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THE MARYLAND CONSTITUTIONAL LAW SCHMOOZE

FOREWORD: MAKING SENSE OF AN EIGHTEENTH-CENTURY CONSTITUTION IN A TWENTY-FIRST-CENTURY WORLD

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Prominent constitutional originalists and historians of political thought when examining political texts often employ the same methods for very different reasons. Both seek to understand political language as that language was understood when uttered. Randy Barnett, a leading constitutional theorist, insists that “the words of the Constitution should be interpreted according to the meaning they had at the time they were enacted.”¹ Quentin Skinner, the founder of the influential Cambridge School in political philosophy, wholeheartedly agrees with this method of analysis: “The essential question which we therefore confront, in studying any given text,” he writes, “is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of this given utterance.”² Nevertheless, constitutional originalists and Cambridge School political philoso-

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1. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 89 (2004).

2. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS 63 (James Tully ed., 1988). The above passage, read out of context, might suggest an original understanding rather than an original meaning approach to textual analysis. Skinner, however, maintains that original meaning analysis is typically the best way of realizing original understanding. *See id.* at 64.

phers have quite disparate motives for studying original meaning. Barnett and many other legal thinkers insist that Americans in 2007 should be legally bound by the original meaning of constitutional provisions. “[O]riginalism is warranted,” Barnett states, “because it is the best method to preserve or ‘lock in’ a constitution that is initially legitimate because of what it says.”³ Skinner claims that Americans in 2007 cannot be legally bound by the original meaning of constitutional provisions: “Whenever it is claimed that the point of the historical study . . . is that we may learn directly from the *answers*,” he bluntly states, “it will be found that what *counts* as an answer will usually look, in a different culture or period, so different in itself that it can hardly be in the least useful even to go on thinking of the relevant question as being ‘the same’ in the required sense at all.”⁴

The 2007 Maryland Constitutional Law Schmooze⁵ provides a forum for exploring this tension between these contrasting approaches to the value of constitutional originalism. Much discussion focused on the enormously influential recent works of Jack Balkin and Sanford Levinson, regular Schmooze participants. Although good friends and ongoing collaborators,⁶ Balkin and Levinson have taken positions on opposite sides of the originalist divide between Barnett and Skinner. Balkin has recently announced his conversion to originalism: “Constitutional interpretation,” he now states, “requires fidelity to the original meaning of the Constitution and to the principles that underlie the text.”⁷ Levinson has experienced a more Skinnerian conversion. He finds continued recourse to an eighteenth-century text for governing a twenty-first-century polity absurd: “the Constitution,” Levinson asserts, “is both insufficiently democratic, in a country that professes to believe in democracy, *and* significantly dysfunctional, in terms of the quality of government that we receive.”⁸

The following Essays on *An Eighteenth-Century Constitution in a Twenty-First-Century World* explore the interpretive and political challenges inherent in recourse to an ancient text for resolving political

3. BARNETT, *supra* note 1, at 89.

4. Skinner, *supra* note 2, at 66.

5. For details on the Schmooze, see Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1, 4 (2006).

6. See, e.g., Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

7. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. (forthcoming 2007); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. (forthcoming 2007).

8. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 9 (2006).

questions. Although no Essay cites Quentin Skinner,⁹ the debates between participants in the Schmooze and this Symposium mirror the debates between Skinner and his critics.¹⁰ Some participants insist that crucial aspects of an eighteenth-century text remain vibrant at present, that contemporary political life would be improved by more careful study of the Constitution. Bradley Hays's study of state interposition in the early-nineteenth century takes the Barnett/Balkin position that "contemporary problems are likely not wholly new and that past generations fought similar constitutional battles." In his view, framing "innovations are useful resources for contemporary constitutional problems."¹¹ Others blame crucial pathologies of American politics on a combination of too careful study of and too uncritical veneration for the constitutional text. Surveying the pathologies of single-membered districts in a time of political polarization, Carol Nackenoff concludes, "there are surely ways we could form a better plan of union for a twenty-first-century nation."¹²

Concerns with whether "constitutionalism" presently has the same meaning or commitments as in past centuries are at the heart of many Essays that follow. George Thomas insists that the "elements of eighteenth-century constitutionalism that our Constitution embraces . . . should be foundational to any new form of government we create in the twenty-first century."¹³ Thomas most forcefully insists that any new constitutionalism respect the inherited constitutional "insistence on substantive limits to governmental power."¹⁴ Peter Quint points out that contemporary constitutions are often more concerned with empowering government to do well than disempowering them to violate fundamental rights. In sharp contrast to constitutions drafted in the eighteenth century, constitutions drafted in the twentieth century "impose obligations of social welfare, education, and

9. *But see* Pamela Brandwein, *The Civil Rights Cases and the Lost Language of State Neglect*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 278 (Ronald Kahn & Ken I. Kersch eds., 2006); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 219 (1980) (citing Skinner in support of claims that original meanings cannot be fully recovered).

