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Original Intent: "With Friends Like These..."

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ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION. By *Leonard W. Levy.* New York: Macmillan Publishing Co. 1988. Pp. xviii, 525. $19.95.

Professor Leonard Levy, a historian and Pulitzer Prize-winning author, has written a sizeable body of work on the adoption and development of the Constitution. His latest book, *Original Intent and the Framers' Constitution,* incorporates two somewhat disparate categories of essays: the larger group comprises in-depth chapters on about ten of the more interesting and significant provisions of the document or aspects of its development, including the right against self-incrimination (pp. 247-66), *Marbury v. Madison* and the development of judicial review (pp. 75-88), the first amendment's establishment clause (pp. 174-94), and the free press clause (pp. 194-220).

Professor Levy's heart, however, is plainly with the book's other thrust: the chapters that mount an attack on what he perceives to be the jurisprudence of original intent. In these, Levy characterizes original intent as, among other things, "the elusive yeti of our constitutional history" (p. 299), a "will o' the wisp" (p. 296), whose pursuit is "elusive, if not illusive" (p. xiv) and which is usually resorted to "to prove some point [that judges] have in mind" (p. 388). These and other dismissive characterizations are garnished with the obligatory, sardonic quotations from Mr. Dooley (p. ix), with some whimsical observations from the sometimes puckish Justice Richard Neely of West Virginia (p. 320), and even with a passage from E.L. Doctorow (p. xiv).

Professor Levy is plainly of two minds about the central fact of modern constitutional law: that courts, both state and federal, following the Supreme Court's lead, have been issuing great numbers of "constitutional law" decisions that are not based on the Constitution and cannot be justified by reference to it. Early in the work he declares himself an "interpretivist" (p. xv), yet throughout the remainder of the work he displays at least two characteristics of the "non-interpretivist" approach to constitutional construction. For the reader unfamiliar with the latter, a thumbnail sketch may be in order.

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Non-interpretivism is essentially a reactive view, one best expressed as a response to a hypothetical inquiry: "Why not try to hew to the Framers' intent as expressed in the Constitution, and what other guide have we in construing it?" "Ah yes," replies the non-interpretivist, "we'd like to do that; but for a lot of reasons we can't. In the first place, we don't know whose intent you're talking about — that of the Framers, that of those who attended the ratifying state conventions, or someone else's. And even if we could decide this, we know that many of the Framers had conflicting views on the document; whose are we to choose? Second, the two centuries separating us from the Framers and the absence of any reliable account of the Convention's proceedings prevent us from discerning what the Framers or ratifiers meant with any assurance. Third, even if we could discover the Framers' intent, it would be merely the anachronistic view of a long-gone generation, one of little value or significance today. Finally, although so general, luminous, and obscure as to be all but useless as written law, the Constitution is a sublime oration on the dignity of man, a compendium of great and overarching principles, and the embodiment of our aspirations to social justice, brotherhood," and so on.

These propositions are not my confections. Each is a quote or near-quote from one or more serious and sincere defenses of non-interpretivism; and each, if accurate, is a substantial argument against attempting to apply the Constitution as though it possessed a discernable intent. The difficulty is, none of them can withstand more than a moment's serious examination.

As for the first objection — that we do not know whose intent to seek — the answer is the paradoxical one that we do not really seek *anyone's* actual intent. As any lawyer who picks up a will or a contract knows, the "intent" of the document is derived (where possible, and with the Constitution it usually *is* possible) from the words of the document themselves.[1] Of course, a document is an artifact, not a mind, and only a mind can have a purpose or an intent. So what do we mean when we talk about the "intent" of the Constitution or a statute or a contract or a will? That expression is really shorthand for the intent of a hypothetical mind that we project backwards, so to speak, from the language of a document. The correct question for a theory of original intent is not, as Professor Levy would have it, "What was in the mind of the Framers?," if that question be taken as

1. *See, e.g.*, T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 55 (1868 & reprint 1972) ("In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself."); A. HAMILTON, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 83 (H. Syrett ed. 1965) ("whatever may have been the intention of the framers of a Constitution . . . that intention must be sought for in the instrument itself").

strictly a historical and psychological one.[2] That version of the theory does indeed bog down quickly in pointless embarrassments about whose intent counts — the authors', the public debaters', the ratifiers', and so forth. Rather, the correct question is, "What would a person who spoke these words at that place and time have meant by them?" The historical inquiry is important, of course, because to be understood, the hypothetical mind must be situated in a concrete political and cultural context. But the actual intent of any particular person or group of persons is irrelevant because, by consenting to the language of the document, *all* parties to the instrument agreed that it expressed an intent acceptable, or in any case tolerable, to them.

In fact, the great body of the Constitution is very matter-of-fact indeed: "No Person shall be a Senator who shall not have attained to the Age of thirty Years"; "No Tax or Duty shall be laid on Articles exported from any State." The intent of such passages is immediately apparent. A few portions of the Bill of Rights are vague (or have been made so), but even these require little more than a nodding acquaintance with the conditions of the late eighteenth century for a general understanding of their meaning: "Congress shall make no law respecting an establishment of religion"; "No person shall . . . be deprived of life, liberty, or property, without due process of law." The intent is what the words say; what you see is what you get.

