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"ORIGINAL INTENTION": RAOUl BERGER’S FAKE ANTIQUE

HANS W. BAADE*

In this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people.

Lord Denning**

INTRODUCTION

Originalism, Raoul Berger has written recently in these pages, "look[s] to the Framers' recorded explanations of what they meant to accomplish."1 As a technique of interpretation, he asserts, "originalism has its roots in 600 years of Anglo-American practice."2 Berger seeks to substantiate that assertion by reference to English authorities dating from the fifteenth to the early eighteenth centuries.3 He has advanced a like argument in other publications in recent years, supplying additional English authorities with a somewhat greater time span but not going beyond Matthew Bacon’s Abridgment, which started appearing in 1736.4

The following pages will show, first, that English law and the law of the common-law Commonwealth have excluded reference to the parliamentary history of bills in aid of interpreting acts of Parliament from 1769 to the last few decades;5 second, that evidence of congressional de-

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** Escoigne Properties Ltd. v. Inland Revenue Comm'r, 1958 App. Cas. 549, 566 (appeal taken from Eng.).

2. Id.
3. Id. at 118.
5. See infra notes 11-21 and accompanying text.
bates in aid of the interpretation of federal statutes was inadmissible in the United States until the very end of the nineteenth century; and, third, that for much of this century such evidence continued to be inadmissible in federal courts where the statutory text to be interpreted carried a plain meaning.

Fourth, these pages will show that in pre-eighteenth-century England, as well, references to the "intent of the makers" of an act did not invoke the actual, subjective intention of Parliament as reconstructed from its "recorded explanations," but the "equity of the statute" as construed judicially. Fifth, it will be demonstrated that such references were, both quantitatively and qualitatively, of minor significance in the doctrines of statutory interpretation held by such pre-eminent common lawyers as Sir Edward Coke. Sixth and finally, it will be shown that isolated judicial references to "original" intention by English courts do not displace the well-established common-law maxim that the meaning of permanent statutes is subject to elaboration in a continuous, evolutive process of adjudication: optima interpres consuetudo.

1. THE ENGLISH "EXCLUSIONARY" RULE

It is readily ascertainable from standard authorities that English counsel may not refer to, and English judges may not consider, legislative debates in aid of statutory construction. Standard sources readily show that this rule dates to Millar v. Taylor, decided in 1769. As Mr. Justice Willes put it:


7. See infra notes 36-51 and accompanying text. For additional authorities, see Baade, supra note 6, at 1084-87 & nn.602-20.


10. See infra notes 123-51 and accompanying text.


The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the Sovereign. In the Hertford College case, the Court of Appeal stated that "the parliamentary history of a statute is wisely inadmissible to explain it, if it is not [clear]." Lord Fitzgerald said in 1887 that the rule barring recourse to legislative history, "so aptly expressed" by Mr. Justice Willes in Millar v. Taylor, "has always been enforced in this House." The same rule has prevailed in Canada, again with reference to the rule laid down by Mr. Justice Willes in 1769.

After extensive study of the subject of statutory interpretation, the two British Law Commissions concluded in 1969 that "at present reports of Parliamentary proceedings should not be used by the courts for the interpretation of statutes." More recently, a leading Canadian constitutional lawyer has written that Raoul Berger's argument that the original intention of the framers is "as good as written into the text" and is "binding" on the court . . . would be utterly implausible in Canada and other Commonwealth jurisdictions where legislative history has generally been held to be inadmissible as an aid to the construction of constitutional or statutory texts. As if to drive home that point, the High Court of Australia said in 1988 that reference to the history of the adoption of a section of the constitution of that country may not be made "for the purpose of substituting for the meaning of the words used the scope and effect—if such could be established—which the founding fathers intended the section to have."