10. For a flavor of those debates, see Skinner, *supra* note 2, at 135–288.

11. Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis have to Offer Regarding Resistance to the Bush Administration*, 67 MD. L. REV. 200, 221 (2007).

12. Carol Nackenoff, *Constitutional Reforms to Enhance Democratic Participation and Deliberation: Not All Clearly Trigger the Article V Amendment Process*, 67 MD. L. REV. 62, 84 (2007).

13. George Thomas, *Two Cheers for Eighteenth-Century Constitutionalism in the Twenty-First Century*, 67 MD. L. REV. 222, 224 (2007).

14. *Id.* at 230.

other services on government.”¹⁵ Twenty-first-century constitutions, Quint observes, announce such “third-generation rights” as rights to a safe environment, international peace, and cultural integrity.¹⁶ Given these differences in constitutional purposes, Skinnerian questions may be raised about whether the word “constitutionalism” is even describing the same political phenomenon when used in the eighteenth and twenty-first centuries.¹⁷

A new constitutionalism may require innovative constitutional thinking and fundamental constitutional transformations. Joe Oppenheimer and Norman Frohlich insist that persons who share the contemporary constitutional commitment to social welfare must develop a new metric for measuring social welfare, one that “focus[es] on needs as a foundational aspect of social welfare.”¹⁸ Constitutional regimes at present are likely to meet these contemporary standards, they assert, only by institutional adjustments that reduce “the checks and balances against democracy” that “prevent some democratic systems from delivering better policies (i.e., those that could ensure higher welfare) to their citizenry.”¹⁹ Paradoxically this greater attention to inequality may inspire greater appreciation of the framing vision. Yasmin Dawood points out that more so than many twenty-first-century constitutionalists, Madison and others regarded “the task of constitutional design” as “neutraliz[ing] the potentially devastating political effects of the wealth divide by institutional means.”²⁰ While the persons responsible for the Constitution of 1789 believed that economic equality was undesirable and would violate property rights, Dawood points out that the Framers were far more willing than many contemporary Americans to acknowledge how “the ‘distinction of rich & poor’” threatened “the very survival of republican government itself.”²¹

Other Essays examine the value of specific eighteenth-century principles in a twenty-first-century world. Kenneth Ward suggests that separation of powers may be fatally weakening the constitutional re-

15. Peter E. Quint, *What is a Twentieth-Century Constitution?*, 67 MD. L. REV. 238, 240 (2007).

16. *Id.* at 243.

17. See Skinner, *supra* note 2, at 50 (noting how “the literal meaning of key terms sometimes change over time”).

18. Joe Oppenheimer and Norman Frohlich, *Demystifying Social Welfare: Foundations for Constitutional Design*, 67 MD. L. REV. 85, 87 (2007).

19. *Id.* at 113 (emphasis omitted).

20. Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 126 (2007).

21. *Id.* at 127–28.

public. His examination of post-September 11 political debates concludes that “the constitutional system of checks and balances distorts democratic deliberation about issues of national security by integrating questions of security within a broader political agenda.”²² The rise of political parties combined with too sharp a separation of governing institutions, in his view, provides incentives for government officials to promote partisan causes rather than intelligent security policy when debating measures for combating terrorism.²³ Both Frances Lee and Carol Nackenoff raise questions about whether an eighteenth-century scheme of representation generates representative institutions capable of responding to twenty-first-century problems and satisfying twenty-first-century interests. The “[g]eographic constituencies mandated by the Constitution of the United States,” Lee complains, “hearken back to a time of small, isolated, rural communities where communication and travel were difficult.”²⁴ She details how maintaining such representation at present “makes parochialism normative for members of Congress.”²⁵ Nackenoff blames the constitutional failure to mandate proportional representation for the contemporary “party polarization in Congress.”²⁶ This polarization is to blame for the “legislative gridlock” that “reduces [Congress’s] output of significant (as opposed to trivial and narrow) legislation.”²⁷ Hays, by comparison, thinks that greater appreciation of eighteenth-century federalism might provide some constitutional tonic at the dawn of the twenty-first century. “State-driven constitutionalism” during the embargo crisis of 1807-09, he details, “provided an important critique of executive power on constitutional grounds (criticism largely absent today) and resulted in important constraints on power and policy changes.”²⁸

Cindy Skach provides a particularly fascinating exegesis on the viability of eighteenth-century practices in a twenty-first-century world. Religious diversity, she notes, is “one of the most important global constitutional challenges in the twenty-first century.”²⁹ Both the eighteenth and twenty-first century provide resources that may be used to

22. Kenneth Ward, *The Fog of War: Checks and Balances and National Security Policy*, 67 MD. L. REV. 36, 36 (2007).

23. *Id.* at 46–47.

