

BOOK REVIEW

OURSELVES AND
OUR POSTERITY:

ESSAYS IN CONSTITUTIONAL ORIGINALISM

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ABSTRACT: *Ourselves and Our Posterity: Essays in Constitutional Originalism* addresses the views of ten legal scholars and political scientists who assert that the influence of Originalism has become so far reaching that many judges have openly stated: “we’re all originalists now.” Analyzing some of the most salient Supreme Court cases like *District of Columbia v. Heller*, *Boumediene v. Bush*, *Roe v. Wade*, and *Marbury v. Madison*, this review describes instances when Originalism was properly employed and highlights instances when it was rejected in favor of judicial activism.

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In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008),¹ the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms. As interesting as the specific outcome was the interpretive method employed by Justice Scalia in the majority opinion (joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito) and by Justice Stevens in the principal dissenting opinion (joined by Justices Souter, Ginsburg and Breyer). Faced with a rare question of first impression concerning the meaning of the words employed by the Framers to establish a substantive constitutional right, all of the justices rooted their competing interpretations in the text itself, construed in light of founding-era sources. So striking were the justices' pure application of originalist methodology that at least two commentators proclaimed, "We're all originalists now."²

Similarly, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008),³ the Court reviewed the history of the writ of *habeas corpus* from its origins in the Magna Carta to its American usage in 1789, concluding that the writ extends to enemy combatant detainees held outside of the United States. As in *Heller*, the four dissenting justices agreed that historical understanding and practice resolved

1 *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (holding that the Second Amendment confers an individual right to keep and bear arms).

2 Dale Carpenter, *Heller On a First Read*, THE VOLOKH CONSPIRACY (June 26, 2008), available at http://volokh.com/archives/archive_2008_06_22-2008_06_28.shtml#1214514180 and Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, HUMAN EVENTS (June 27, 2008), available at <http://www.humanevents.com/article.php?id=27229>.

3 *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

the question, even though they personally would have reached a different conclusion.⁴

Even avowed non-originalists acknowledged that legal conservatives and progressives were in some sense “all originalists now” long before *Heller* and *Boumediene*.⁵ Indeed, the originalism advocated in the 1970s and 1980s by Raoul Berger,⁶ Robert Bork,⁷ William H. Rehnquist,⁸ Antonin Scalia⁹ and Edwin Meese,¹⁰ as subsequently refined by them and others, has been increasingly

4 *Id.* at 2303-2307 (Scalia, J., dissenting); see also *id.* at 2279 (Roberts, C.J., dissenting).

5 See, e.g., Laurence H. Tribe, Comment, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 67 (Amy Gutmann ed., 1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION] (“We are all originalists now....”) and Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 Va. L. Rev. 669, 718 (1991) (“[W]e are all originalists now -- or should be.”)

6 RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

7 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Robert H. Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

8 William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

9 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, *Originalism*].

10 Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), reprinted in *Originalism: A Quarter Century of Debate* 47 (Stephen G. Calabresi ed., 2007); Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (November 15, 1985), reprinted in *Originalism: A Quarter Century of Debate* 71 (Stephen G. Calabresi ed., 2007).

ascendant,¹¹ though it continues to withstand sustained criticism¹² and non-originalist decisions still proliferate.

In *Ourselves and Our Posterity*,¹³ ten distinguished legal scholars and political scientists explain and defend originalist interpretive methodology, apply originalist principles to current legal and political disputes, and consider the effects of non-originalist judicial activism on the nation's political and cultural environment. It is a valuable contribution to the ongoing debate over originalism. In the opening chapter, "Original Meaning and Responsible Citizenship," Edward Whelan argues that originalism is both common-sensical and necessary to discern constitutional meaning in most cases. Employing originalist principles, judges can usually discern, or at least significantly limit, the range of possible meanings of disputed texts, thus constraining their personal preferences. When the original meaning is not sufficiently clear, adherence to an ethic of judicial restraint preserves the democratic, majoritarian character of American political design. In the absence of a clear constitutional provision, the judiciary—the "least dangerous" branch of government¹⁴—should defer to

11 Rory K. Little, *Heller and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L. J. 1415, 1417 (2009).

12 See, e.g., Mitchell M. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 DUKE L. J. 239 (2009); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

13 OURSELVES AND OUR POSTERITY: ESSAYS IN CONSTITUTIONAL ORIGINALISM (Bradley C. S. Watson ed., 2009) [hereinafter OURSELVES AND OUR POSTERITY].

