., 1st Sess. 1292 [1866] (emphasis added by Curtis) as quoted in Curtis, p. 123)
24 As quoted, Curtis, p. 111 (emphasis added by Curtis).
26 Ibid., 1769.
28 Carter, p. 41.