15. Id. at 707.
20. Cole v. Whitfield, 78 A.L.R. 42, 49 (Austl. 1988). See generally Patrick Brazil, Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular, 4 U. QUEENSLAND L.J. 1, 16-21 (1961) (discussing the position of the Australian courts that "legislative history of the Constitution has been largely, though not wholly, excluded for construction purposes"). For legislative modifications of that rule, see Patrick Bra-
So much, then, for the "Anglo" component of Berger's claimed "Anglo-American practice."  

2. THE "ENGLISH RULE" IN THE UNITED STATES

In his opinion on the constitutionality of the first Bank of the United States, Alexander Hamilton wrote, in 1791: "[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself . . . ."  

Five years later, in the course of the Jay Treaty debates, Representative Robert Harper invoked the "universal practice of the Courts of Law, who, when called on to expound an act of the Legislature, never resorted to the debates which preceded it—to the opinions of members about its signification—but inspected the act itself, and decided by its own evidence."  

Representative William Smith made reference to the Federal Carriage Tax Case just decided by the United States Supreme Court, and asked rhetorically:

[H]ow did the Court proceed? Did they call for the Journals of the two Houses, or the report of the Committee of Ways and Means, in which the law originated, or the debates of the House on passing the law? What impression would such call have made on the public mind?

Three leading cases confirm the correctness of this view in antebellum American jurisprudence. First in time is the 1818 New York case *People v. Utica Insurance Co.*, in which Chief Justice Thompson said: "That in construing a statute, the intention of the Legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention, however, is to be collected from the act itself, and other acts, in pari materia."  

Justice Spencer, dissenting, specifically agreed with that proposition: "Courts of law cannot consider the motives which may have influenced the Legislature, or their intentions, any further than they

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21. See Berger, supra note 1, at 117.


23. 5 *Annals of Cong.* 462 (1796).


25. 5 *Annals of Cong.* 441 (1796).


27. *Id.* at 380.
are manifested by the Statute itself."

The second case usually referred to in this connection is *Mitchell v. Great Works Milling & Manufacturing Co.*,\(^2^9\) decided by Justice Story sitting on circuit. Rejecting proffered evidence of the views expressed in the House of Representatives as to the meaning of the statute to be construed, he wrote:

But in truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect.\(^3^0\)

Finally, in *Aldridge v. Williams*\(^3^1\) the Supreme Court rejected a like proffer of evidence of legislative intent. Writing for the Court, Chief Justice Taney stated:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.\(^3^2\)

Remarkably enough, this view prevailed until (and indeed, beyond) the 1897 case of *United States v. Trans-Missouri Freight Ass'n*,\(^3^3\) in which the Court noted "a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."\(^3^4\)

So much, then, for the American component of Raoul Berger's claimed "Anglo-American practice."\(^3^5\)

### 3. The Barrier of Plain Meaning

In 1904 the Supreme Court of the United States once again reiterated the proposition that "debates in Congress are not appropriate sources of information from which to discover the meaning of the lan-

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28. *Id.* at 394-95 (Spencer, J., dissenting).
29. 17 F. Cas. 496 (C.C.D. Me. 1843) (No. 9662).
30. *Id.* at 499.
31. 44 U.S. (3 How.) 9 (1845).
32. *Id.* at 24.
33. 166 U.S. 290 (1897).
34. *Id.* at 318.
35. See Berger, *supra* note 1, at 117.
language of a statute passed by that body." At the same time, however, it affirmed "examining the reports of either body [of Congress] with a view of determining the scope of statutes passed on the strength of such reports." Indeed, the Court occasionally had considered congressional committee reports in aid of statutory interpretation since 1859; in the resolution of the well-known Church of the Holy Trinity case, this source had been a key factor.

It would be quite wrong, nevertheless, to regard the judicial consideration of congressional committee reports between 1860 and 1940 as an espousal of the "originalism" sponsored by Raoul Berger. The Court did look to these particular "recorded explanations" of Congress in those eight decades, but it did so only as and when first-level interpretation through textual exegesis failed to yield a clear answer. This two-step approach was mandated by the plain meaning rule then prevailing, which precluded resort to legislative history wherever the significance of a statutory term could be determined by textual construction.