24. Frances E. Lee, *Geographic Representation and the U.S. Congress*, 67 MD. L. REV. 51, 52 (2007).

25. *Id.* at 54.

26. Nackenoff, *supra* note 12, at 78.

27. *Id.*

28. Hays, *supra* note 11, at 202.

29. Cindy Skach, *From “Just” to “Just Decent”? Constitutional Transformations and the Reordering of the Twenty-First-Century Public Sphere*, 67 MD. L. REV. 258, 259 (2007).

ameliorate or exacerbate religious conflict in the United States and abroad. Skach finds the eighteenth-century commitment to religious liberty a positive guide for contemporary policymaking. She regards recent European constitutional decisions limiting rights to wear head scarves as “a slippage, by way of constitutional law, away from liberal constitutional democracy.”³⁰ Those mistaken decisions, however, prove to be rooted in a less salutary eighteenth-century constitutional commitment, a “return to an ‘originalist’ interpretation of the European constitutional principle of public order.”³¹ Skach’s paper highlights how many eighteenth-century constitutions exist. Our choices between them may be more significant than the choice between an eighteenth-century and twenty-first-century constitution.

Some participants in the Schmooze question the value of speaking of an eighteenth-century constitution in a twenty-first-century world. American constitutional development, they observe, has been marked by ongoing constitutional change. The ink was hardly dry on the document of 1789 when constitutional practices began diverging from the constitutional text. Leslie Goldstein notes how fundamental changes in the constitutional understanding of slavery may have taken place as early as 1817, when a previous judicial commitment to “giv[ing] priority to firming up the property rights of slave holders” was transformed into a judicial commitment to giving “priority to liberty.”³² Contemporary constitutionalists often imitate Chief Justice John Marshall’s penchant for constitutional creativity. Ronald Kahn observes that the constitution of the twenty-first century is fashioned by a social construction process, “a process that is far removed from the premises and intentions that jurists and scholars have constructed as occurring in the founding period.”³³ The “Supreme Court’s legitimacy,” he maintains, is rooted in public expectations that constitutional provisions will be interpreted consistently with notions of the living Constitution rather than remain frozen by past commitments.³⁴ Stephen Griffin complains about the democratic costs paid by a polity that consistently refuses to acknowledge that major constitutional changes have taken or are taking place. “[T]he widespread view in our constitutional culture that amendments are dangerous,” he charges, “has operated to suppress the kind of politics that may be

30. *Id.* at 260.

31. *Id.*

32. Leslie Friedman Goldstein, *Slavery and the Marshall Court: Preventing “Oppressions of the Minor Party”?*, 67 MD. L. REV. 166, 167 (2007).

33. Ronald Kahn, *Originalism, The Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining Lawrence v. Texas*, 67 MD. L. REV. 25, 34 (2007).

34. *Id.*

necessary to provide a full measure of legitimacy for government action in the post-New Deal state.”³⁵ Rather than judge our present conditions by past standards, Griffin urges us to determine for ourselves what goods government ought to produce and what institutional arrangements will best produce those goods.³⁶

Whether constitutional originalism even makes sense as an interpretive strategy casts further doubt on the extent to which the eighteenth-century Framers continue to guide the destiny of a twenty-first-century polity. James Fleming points out that “there are numerous varieties of originalism” and they “are moving targets that have moved considerably toward the positions of their critics.”³⁷ The apparent convergence of constitutional theories, his Essay observes, explains why Robert Bork makes constitutional claims similar to Ronald Dworkin when both agree that the original expectations of the Framers (as opposed to their principles) are undesirable.³⁸ Saul Cornell challenges the historical pretensions of much originalism. He details how “the methods of original meaning originalism ignore many of the most basic rules of historical inquiry” and may not be “a historically accurate reflection of how many [Framers] would have interpreted the Constitution.”³⁹ Originalism as practiced, in this view, is less an attempt to construct the present in the image of the past than an effort to reconstruct the past in the image of the future.⁴⁰