14 Federalist No. 78 (Hamilton).

legislative enactments.¹⁵

Whelan would probably challenge the suggestion that “we are all originalists now” as unduly optimistic. In the second part of his essay, Whelan surveys the “judicial abandonment of originalism” begun by the Warren Court (1953-69) and continued in *Roe v. Wade*, 410 U.S. 113 (1973)¹⁶ and its coda, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).¹⁷ In *Casey*, the Court rejected the goal of originalism (fidelity to the written constitution as understood at the time that it was adopted) in favor of a strong theory of *stare decisis* rooted in what Whelan calls a “grandiose misunderstanding of the Supreme Court’s role.”¹⁸ Thus liberated from the original understanding of the Due Process Clause, the Court adduced an expansive conception of constitutional liberty to gird up *Roe*’s shaky theoretical foundation: “At the heart of liberty is the right to determine one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁹ That this passage continues to echo through substantive due process²⁰ and equal protection²¹ cases is sufficient evidence that originalism has not finally carried the day.

Finally, Whelan considers the harmful effect that judicial

15 OURSELVES AND OUR POSTERITY, *supra* note 13 at 7.

16 *Roe v. Wade*, 410 U.S. 113 (1973).

17 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

18 OURSELVES AND OUR POSTERITY, *supra* note 13 at 15.

19 *Planned Parenthood*, 505 U.S. at 851.

20 *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

21 *See Kerrigan v. Comm’r of Public Health*, 289 Conn. 135, 235, 957 A.2d 407, 466 (Conn. 2008).

activism has had on the judicial confirmation process. The transfer of a broad range of substantive policy issues from elected officials to courts has spawned new constituencies who jealously guard the judicial victories that they could not achieve through the democratic process.²² To these constituencies, the appointment of judges who are committed to the principles of originalism and judicial restraint are a threat the creation of public policy-by-litigation. The judicial confirmation process, particularly for Supreme Court justices, has therefore become a heavily contested battlefield.²³

Hadley Arkes' chapter, "Confirmation to the Court in Times Turned Mean: A Strategy for the Hearings," extends Whelan's criticism of judicial confirmations. Arkes begins with an historical survey of confirmation hearings from the early twentieth century (when some nominees were confirmed without hearings, and when hearings were held, the nominees often did not even appear) through the tumultuous Bork and Thomas hearings of 1987 and 1991. Arkes persuasively argues that the confirmation process devolved to its current state because of the Supreme Court's federalization of the abortion issue in *Roe v. Wade*. Now that the Court has arguably taken ownership of abortion policy and other controversial issues, judicial confirmation hearings are the last opportunity for the people, acting through their elected representatives, to vet "the persons who truly will govern us."²⁴

22 OURSELVES AND OUR POSTERITY, *supra* note 13 at 17.

23 *Id.* at 17-21.

24 *Id.* at 132.

Confirmation hearings, particularly for Supreme Court nominees, now carry a tinge of partisan desperation because the president is “choosing the true, supreme Legislators whose decisions cannot be vetoed by the Executive, and cannot be overturned with anything less than a constitutional amendment.”²⁵

Arkes argues that embattled nominees should adopt a new strategy for judicial confirmation hearings. Particularly when questioned about one’s fidelity to *Roe* and its progeny, nominees should answer senators’ questions with more queries designed to clarify and reveal the full sweep of the Court’s abortion jurisprudence.²⁶ Arkes speculates that this maneuver would move the exchange in a direction that hostile senators would prefer to avoid and transform hearings from spectacles into serious public “seminars” on constitutional law.²⁷

While interesting to ponder, Arkes’s proposed strategy would be highly risky. As Arkes acknowledges, some of his politically experienced friends express a dim view of the plan because it places nominees in a no-win situation.²⁸ If the nominee is insufficiently deft, he may fail to control the discussion in the manner that Arkes suggests.

But even if the nominee is able to turn the questioning so as to discomfit hostile senators, what has he accomplished *toward the end for which the judicial confirmation hearing is designed?*

25 *Id.*

26 *Id.* at 133-134.

