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EMBATTLED ORIGINALISM

Helen Irving*

GARY L. MCDOWELL, *THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (Cambridge Univ. Press 2010). Pp. 428. Hardback. \$99.00. Paperback. \$32.99.

STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (Alfred A. Knopf 2010). Pp. 288. Hardcover. \$26.95.

Like many American products, constitutional originalism is iconically American and attracts an international audience. It is familiar to constitutional scholars in every country with a written constitution and probably a good number elsewhere. Originalism is said to be compelling, *the real thing*, but why — what makes it so — is another matter. The routine answer is that adherence to original meaning prevents judges from substituting their personal values for, or sneaking political agendas into, judicial conclusions: it is a curative for judicial activism. However, this response is mostly self-affirming: originalism is good, because judicial activism is bad. The Constitution, originalists tell us, belongs to “We, the people”: it is wrong to depart from the people’s original understanding about what was promised and what was agreed. But why?

Gary McDowell’s *The Language of Law and the Foundations of American Constitutionalism* proffers a new(ish) answer. It is long and intricate — a *summa*, it seems, of his previous writings — and it requires some patience. McDowell opens with the well-worn propositions about originalism and judicial activism; however, his conviction that the latter is evil reaches unusual heights. The adherents of original meaning, McDowell writes, are engaged in no less than a “contemporary war for the Constitution”¹ which they must win at the country’s peril. The war was brewing for a long time, but its “first great battle”² can be dated precisely. On October 23, 1987, the Senate voted down President Reagan’s nomination of Judge Robert H. Bork to the United States Supreme Court. Bork, McDowell writes, was incontestably qualified to sit on the Court; his “legal abilities, and personal integrity were never in question.”³ It was his originalism — his commitment to deriving constitutional meaning from the framers’ words, and his eschewal of unenumerated, non-textual rights — that sounded the death-knell for his higher judicial prospects. Driven by methodological hostility, the Senate

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1. GARY L. MCDOWELL, *THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 7 (2010).

2. *Id.*

3. *Id.*

“concluded one of the most tumultuous battles in the history of the republic” and committed an “unforgivable political and constitutional sin.”⁴

This is heady stuff for your average constitutional scholar. With a narrative that flips between invective and deep theory, almost post-modernist in its refusal to adopt a detached, non-authorial voice, McDowell tells us just what is at stake: a choice between stability and two equally terrible alternatives: anarchy or tyranny. Constitutional originalism will guarantee the first; “living” constitutionalism will deliver the others. The seeds of the Senate’s sin lie in the nineteenth and early twentieth centuries, in the work of three radical scholars: Christopher Columbus Langdell, appointed *Dean of Harvard Law School* in 1870; Woodrow Wilson, President of Princeton in the first decade of the twentieth century; and Edward S. Corwin, recruited by Wilson in 1905. Together, these men achieved a profound epistemological shift, a “new understanding of constitutional interpretation as moral theory.”⁵ Breaking from the established Newtonian science of static rules to embrace a social Darwinian science of evolution, they severed constitutional meaning from legal principles or rules. The scholars’ core strategy was to postulate a higher, natural law, discernable only to initiates and yet adaptable to changing circumstances and modern standards.

The revolution, we learn, kicked off with Langdell’s pedagogical decision to replace legal treatises with the case method at Harvard Law School, his appointment of the first non-practitioner faculty member, James Barr Ames, and his establishment of the *Harvard Law Review*. Wilson (supported by a “chorus” of “luminaries” like Oliver Wendell Holmes)⁶ played his part by promoting the new constitutional science and appointing Corwin, who systematized the idea of “higher-law” in his writings, thus “cultivat[ing] the then-fallow field of constitutional law understood in light of political theory.”⁷ Judges quickly embraced the idea. Freed from the strictures of legal treatises, they confused their own moral values with service to the higher law. As theory triumphed, judge-made norms displaced rules and principles, and a common law approach to constitutional meaning was incubated. The monster hatched. After a trial run in the *Lochner* era, the Warren Court struck down laws on no firmer grounds than its own findings that the Constitution protected “higher,” unwritten rights, such as privacy. Bork was purged because he resisted the revolution. “To an extraordinary degree,” McDowell writes, this malign approach “continues to inform and shape much of contemporary constitutional scholarship.”⁸

As we know from Louis Menand’s sublime *The Metaphysical Club*,⁹ evolutionary understandings were winning battles with pre-Darwinian notions all over the American East in the second part of the nineteenth century. Static taxonomies were displaced in disciplines such as history and philosophy, as well as the natural sciences. This part of McDowell’s book might be read as a companion perspective on a contemporaneous

4. *Id.* at 1.