Hamilton v. Rathbone, decided at the turn of the century, stated the two basic propositions associated with that rule. First, when an enactment is "clear upon its face" and, standing alone, fairly capable of only one construction, "that construction must be given to it." Second, and as a negative corollary thereto, extrinsic evidence of legislative intent "may be resorted to, to solve, but not to create an ambiguity."

As applied by the majority in the well-known case of Caminetti v. United States, the plain meaning rule permitted resort to reliable evidence of legislative history (such as the reports of congressional committees) "in cases of doubtful interpretation," but it precluded consideration of any "extraneous sources" when the statutory words were "free from doubt." Doubt, however, also was conceded to arise whenever facially "plain" statutory language led to consequences that were "absurd or wholly impracticable."

37. Id.
40. Id. at 465-71.
41. Berger, supra note 1, at 117.
42. 175 U.S. 414 (1899).
43. Id. at 419.
44. Id. at 421.
45. 242 U.S. 470 (1917).
46. Id. at 490.
47. Id.
The plain meaning rule is readily traceable to Colehan v. Cooke, decided in 1742 and known to American lawyers through later editions of Matthew Bacon's Abridgment. Along with, but superior to, the "mischief" and "golden" rules, it continues to be one of the three ground rules of statutory interpretation in English and Anglo-Canadian law. It is abundantly clear, therefore, that textualism, not "originalism," had its roots in some two centuries of "Anglo-American practice" when the United States Supreme Court discarded the plain meaning rule in 1940. So much, then, for the preferred place of Raoul Berger's preferred "ism" in "Anglo-American" legal practice.

4. THE PREHISTORY OF THE ENGLISH "EXCLUSIONARY" RULE

When presented, at long last, with some of the authorities summarized above, Raoul Berger has responded by (1) challenging the authority of Millar v. Taylor as excluding reference to parliamentary history in aid of statutory construction; (2) arguing that "originalism" prevailed in the United States, in any event, since the Supreme Court first considered congressional committee reports in 1859; and (3) asserting that "for 400 years prior to Millar a succession of English judges had declared that 'actual intent is controlling.' 

He now concedes that as a matter of present-day English law, the legislative history of a statute may not be referred to in aid of statutory interpretation. He promptly seeks to neutralize this (unforgivably late) concession, however, with the argument that "Coke exalted the Maker's intention over his words," and that lawyers in the American colonies were nurtured "upon the methods and constitutional views of Coke."

Thus, Raoul Berger has now come to regard the "400 years prior to Millar" not as the foundation of six centuries of "Anglo-American prac-

49. 6 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW *397.
50. See generally Elmer A. Driedger, Statutes: The Mischievous Literal Golden Rule, 59 CAN. BAR REV. 780, 780-86 (1981) (discussing the three ground rules and concluding that "they have now been fused into one").
52. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769) (discussed supra text accompanying notes 12-13).
55. Id.
56. Id.
tice,” but as the repository of the true common law taught by "Lord" (Sir Edward) Coke and saved in the American colonies while left to decay in its mother country (and, we must add, the common-law Commonwealth). Let us put aside the obvious fact that the rule of Millar v. Taylor did prevail here in the formative era of American law, and the equally obvious fact that the plain meaning rule did indeed exalt the “words” over the “Maker” until discarded by the Supreme Court in 1940. Let us also not query the mastery of Law French and of Latin by colonial lawyers, their level of legal education, and their access to properly equipped law libraries. How accurate is Raoul Berger’s basic contention that for 400 years before Millar (i.e., from 1369 to 1769) “a succession of English judges had declared that ‘actual intent is controlling’ ”?