27 *Id.* at 135.

28 *Id.* at 135-136.

The procedures associated with the Senate's constitutional power to advise and consent with respect to judicial nominations are not, ultimately, educational or aspirational, but purely instrumental: shall the president's nominee become a life-tenured judge, or not?²⁹

Professor Arkes's desire to transform hearings into urbane public teaching sessions is salutary, and if sincerely engaged by their interlocutors many judicial nominees would undoubtedly be up to the task, but his proposal asks too much of nominees under the circumstances. Once nominated by the president, their calling is to win confirmation so that they may exercise the judicial power conferred by Article III of the Constitution. That considerable responsibility is sufficient unto the day. Asking nominees to simultaneously play the role of public intellectual while securing Senate confirmation adds an objective that detracts from, and could unnecessarily frustrate, their (and the president's) primary purpose.

In "Judicial Usurpation: Perennial Temptation, Contemporary Challenge," Robert P. George asserts that once the judicial nominee has successfully run the confirmation gauntlet, his "perennial temptation" is to exercise judicial power lawlessly, that is, to illegitimately "displace legislative judgments."³⁰ In the bal-

29 U.S. CONST. art. III, § 2, cl. 2.

30 OURSELVES AND OUR POSTERITY, *supra* note 13 at 49. *Cf.* The Federalist No. 78 (Alexander Hamilton) ("For I agree, that there is no liberty, if the power of judging be not separated from the legislative and executive powers.") (citing MONTESQUIEU, SPIRIT OF THE LAWS 181 (1752)).

ance of his essay, George offers examples of such judicial usurpation that laid the groundwork for the current controversy over the constitutionality of same-sex marriage. George's list of rogue decisions includes *Dred Scott v. Sandford*, 60 U.S. 393 (1856),³¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896),³² *Lochner v. New York*, 198 U.S. 45 (1905),³³ *Griswold v. Connecticut*, 381 U.S. 479 (1965),³⁴ *Roe v. Wade*,³⁵ *Lawrence v. Texas*,³⁶ and several state court cases finding unconstitutional the restriction of marriage to opposite-sex unions.³⁷

Given the trajectory of recent Supreme Court decisions, George believes that it is only a matter of time before the federal Defense of Marriage Act is invalidated by the Supreme Court of the United States, which would force all states to give full faith and credit to out-of-state same-sex marriages.³⁸ He therefore advocates a constitutional amendment that

Defines marriage in the United States as the union of a man and a woman; preserves the principle of democratic self-government on the issue of civil unions, domestic partnerships, and other schemes under which some of the incidents of marriage

31 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

32 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

33 *Lochner v. New York*, 198 U.S. 45 (1905).

34 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

35 *Roe v. Wade*, 410 U.S. 113 (1973).

36 *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

37 OURSELVES AND OUR POSTERITY, *supra* note 13 at 55.

38 *Id.* at 57.

may be allocated to non-married persons; and respects principles of federalism under which family law is primarily the province of the states rather than the national government.³⁹

In a sense, Ralph A. Rossum's chapter, "'Common-Sense Constitutionalism': Why Constitutional Structure Matters for Justice Scalia," is the anti-type of Robert George's list of "judicial usurpations." Following Justice Antonin Scalia's critique in *A Matter of Interpretation*,⁴⁰ Rossum seeks to avoid the dangers of evolutionary, "common-law constitutionalism" by championing what he calls Justice Scalia's "common sense constitutionalism." By "common sense," Rossum does not refer colloquially to a community's shared agreement and natural understanding. Rather, according to Rossum, Justice Scalia's "common sense understanding" places "emphasis on giving primacy to the constitutional text and on expounding its words based on their 'plain, obvious and common sense.'"⁴¹ It is a rule, or set of rules, for interpreting constitutional text, beginning with

Giving primacy to constitutional structure -- in particular, to understanding, through the words they used, the original meaning of those who wrote and ratified the Constitution regarding how power was to be allocated among the branches

39 *Id.*

40 SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 5.

41 OURSELVES AND OUR POSTERITY, *supra* note 13 at 26 (quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

of the federal government (separation of powers) and, equally importantly, regarding how, over time, that allocation was to be preserved in practice.⁴²

Rossum illustrates Justice Scalia's "common sense constitutionalism" and its emphasis on constitutional structure by reviewing Scalia's opinions in cases dealing with federalism,⁴³ separation of powers,⁴⁴ and constitutional standing.⁴⁵ In contrast to Professor George's litany of substantive due process and right of privacy cases, Rossum's survey is a helpful reminder that originalism has made real and lasting gains in recent decades.