5. *Id.* at 11.

6. MCDOWELL, *supra* note 1, at 40.

7. *Id.* at 41.

8. *Id.* at 53.

9. LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).

trend, albeit an ill-tempered one, whose characters pour “pedagogic salt”¹⁰ into unhealed wounds, insinuate “corrosive” and “destructive”¹¹ doctrines into settled understandings, and commit “egregious” errors.¹² (How, one wonders, did they get away with it?) Still, it is interesting and fun in its splenetic way, and it tells us more about American legal history than most other accounts of the evils of counter-originalism. However, does it throw new light on the *case* for originalism? There is more.

The case, it turns out, has its origins in the early seventeenth century. Thomas Hobbes is the unlikely hero. Hobbes’s theory of the sovereign *Leviathan*, McDowell tells us, trounced the medieval scholasticism that dominated his era. Hobbes rejected notions of “higher law” (natural or theological) and promoted in their place a “sovereignty by institution,” a social contract which recorded the people’s consent.¹³ No other authority subsists, Hobbes concluded; no other source of power is legitimate. *Language* – the keyword in the title of McDowell’s book – now plays its critical role. Language serves as both the form and the vehicle. Spoken intentions, Hobbes recognized, were transcribed into written instruments. Language, thus, offered a sure, accessible, and proto-democratic alternative to the mystifying hermeneutics of the Aristotelian schoolmen (those crafty servants of the Pope!). More famously, Hobbes recognized that human beings need institutions of governance; in their absence, life is “solitary, poore, nasty, brutish, and short.”¹⁴

These propositions, as McDowell explains them, are interwoven: institutions are created by people who record their agreement in words; government is a reflection of their spoken/written “contract.” John Locke now takes up the baton. Locke’s theories, despite his disclaimers, reveal a continuity with Hobbes’s (as happens with many of McDowell’s favorites, the differences turn out to be more apparent than real). Locke’s innovation was to distinguish the sovereign from the government, and affirm the right of the sovereign people to withdraw their consent and institute new government. Locke, thus, supplements Hobbes’s “sovereignty by institution” with a “commonwealth by constitution.”¹⁵ Again, the central motor is language, agreements captured in words. Locke’s ideas took hold and influenced the framers of the United States Constitution. Even the greatest advocates of the common law (William Blackstone and his American followers, Chief Justice Marshall, Joseph Story, and others) shared a commitment to the written record as the only clear guide to the terms agreed by the people. They too understood the terrible alternatives to rule-bound institutions of governance. McDowell, thus, assembles an army of unimpeachable jurisprudential warriors, led by Hobbes.

Facing them are the proponents of “living” constitutionalism, the descendents of Langdell, the liberal, judicial activists, whose triumph (*pro tem*) stands for the very tyranny against which Hobbes and his followers warned. McDowell now makes another move – one often overlooked by defenders of originalism — explaining not only why originalism is normatively desirable, but how judges should go about doing it. This is

10. MCDOWELL, *supra* note 1, at 28.

11. *Id.* at 52.

12. *Id.* at 47.

13. *Id.* at 150-55.

14. *Id.* at 72.