This timeframe is not as arbitrary as might be supposed initially, although it leaves out a well-known judicial comment usually quoted in this connection. In 1305, in Aumeye’s Case, Lord Chief Justice Bereford cut off comment of counsel on the Statute of Westminster II with the words “Ne glosez point le statut: nous la savons mieuz de vous, quer nous le feimes.” While not referring to this source, Berger mentions a similar incident, later recalled by Mr. Justice Frowyk, in which the judges had solicited (and presumably followed) an interpretation of the same statute by its authors. Similar instances are related in Professor Plucknett’s authoritative study of statutory interpretation in the first half of the fourteenth century.

It is common ground among legal historians, however, that the elaboration of judicially developed rules and canons of statutory interpretation in England commenced exactly at the point where this practice of reliance on the intent of the draftsman through personal knowledge or direct inquiry became impossible because of the separation of judicial and

57. Id.
58. See supra notes 18-20 and accompanying text.
59. See supra notes 22-34 and accompanying text.
60. See supra note 51 and accompanying text.
63. Y.B. 33-35 Edw. (Rolls Series) 83 (1305). The Chief Justice’s admonition may be translated as follows: “Don’t bother interpreting the statute for us: we know it better than you do, for we made it.”
64. See Berger, supra note 1, at 118.
governmental functions in the King's Council. In the words of Professor
Thorne: "It is only after the middle of the fourteenth century, when
judges find themselves no longer able to draw either upon the actual in-
tention of the legislator or upon the royal dispensing power, that they are
forced to construct a body of rules of statutory interpretation." While
references to the "intent of the makers of the act" also have been docu-
mented for the fifteenth century, those are readily identifiable as verbal-
izations of the judicial ascertainment of presumed legislative intent
through canons of construction derived mainly from civil- and canon-law
sources.

A main reason for judicial inattention to actual legislative intent
was, in all likelihood, the lack of records adequate for this purpose. The
House of Lords started keeping its journals in 1509; the Commons, some-
time before 1547. Moreover, until 1414, when it resorted to petitioning
for legislation by draft bill, the Commons had no control over the text of
the enactment eventually drafted in Council at the end of the legislative
session. Even thereafter, and through much of the fifteenth century, the
Lords amended Commons bills restrictively (although not expansively)
without reference back.

Remarkably enough, the evolution of the House of Commons into a
deliberative body with formalized proceedings minuted in a journal (a
sixteenth-century development) coincided with the express abandonment
of the judicial practice of seeking legislative interpretations from Parlia-
ment. That practice initially had reflected not only the overwhelming
power of King and Council in legislative (and in judicial) matters, but
also late Imperial Roman and medieval canon law rather than the com-
mon law: cuius condere eius interpretari. This maxim, well-known in
England since Bracton's days, was rejected by Tudor lawyers precisely
because the elective (and hence, the somewhat ephemeral) nature of the

202, 207 (1936).
67. STANLEY B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CEN-
TURY 293-95 (1936); see also id. at 366, 387, 389, 391-92, 394 (case extracts in original Law
French).
68. HOWARD L. GRAY, THE INFLUENCE OF THE COMMONS ON EARLY LEGISLATION:
A STUDY OF THE FOURTEENTH AND FIFTEENTH CENTURIES 15-33 (1932); A.F. POLLARD,
THE EVOLUTION OF PARLIAMENT 322 (2d ed. 1926).
69. See CHRIMES, supra note 67, at 231-32, 247-48. But see GRAY, supra note 68, at 323-
24 (stating that by 1439 approval of the Commons was required for all amendments).
70. Const. 1, 14, 12 (Justinian, 529 A.D.); X [Liber Extra] 5, 39, can. 31 (1200 A.D).
Cuius condere eius interpretari may be translated as "Whose to found, his to interpret."
71. 2 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE fols. 34 &
House of Commons prevented the ascertainment of any genuine legislative intention. As Sir Christopher Hatton put it:

Seeing a great part of them, are by election, namely all of the Lower House, and then by the law Civil, the Assembly of Parliament being ended, Functi sunt officio, and their Authority is returned to the Electors so clearly, that if they were altogether assembled again for interpretation by a voluntary meeting, Eorum non esset interpretari.  

