PANEL IV: IS ORIGINALISM POSSIBLE? NORMATIVE INDETERMINACY AND THE JUDICIAL ROLE

INTRODUCTION

EDWIN MEESE III*

The fourth Panel of this Symposium addresses the fundamental issue of originalism's viability as a theory of constitutional interpretation and its compatibility with the judicial role. As can be seen, we have a star-studded lineup in the speakers for this Panel. I am not going to describe their backgrounds and biographical information because, as Richard Epstein said to me, it would take much too long.

But the speakers themselves bear some introduction. Starting off will be Professor Michael Dorf from the Rutgers University School of Law in Camden, New Jersey. Next will be Richard Epstein from the University of Chicago Law School, who is known to many of you from previous Federalist Society conferences and certainly is a great supporter of the organization; then Michael Perry from Northwestern University School of Law, whose book[1] was referred to in yesterday's proceedings; and finally Steven Smith from the University of Colorado School of Law. Before we begin the discussion, I would like to make a few comments.

At the outset, I think it is important to remember one of the things that was mentioned sporadically yesterday, and that is the fact that the Constitution is in fact the law and thus a legal document. It is, therefore, susceptible to construction or interpretation as any other law or legal document is. The fact that it is a very special law and that its construction may have far-ranging consequences only means that perhaps we must be more careful in how we go about the task.

Second, I would like to suggest that we ought to recognize, despite what might be inferred from some of the speeches that we have heard, that we are not really venturing into uncharted territory. Lawyers, judges, and scholars have wrestled with this

---

* Former Attorney General of the United States; Distinguished Fellow, The Heritage Foundation.

1. *See* MICHAEL J. PERRY, THE CONSTITUTION AND THE COURTS: LAW OR POLITICS? (1994).

problem for quite some time. And I would suggest that perhaps looking backwards might be helpful in understanding the issue of originalism and the problems of construing the Constitution. It might be worthwhile, then, to look back at some of the leading authorities who have viewed this matter before, during, and immediately following the drafting and ratification of the Constitution and the first ten amendments.

In looking to the past I am particularly indebted personally to my former colleague and good friend Gary McDowell, who is known to many of you and has been an active supporter of the Federalist Society. Mr. McDowell is now the Director of the Institute of United States Studies at the University of London. He is using his time in England to do considerable original research on some of the antecedents of the American legal system and the Constitution itself.

I would suggest to you that the power of originalism lies not only in the intellectual basis for it, which is being discussed here, but also, to a certain extent, in its antiquity. This is not some methodology that is thought up to legitimate judicial power to reach certain politically attractive ends. Rather, it is a methodology that has evolved from experience.

As long ago as 1527 in the preface to what was really the first true law dictionary, *The Terms of Law*, John Rastell wrote:

> The law in every room should be so published, declared and written in such wise that the people so bound to the same might soon and shortly come to the knowledge thereof or else such a law, so kept secretly in the knowledge of a few persons and from the knowledge of the great multitude, may rather be called a trap and a net to bring the people to vexation and trouble rather than a good order to bring them to peace and quietness.[2]

Another useful source is Thomas Rutherford, an English legal writer whose works were very influential at the time of the establishment of the Constitution. Rutherford was widely read and cited both by the founding generation and by the first generation to use and to interpret the Constitution. As you can see from the excerpt of his writings printed below, he might well be de-

2. JOHN RASTELL, EXPOSITIONES TERMINORUM LEGUM ANGLORUM (London, John Butler & Robert Wyer 1527). The title of the book translates to "Expositions of the Terms of English Laws."

scribed as an Eighteenth-Century Lino Graglia. Rutherford's fundamental premise is a simple one:

> [T]he end, which interpretation aims at, is to find out what was the intention of the writer; to clear up the meaning of his words, if they are obscure; to ascertain the sense of them, if they are ambiguous; to determine what his design was, where his words express it imperfectly.[3]

In terms of those who were interpreting the United States Constitution itself, I would suggest that Justice Story, writing in his *Commentaries on the Constitution,* had a relatively modest vision of the Constitution and also of the power of judges to construe it. He said:

> Constitutions are not designed for metaphysical or logical subtleties . . . or for the exercise of philosophical acuteness, or juridical research. They are instruments of a practical nature, founded upon the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.[4]

Finally, as we gather here to consider the importance of originalism in our constitutional law, we should keep plainly in view the admonition that one justice, writing halfway through the judicial history of our country, saw fit to offer to his generation. Writing in the shadow of the *Dred Scott* case, Justice Benjamin Curtis offered a simple warning:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[5]

As Justice Curtis, Justice Story, and the others knew so well, a great deal hangs in the balance when it comes to the interpretation of our fundamental law. And thus we in this generation are

3. 2 THOMAS RUTHERFORD, INSTITUTES OF NATURAL LAW 309 (London, J. Bentham 1754).

4. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 210, at 157-58 (Carolina Academic Press reprint 1987) (1833).

5. Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1856) (Curtis, J., dissenting).

obligated to get it right. To tell us how to get it right, we now turn to the members of our Panel.