

A Debate as Old as the Constitution Itself

ORIGINAL MEANINGS Politics and Ideas in the Making of the Constitution

By Jack N. Rakove
Alfred A. Knopf. 439pp.
\$35

FREEDOM'S LAW The Moral Reading of the American Constitution

By Ronald Dworkin
Harvard University Press.
404 pp.
\$35

Reviewed by Paul Sracic

Not long ago, a former student of mine who now attends a prestigious law school mentioned to me that his constitutional law professor referred to the text of the U.S. Constitution as "extraneous reading." I was somewhat taken aback by the professor's candor, but I didn't find his view all that remarkable. The simple fact is that, for the practicing lawyer, a knowledge of major Supreme Court decisions is more valuable than a familiarity with the constitutional text upon which those decisions depend.

Still, there are many lawyers, judges and scholars who think that we have an obligation to decide for ourselves what the text means. The main obstacle to following the plain words of the Constitution, however, is that the meanings of the words and phrases that make up the constitutional text — such as privileges

and immunities, cruel and unusual, and due process of law — are not obvious; some sort of interpretive method is required.

Even those who attempt to discern the original meaning of the Constitution must admit that they are moving beyond the plain words of the text, to the understandings of those who wrote and ratified the document.

Two new books, one by historian Jack Rakove and another by legal theorist Ronald Dworkin, make it clear that the debate about the role of original meaning within the larger project of constitutional interpretation is alive and well.

Rakove provides a concise account of the political theories and debates surrounding the drafting and ratification of the Constitution. Avoiding the storytelling approach of many who have covered this period, Rakove focuses his readers on the framers' (and particularly James Madison's) ability to cobble together the practical and the theoretical. The account he gives, however, emphasizes the unavoidable conclusion that no one at the Philadelphia convention in 1787 managed to have his precise intentions incorporated into the Constitution.

Instead, the Constitution that was finally submitted for ratification is a rather brief amalgam of vague and not altogether coherent understandings and ideas. As Rakove makes clear, this has never stopped anyone from searching for specific meanings within the hidden motives of those who drafted the document. Indeed, in discussing the rhetoric of those directly involved in the debate over ratification of the Constitution, Rakove observes that "by ascribing meaning to

the spare language of the Constitution, purposes noble and sinister to its framers ... they initiated a process of interpretation that has continued ever since."

Although *Original Meanings* is concerned mainly with the debates and ideas of the Constitutional Convention, Rakove's most valuable contribution may lie in his discussion of the post-convention debates over the Bill of Rights. Most of the open-ended language in the Constitution occurs in the Bill of Rights. This explains why the majority of the legal disputes over constitutional meaning focus on these initial amendments. Nevertheless, Rakove's account reminds us that most who supported these amendments did not see them as a source of litigation; they thought a bill of rights was educative.

But what are the lessons of the Bill of Rights? Who should teach these lessons? And how do we apply these often-abstract lessons to political and legal disputes? These questions have been at the heart of virtually all of the essays and books Dworkin has published over the last 20 years in his latest effort, *Freedom's Law*, a compilation of many of his recent articles, supplemented by an introductory essay.

Dworkin does not shy away from controversy: He addresses everything from Catherine MacKinnon's critique of pornography to Clarence Thomas' views on natural law.

Nor does he hide behind obscure academic or legalistic terminology. Instead, he has a straightforward message: The ambiguous language of the Constitution is both purposeful and empowering. The very notion of a

Bill of Rights encourages a belief in limited government.

At the same time, the broad and according to Dworkin, moral language within the amendment; forces each generation to form its own conceptions, based on moral principles, about where these lines lie.

Perhaps the most perplexing question raised by Dworkin's book involves identifying the source and substance of these moral principles. He does an excellent job of connecting notion of equality and rights to the larger ideal of a constitutional democracy, insisting that in order to have a constitutional democracy, government must recognize the equal worth of its citizens.

Although this is a logical argument, is it a moral one? The question is important, for, in many of the essays contained in this book Dworkin insists that the moral arguments put forth by others (for example, anti-abortion groups) do not deserve the kind of constitutional recognition that he would afford to his own principles.

What is important, however, is that this is precisely the kind of question that Dworkin's book provokes. According to Dworkin, of course, the real stimulus for these questions is the constitution! text itself. Perhaps this is the educational mission alluded to by the framers of the document. If it is then it would be a shame if we let judges do our thinking and our learning for us.

Perhaps our law professors should keep this in mind.

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