15. MCDOWELL, *supra* note 1, at 155-62.

helpful. If original meaning is to be binding, we need to know how to decipher what was meant by the people (now dead) who originally uttered the words. McDowell's answer, an extended version of Antonin Scalia's, in *A Matter of Interpretation*,¹⁶ is that the meaning captured in the text is discernible via principles of statutory interpretation. These principles are rule bound, declarative, and unambiguous. The rules are found in the common law canons, which, despite their *unwrittenness*, are actually written: in the treatises that Langdell abjured. *Marbury v. Madison*¹⁷ stands as the anchor point, where constitutional interpretation is affixed to statutory interpretation. *Marbury* affirms not only the power of judicial review, but expresses what Marshall later called "the most sacred rule of interpretation": it is "the great duty of a judge who construes an instrument . . . to find the intention of its makers."¹⁸

There is much to be said for the recognition of human beings as *institutional*, thriving best under organized government and flourishing in the balance between rule-based stability and ordered opportunities for rule changing. The idea (which, it might be thought, derives less from Hobbes than from Rousseau¹⁹) that "the people" are both constituted by and through the act of creating their own institutions has received recent attention, in particular in European and British constitutional scholarship.²⁰ However, it is another thing for McDowell to find institutional stability in written constitutions alone (as his logic, despite disclaimers, suggests). It is still another to imply that the multitude of government functions that go on every day without recourse to constitutional rules, in countries with or without written constitutions, are akin to trucks loaded with nitroglycerin, stable only so long as they do not meet a bump in the road. The ordinary functioning of American government belies this. The experience of countries like Britain, without a single constitutional instrument, or Australia, with relatively few constitutional constraints, belies this. Arguably, judicial review keeps governments on track at critical times – although the scope of *Marbury* remained unsettled and judicial invalidation of laws was rare for much of the nineteenth century without disastrous results – but it can also flick the off-switch on functioning government, if judges (including those motivated by originalism), see their role as paramount rather than part of a cooperative venture.

This is the message in Stephen Breyer's *Making our Democracy Work: A Judge's*

16. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Scalia, however, is scarcely acknowledged by McDowell. There may be a reason. Scalia, it turns out, does not consistently follow through. In the Court, McDowell writes, "[t]he weight of . . . precedents is such that even he tends to acquiesce in their lingering legitimacy as a matter of binding constitutional law." Gary L. McDowell, *The Perverse Paradox of Privacy*, in "A COUNTRY I DO NOT RECOGNIZE" THE LEGAL ASSAULT ON AMERICAN VALUES 57, 81 (Robert H. Bork ed., 2005). If *even* a dedicated textualist like Scalia must throw in the towel at times, surely the goal of methodological purity, upon which McDowell insists, is questionable.

17. *Marbury v. Madison*, 5 U.S. 137 (1803).

18. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 167-69 (Gerald Gunther ed., 1969), quoted in MCDOWELL, *supra* note 1, at 2.

19. "[T]o find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. . . . is the fundamental problem of which the social contract provides the solution. The clauses of this contract are so determined by the nature of the act that the slightest modification would make them vain and ineffective." JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE DISCOURSES* 190-91 (G.D.H. Cole trans., Everyman's Library rev. ed. 1993).

20. *E.g.*, *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (Martin Loughlin and Neil Walker eds., Oxford Univ. Press 2007).

View.²¹ Breyer's book is a primer with a purpose: it is intended for a public audience, introducing the varied and complex work of the Supreme Court, while providing a normative guide to the theory and methodology of pragmatism. Breyer defends pragmatism as delivering flexible constitutional outcomes in varying practical circumstances; however, his pragmatism is not unprincipled. It is anchored to a constellation of "unwavering values"²²: a commitment to liberty and to its bulwark, democratic government. Breyer illustrates these principles with the stories of several celebrated cases and an appendix of visual images to show that real human beings were involved (no villains lurk in this gentle account). Context, Breyer stresses, is at the heart of finding and applying constitutional purpose to factual circumstances.

The intention to demystify is appealing. For all this, and despite his focus on constitutional law, Breyer's chapter on administrative agencies and the interpretation of statutes that govern them is a paradoxical highlight. It serves to illustrate both the under-recognized, non-constitutional role played by the Court, and also the logic of judicial deference towards non-judicial actors, often better placed to understand the practical operation of the law. Furthermore, it illustrates something Breyer himself may not have intended: that there is a lot more to law than the protection of rights.