What is the relationship between pure originalism and the doctrine of *stare decisis*? Setting aside arguments about whether the American constitutional tradition is, in fact, textualist rather than precedent-based,⁴⁶ many believe that the extent to which one is willing to abandon text, history and structure for the sake of continuity (or, perhaps, in order to safeguard the public's alleged perception of the judiciary)⁴⁷ is in practice the most significant

42 *Id.* at 29.

43 *Printz v. United States*, 521 U.S. 898 (1997).

44 *Morrison v. Olson*, 487 U.S. 654 (1988); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

45 *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

46 See Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J. L. & PUB. POL'Y 947 (2008); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994).

47 See *Planned Parenthood*, 505 U.S. at 864-69.

challenge for those who are sympathetic to originalist arguments.⁴⁸

In “Authority Doctrines and the Proper Judicial Role: Judicial Supremacy, Stare Decisis, and the Concept of Judicial Constitutional Violations,” Jack Wade Nowlin balances the claims of *stare decisis* against originalist ideals, landing squarely in the middle.⁴⁹ Essentially, Nowlin argues that activist, results-oriented unconstitutional decisions are not entitled to respect as binding precedent.⁵⁰ However, even Court decisions that conflict with the Constitution may for prudential reasons continue to command deference, although ideally they would be limited and incrementally eroded by subsequent judicial opinions.⁵¹ In short, Nowlin appears to fall comfortably into the camp that Justice Scalia memorably labeled “faint-hearted originalists.”⁵²

In his essay, “Freedom Questions, Political Questions: Republicanism and the Myth of a ‘Bill of Rights,’” the intrepid Matthew J. Frank shows himself to be no faint-hearted originalist. Beginning with *Marbury v. Madison* and the entire first cen-

48 See, e.g., Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J. L. & PUB. POL’Y 5, 13-14 (2011) (“It could almost go without saying that the proper resolution of many important constitutional issues could hinge on the conditions, if any, under which various versions of originalism would authorize courts to deviate from the original constitutional meaning based on considerations of precedent and prudence”). But see, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW U. L. REV. 803 (2009) (arguing that precedent is a legitimate and coherent doctrine that is compatible with originalism).

49 OURSELVES AND OUR POSTERITY, *supra* note 13 at 84.

50 *Id.* at 79.

51 *Id.* at 80.

52 SCALIA, ORIGINALISM, *supra* note 9, at 861-62.

ture of American jurisprudence, Franck argues that what we have come to call “judicial review” was originally (and still should be) extremely limited, addressing only particular individual rights⁵³ but not questions relating, for example, to the “freedoms” and other “community-defining declarations” (which are not judicially enforceable “rights”) enumerated in what we have come to call, “the Bill of Rights” (as opposed to a bill of rights).⁵⁴ He concludes that the free speech “rights” that the Supreme Court has defined and regularly enforced since 1925⁵⁵ are actually non-justiciable political questions that should be left to the legislative and executive branches.⁵⁶

Franck’s essay is provocative, especially its premise that as an original matter, the first ten amendments to the Constitution are exclusively political in nature and purpose, but Frank’s argument is more interesting than it is likely to persuade. In the Supreme Court’s two most recent Terms, all of the currently sitting justices who have shown any affinity for originalism, including Justice Clarence Thomas, the Court’s most stout-hearted originalist, affirmed without reservation the conventional understanding that the Framers constitutionalized judicially enforceable free speech

53 OURSELVES AND OUR POSTERITY, *supra* note 13 at 99-104.

54 *Id.* at 110-15.

55 *See* *Gitlow v. New York*, 268 U.S. 652 (1925) (declaring First Amendment free speech rights among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment).