Insofar as my reply to the first objection does not dispose of the difficulties posed by the vast span of years between the confecting of the Constitution and contemporary times and the want of reliable "legislative history," I would add only that Shakespeare's plays are quite a bit older than the Constitution, and Chaucer and the Magna Carta older still. After a few archaic spellings are tidied up, few people seem to experience much difficulty in understanding them. It is true that words can change their meanings over great periods of time, as in the anecdote of King Charles' compliment to Sir Christopher Wren at the dedication of St. Paul's Cathedral in 1675 — that it was "[a]wful, amusing and artificial," by which he meant "awe-inspiring, amazing and artistic." Adjectives seem especially prone to these sea-changes, however, and the Constitution is mostly nouns and verbs. Where the things that they represent have changed — as where Militia has become National Guard — the new meaning is usually quite plain.

Nor can I agree that the intent with which the Constitution was adopted is of small interest today because the world has changed so much and that of the Framers is dead and gone. To be sure, there

2. Yet, as I shall note later, even this question has an answer, and the answer is that they intended us to do what lawyers or judges of their time would have done: deduce the meaning (objective intent) of the instrument from its terms. *See* A. HAMILTON, *supra* note 1; Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885, 903 (1985) (The Framers' "primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.").

have been changes, but much of what was commonplace then remains: airplanes and automobiles have come along, but horses, cows, dogs, cats, and chickens are still with us, as are beer, wine, woodsmoke, Christmas, and a thousand other features of their day. And as for the great matters which chiefly moved the Framers in adopting the Constitution — the Nature of Man, the corrupting effect of power, and the like — there has been no change at all, by my reading of history.

Last, there is the matter of the supposed vagueness and obscurity of the Constitution, and its majestic, overarching principles. I do not find much of either in the document, although various small parts of it are vague, and some have been tortured into ambiguity.[3] Except for these, it seems a pretty matter-of-fact, nuts-and-bolts document.

Writing as a historian, Professor Levy touches upon most of the above themes. His heavy-artillery barrage, however, consists of page after page in which he deprecates as unknowable the straw man of the subjective intent of the Framers (or ratifiers, or whomever) and bemoans the inadequacy of contemporary historical accounts of the Constitutional Convention. As a consequence, Levy argues, judges must be guided not by the Constitution's text but by their consciences, or by natural law, or by "the public interest as we see it"; he characterizes this result as patent — a perhaps-regrettable but palpable fact that "we must face up to."[4] Methinks these be crocodile tears.

For throughout the work Professor Levy lets slip tell-tale hints that, in his view, we should be content in matters of serious moment to be ruled by our betters — the Court's nine unelected lawyers — and that those who come to power by, and remain subject to, democratic processes are not to be trusted to deal with such things. Within the space of three pages, for example, we are told that "[m]ost of the Framers probably feared and deplored democracy" (p. 363), that "[t]he Court can be countermajoritarian without being undemocratic" (p. 364), and that "[p]recisely because the members of the Court . . . are not politically responsible, . . . they are best suited for the task of deciding constitutional issues."[5] Moreover, Levy asserts, the Court is "considered by the electorate . . . more trustworthy than the political branches" (p. 365). On the same page, Levy's praise of the Court and deprecation of majoritarian institutions both shift into overdrive, as we are advised that "[t]he people seem to regard the Court as their conscience" and that "[t]he political branches cannot be expected to do

3. To take one illustration only, the Framers lived in a time and in cultures where established churches were the rule; and, doubtful as its meaning has now been rendered, there can be little real question what they meant when they referred to "an establishment of religion."

4. P. 398. Indeed, the book closes on just such an assertion, voiced by Chief Justice Earl Warren on the occasion of his retirement 20 years ago. *Id.*

5. P. 365. These issues are, we are advised in a quote from Eugene Rostow, moral ones: "a constitutional — that is, . . . a moral — obligation." P. 366.

the right thing, because of political considerations . . . ."[6]

Well. There is much more, but the above will probably suffice to demonstrate Professor Levy's distrust of, and discomfort with, majoritarian rule. Thus, it is scarcely surprising that he applauds judicial policymaking, and readers of a like mind will enjoy his attempt to demonstrate that there is some principled way for a judge to act in the name of the Constitution without reference to what it says.

But I, for one, can find none. Original intent is, in fact, the only game in town; and those who seek another invariably wind up excusing acts of free judging (by those sworn to uphold and defend the Constitution) on the ground that the actors could not do otherwise because the Constitution is meaningless, or was framed (or adopted) by people who disagreed about its meaning, or whatever. It is hard to take these excuses seriously.

The Constitution was drawn up and ratified mostly by men who were steeped in common-law methods and procedures, as Professor Levy himself concedes (p. 331). These men had no expectation that those who sought to apply the Constitution's provisions would be looking for legislative history or scurrying after the Framers' private motives. They knew that the Constitution's intent would be sought in the text of the document itself, as with any other legal document of the time. And Professor Levy knows it too (p. 354).

That is where it should be sought today.

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6. A truer note is that of Fisher Ames, speaking in 1795 in the House of Representatives: "A monarchy is a merchantman which sails well, but will sometimes strike on a rock and go to the bottom; a republic is a raft which will never sink, but then your feet are always in the water."