The purpose of law or, indeed, of constitutions, need not be exclusively the restraint of government. Governments can be affirmative; they can act, as they often have in history, as agents of human advancement and collective flourishing. Respect for, rather than suspicion of government, infuses Breyer's account, but still his stories are overwhelmingly about judicial responses to rights-denying laws. Perhaps the book's purpose of explaining judicial review compels this, but it sits at odds with the theme of balancing judicial supremacy with the working of good government. From this sweetly, if subtly, unbalanced narrative emerges a picture of a judge who is half-hearted about the courts.

Indeed, Breyer's perspective on judicial review is compatible with what Mark Tushnet has labeled "weak-form."²³ Weak-form review is found in constitutions (or superstatutes) that allow the legislatures to pass laws "notwithstanding" their conflict with protected rights (as under the 1982 Canadian *Charter of Rights and Freedoms*²⁴), or deny courts the power of full judicial invalidation, but permit them to make "declarations of incompatibility" between challenged laws and protected rights (as in the United Kingdom's *Human Rights Act 1998*²⁵). Declarations, specifically, are invitations to governments to respond, to say whether or not they intend to correct the law, and why. The process is said to rest on *dialogue* between the arms of government, rather than single department supremacy. Dialogic judicial review has its critics (I, for one, question whether it delivers the judicial restraint and inter-departmental cooperation that its proponents claim), but it offers, for some, a half-way house between heavy-handed

21. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010).

22. *Id.* at 75.

23. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003). Breyer notes that Canada, Britain, and New Zealand have courts that lack "the power to patrol constitutional boundaries," but offers no perspective on them. BREYER, *supra* note 21, at 3.

24. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

25. Human Rights Act, 1998, c. 42, § 4 (U.K.).

judicial review and none at all. Moreover, for its critics, it is at least a means of continuing the debate about the legitimacy of judicial review, *tout court*.

To a non-American (albeit in a country whose Constitution was significantly copied from the American), the unending debates over originalism and the turbulence and passion that surround it are both enthralling and revealing. Scholar after scholar steps up to defend their favorite, seeking converts, and hoping to bring the debate to a conclusion. But, as with the Sorcerer's Apprentice, the harder they try, the more the broom multiplies. Why does it matter so much? What is at stake? We have seen McDowell's response: it is the very fate of the nation. But, despite the methodological war that McDowell sees raging in the United States, the absence of anarchy or tyranny (at least in any meaningful sense) suggests this cannot be the only answer. Surely, what one seeks is a methodology that will work not only in those happy times when one's value-friends are on the bench, but also in those inevitable slumps — sometimes depressingly long — when one's opponents hold office. McDowell wants to tie the hands of friends and enemies alike, outsourcing constitutional meaning to a historically distant provider (*dialogue* — an open-ended, rule-avoiding, inconclusive process — would be anathema, one assumes²⁶). Breyer wants to free the hands but keep the hearts attached to a set of enduring values.

What happens, then, when the Court reaches a conclusion that both originalists and liberal pragmatists find abhorrent? Both McDowell and Breyer consider at length the notorious 1857 case of *Dred Scott v. Sanford*.²⁷ Each, unsurprisingly, finds Chief Justice Taney's reasoning to be wrong and prefers Justice Curtis's famous dissent. Each explains Taney's conclusion that African Americans could not be constitutional "citizens" in a revealingly tendentious way. For McDowell, Taney "helped to lay the foundation for the rise of . . . government by judiciary,"²⁸ attaching a new and ultimately influential meaning to "due process" — one which connected it to the idea of implied constitutional protection of property, and "embolden[ed] the judges to give voice to their personal views of justice, which they could then present" as constitutional requirements.²⁹ Taney, in other words, was not an originalist. For Breyer, Taney gave literal meaning to the Constitution's words in the misguided attempt, *perhaps*, to settle a festering political issue. He neither recognized an alternative historical context for the Constitution's words, nor accepted that a workable, but decent conclusion was available. Taney, in other words, was — or at least pretended to be — a semantic originalist. Breyer also shares McDowell's regard for *Marbury v. Madison*,³⁰ albeit as a pragmatic *tour de force* and an affirmation that the "courts, *as well as other departments*, are bound by' the Constitution."³¹

What, if anything, does this divergence from a common normative starting block

26. McDowell's definition of judicial review as "the power by which the federal courts declare legislative acts unconstitutional" suggests as much. MCDOWELL, *supra* note 1, at 311. Even the "review" side of the business seems eclipsed in this jurisprudential *Weltanschauung* (doesn't "judicial review" involve the courts' *considering* whether an act is unconstitutional?).

27. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

28. MCDOWELL, *supra* note 1, at 384.

29. *Id.* at 385.

30. *Marbury v. Madison*, 5 U.S. 137 (1803).

31. BREYER, *supra* note 21, at 21.

reveal? If nothing else, it reveals that interpretive methodologies are not predictors of norms, and norms are not predictors of interpretive conclusions. Try as we might, certainty eludes our grasp and slips from our fingers. Jurists who promise certainty risk the disillusionment of the public. Breyer understands this. Keeping the public's confidence is central to his project. Making the public fearful seems to drive McDowell's account.

If McDowell and Breyer, for opposing reasons, share an anxiety that judges will assume a role subversive of government, neither notices a reason that such a takeover might be possible. Their books, whether consciously or not, record the triumph of the constitutional rights paradigm and, with it, judicial review inevitableness. Constitutions, it is assumed, are *analytically* rights-protecting. Their institution-building, power-distributing function (which, it might be noted, was the United States paradigm until the twentieth century, as the ratio of federalism to rights cases reveals) is considered to be secondary. With some rare exceptions (Australia, for example, the stand-alone in the common law world with no bill or superstatute of rights, valiantly resisting both the pressure and the opprobrium) national constitutions and international conventions are configured as instruments of *rights*. It may shock American readers, but in practice, rights and freedoms only rarely depend on legal enforcement or even the threat of it, and it may surprise (I won't say shock) Justice Breyer that his book, paradoxically, is an affirmation of this reality.

However, with the triumph of the constitutional rights paradigm comes the triumph of judicial review. Notwithstanding a few lone scholars like Jeremy Waldron³² and Mark Tushnet,³³ who give more than a nod at the memory of Alexander Bickel, debate over the democratic *legitimacy* of judicial review seems all but settled in the United States, as it will become, indeed, in other countries, when their bills of rights dig in. The search for ways to attenuate its effects, easing the disquiet some feel, by offering the choice of weak-form review, or an "*uneasy case*" in its defense,³⁴ only illustrates the epistemological triumph. Here, debates about methods of constitutional interpretation take their place. If judicial review is a fact of constitutional life, then arguing about the method (or, at best, about who should do it³⁵) becomes critical. Originalism offers itself as the keep: "The only way the inherently undemocratic power of judicial review can be reconciled with the demands of republican government is by keeping it tied to the written text of the fundamental law," writes McDowell.³⁶ But, like that other American innovation, the *pre-nup*, originalism anticipates only what will happen in the event of a break-up, and makes no allowance for the shared capacity building (not to mention love) for which a marriage is designed. Breyer, in contrast, wants to make the marriage work.

Breyer appeals to the American public, for whom, one imagines, the promise of

32. E.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

33. E.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Mark Tushnet, *How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?*, 30 OXFORD J. LEGAL STUD. 49 (2010).

34. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARVARD L. REV. 1693 (2008) (arguing that the justification for judicial review lies in the responsibility of courts to safeguard fundamental rights).

35. Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886 (2008).

36. MCDOWELL, *supra* note 1, at 6.

originalism and *strong* judicial review is more likely to be tempting than the uncertainties of pragmatism. He calls to them with reason, though much rests on the thin reed of his own dissents; but — as he asks himself — *will they come?* On the other hand, will an American audience really be outraged by the story of juristic treason and the case method, and aroused by a glimpse of the army led by Hobbes and his footsoldiers bearing copies of Blackstone's *Commentaries on the Laws of England* and *Dwarris on Statutes*?