No twenty-first-century constitutionalist escapes the pull of the eighteenth century as easily as these observations might suggest. Those Schmoose participants most committed to a living constitutionalism nevertheless recognize the complex ways in which present practices and alternatives are decisively shaped by past choices. The constitutional changes Goldstein discusses took place at the constitutional margins, only on those matters where the constitutional text “applied in arguably ambiguous or debatable ways.”⁴¹ When criticizing contemporary originalists, Cornell acknowledges that contemporary constitutionalists are capable of uncovering past constitutional

35. Stephen M. Griffin, *Levinson and Constitutional Reform: Some Notes*, 67 MD. L. REV. 14, 24 (2007).

36. *Id.* at 23–24.

37. James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 11, 12 (2007).

38. *Id.* at 13.

39. Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 150, 151 (2007). Readers interested in Cornell’s historical analysis of the Second Amendment should consult SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006).

40. Cornell, *supra* note 39.

41. Goldstein, *supra* note 32, at 167.

meanings. “[S]tandard historical methods,” he states, reveal that “the term ‘bear arms’” in the Second Amendment “fit the military understanding of the term.”⁴² Originalism is, thus, not impossible, only likely to be corrupted by present political exigencies. Fleming’s “moral reading” of the Constitution of the United States commits constitutional interpreters to “elaborating abstract principles or values” designated by framers in 1787, 1791, and 1868,⁴³ rather than those principles and values we might think best. To paraphrase his conclusion, “are we all [simultaneously] moral readers [and originalists] now.”⁴⁴

Most important, the eighteenth century continues to provide standards for justifying, evaluating, and rebuking twenty-first-century constitutionalism. The American antipathy to either formal constitutional change or acknowledging informal constitutional change that Griffin condemns⁴⁵ compels contemporary political leaders to claim endorsements from James Madison and Abraham Lincoln for constitutional visions neither could even imagine, much less champion. The legitimacy of the administrative state, the constitutional merits of efforts to regulate the mass media and the internet, and the appropriate strategies for fighting the War on Terror must all be determined, at least in public, partly by their consistency with eighteenth-century metrics. The forms of constitutional reasoning further promote the American tendency to march backwards into the future.⁴⁶ “All [constitutional decision makers],” Kahn points out, “agree to follow precedent, consider polity and rights principles in making constitutional choices, and engage in analogical reasoning.” These constitutional logics practically compel contemporary advocates to seek George Washington’s approval for all crucial projects that will shape the constitutional regime in the twenty-first century. Whether these practices promote continuity with a just past or a dangerous antiquarianism is for the reader of the following Essays to determine.

James Madison might have been disturbed that no participant in the Symposium maintains that constitutional criticism is off-limits. Writing as Publius, Madison insisted that even conversations about alleged constitutional failings risk serious constitutional evils. Criticiz-

42. Cornell, *supra* note 39, at 156, 162–63.

43. Fleming, *supra* note 37, at 13. Fleming has developed this thesis in several important books. See SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION* (2007); JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* (2006).

44. Fleming, *supra* note 37, at 13.

45. See Griffin, *supra* note 35, at 22–24.

46. See QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 149–50 (2002) (noting that “[a]ll revolutionaries are . . . obliged to march backwards into battle”).

ing Jefferson's call for repeated constitutional conventions, he stated, "frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything."⁴⁷ The spirit of *Federalist* No. 49 would condemn our debates over the merits of the Constitution for insufficiently appreciating the "danger of disturbing the public tranquillity by interesting too strongly the public passions"⁴⁸ and threatening "the constitutional equilibrium of the government."⁴⁹ "[T]he most rational government," Madison maintained, "will not find it a superfluous advantage to have the prejudices of the community on its side."⁵⁰

All the following papers are Jeffersonian in that none "look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched."⁵¹ None "ascribe to the [Framers] . . . a wisdom more than human, and suppose what they did to be beyond amendment."⁵² Both Levinson and his critics agree that "[e]ach generation . . . has . . . a right to choose for itself the form of government it believes most promotive of its own happiness."⁵³ The dispute is over the extent to which the Constitution of 1787, as modified in 1868, is that "form of government."⁵⁴

47. THE FEDERALIST NO. 49, at 282 (James Madison) (Clinton Rossiter ed., 1999).

48. *Id.* at 283.

49. *Id.*

50. *Id.*

51. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, at 674 (Adrienne Koch & William Peden eds., 1944).

52. *Id.*

53. *Id.* at 675.

54. *Id.*