56 *Ourselves and Our Posterity* at 115-18.

rights in the First Amendment.⁵⁷

As faint-hearted originalists acknowledge, for prudential and other reasons relating to the doctrine of *stare decisis*, it may be preferable in some instances to suffer the continued viability of an unconstitutional decision. Yet such decisions do not necessarily mellow with age; rather, they may continue to deform constitutional jurisprudence and, as Christopher Wolfe argues, transform attitudes and behavior.⁵⁸ Wolfe's chapter, "The Supreme Court and Changing Social Mores," considers the sociological impact of Supreme Court decisions regarding democratically enacted laws regulating the sale and use of contraceptives, obscenity, abortion, and homosexual activity—the primary fodder of today's "culture wars."⁵⁹ Wolfe's analysis is purely descriptive, not prescriptive, but it is an insightful meditation on the scope of judicial power, which can far exceed the narrow remedy fashioned in a particular case or controversy.

The final three chapters in *Ourselves and Our Posterity* are interesting and thought-provoking, although their relationship to constitutional originalism is less apparent. In his essay titled "The Devil's Pitchfork," Robert Lowry Clinton traces the influence of scientific materialism and Auguste Comte's positivism on modern social science. According to Clinton, philosophical materialism and legal positivism necessarily refuse to acknowledge "the exis-

57 See *Snyder v. Phelps*, 562 U.S. ____ (2011) and *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

58 OURSELVES AND OUR POSTERITY, *supra* note 13 at 153.

59 *Id.* at 153-68.

tence of a social order rooted in human nature.”⁶⁰ That denial robs the law of an internal reality or rationality and “leads straightforwardly to judicial supremacy” based ultimately upon raw power.⁶¹

In “A Constitution to Die For?” Stanley C. Brubaker briefly considers the origin of Congress’s power “to raise and support armies”⁶² before launching into a defense of what he calls “Real Meaning Originalism.” Under this theory, judges should attempt to divine “a constitutional reality” or “constitutional personality” that is independent of the constitutional text and its objective, semantic meaning.⁶³ Brubaker considers and rejects Locke’s concept of natural rights, Rousseau’s Social Contract, and (anachronistically) John Rawls’s neo-Kantian theory of justice, before asserting that Aristotelian ethics provides the best theoretical foundation for a “constitutional personality” that justifies Congress’s Article I power to raise armies.⁶⁴ It is an interesting philosophical tour, but lacks connection to anything ever uttered by a Framers or member of the State ratifying conventions. As the late M.E. Bradford continually emphasized, the Framers were not inclined to “metaphysical speech concerning abstract moral principles and ideal regimes,”⁶⁵ and did not think or speak about “natural rights apart from their incarnation in historic rights, as logically prior to

60 *Id.* at 206.

61 *Id.*

62 U.S. CONST., art. I, § 8, cl. 12.

63 OURSELVES AND OUR POSTERITY, *supra* note 13 at 224-27.

64 *Id.* at 227-38.

65 M.E. BRADFORD, ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 33 (1993).

the social matrix where they took root.”⁶⁶

The volume concludes with Ken I. Kirsch’s chapter, “Neo-conservatives and the Courts: The Public Interest, 1965-1980.” According to Kirsch, early neoconservatives did not engage in debates about judicial philosophy or constitutional interpretation, but indirectly touched upon legal matters through their criticisms of domestic policy programs. In the pages of *The Public Interest*, neoconservatives such as Martin Mayer and Nathan Glazer decried the legalization of public policy and the aggrandizement of judicial power,⁶⁷ and Daniel Patrick Moynihan criticized judges’ misuse of social science.⁶⁸ By 1975, Martin Diamond specifically examined liberal and conservative judicial philosophies in relation to the Framers’ original constitutional order, previewing arguments that would become familiar when debates over theories of constitutional interpretation erupted during the Reagan administration.⁶⁹

In *Ourselves and Our Posterity*, Bradley C.S. Watson has assembled a delightful collection of papers on the theory and practice of constitutional interpretation. Given the scope of material covered in the ten chapters, it could serve both as an introduction and as a valuable contribution to the ongoing discussion about originalism.

66 M.E. BRADFORD, A BETTER GUIDE THAN REASON: FEDERALISTS AND ANTI-FEDERALISTS 91 (1994).

67 OURSELVES AND OUR POSTERITY, *supra* note 13 at 251-52, 263-68.

68 *Id.* at 270-77.

69 *Id.* at 285-89.