That left statutory interpretation where it has been since then: in the hands of the “Sages of the Law,” from whom “we seek these interpretations as Oracles from their mouths.”

We are able to trace the evolution of common-law rules and canons of statutory interpretation in the Tudor and early Stuart periods with some degree of accuracy, because the form of law reporting initiated by Sir Edmund Plowden in 1571 gives a full account of argument of counsel and of judicial deliberation as well as resolution in statutory-interpretation cases then deemed significant. The picture emerging from these sources is hardly in doubt. Statutory interpretation was, again in Sir Christopher Hatton’s words, “of two sorts: One is, according to the precise words of every Statute; the other according to equity.”

This meant, in the main, that “beneficial” statutes were interpreted extensively, and “penal” ones, restrictively. Even more significantly for present purposes, it also meant that the unprovided-for case (the casus omissus) could be resolved through the judicial ascertainment of what was by definition a hypothetical (or a fictional) legislative intent. That is brought out clearly in the following passage of Plowden’s famous commentary on Eyston v. Studd:

And in order to form a right Judgment when the Letter of a Statute is restrained, and when enlarged, by Equity, it is a good Way, when you peruse a Statute, to suppose that the Law-maker is present, and that you have asked him the Question you want to know touching the Equity, then you must give

72. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 29 (Richard Tonson, London 1677). Hatton, who lived from 1540 to 1591, was Lord Chancellor from 1587 to 1591. His treatise, published posthumously, probably was written around 1580. “Eorum non esset interpretari” may be translated as “it would not be theirs to interpret.”

73. Id. at 29-30.


75. HATTON, supra note 72, at 28.

76. See, e.g., id. at 31-62, 63-74 (beneficial interpretation); id. at 75-85 (strict interpretation).
yourself such an Answer as you imagine he would have done if he had been present.\textsuperscript{77}

The implications of this use of the “equity of the statute” and of the canons of statutory interpretation developed in its penumbra have not escaped notice by students of the subject. In Professor Plucknett’s words, their net effect was that “the power of the courts to construe or misconstrue legislation was unimpaired, and indeed increased.”\textsuperscript{78} Indeed, it is a matter of contemporary judicial record that judicial power to misconstrue statutes by resort to their “equity” was then used with some frequency for the precise purpose of frustrating actual legislative intent. As Lord Ellsmere powerfully put it in 1615, in the \textit{Earl of Oxford’s Case},\textsuperscript{79} “the Judges themselves do play the Chancellors Parts upon Statutes, making Construction of them according to Equity, varying from the Rules and Grounds of Law, and enlarging them \textit{pro bono publico}, against the Letter and Intent of the Makers, whereof our Books have many Hundreds of Cases . . . .”\textsuperscript{80} So much, then, for the contention that “actual” legislative intent was controlling in Sir Edward Coke’s days.

5. PLOWDEN, COKE, AND MATTHEW BACON

The \textit{Earl of Oxford’s Case} established the proposition that equity always acts in personam.\textsuperscript{81} In so doing, it enjoined, as unconscionable, the enforcement of the judgment of the Court of King’s Bench in the \textit{Magdalen College Case}.\textsuperscript{82} Soon thereafter (but not before he had published his report of that latter case), Sir Edward Coke was removed by King James I from his position of Chief Justice.\textsuperscript{83} Lord Ellesmere (formerly Thomas Egerton), who together with Francis Bacon was responsible for this action, is also the probable author of the \textit{Discourse upon the Exposicion & Understandinge of Statutes}.\textsuperscript{84} None of this necessarily detracts from the authority of the \textit{Magdalen
College Case on the law of statutory interpretation as applied by the common-law judiciary in the early Stuart era. Involved were two Elizabethan statutes, enacted five years apart. The first had made illegal, and invalidated pro futuro, all alienations by charitable corporations of their endowed property other than leases for a maximum of twenty-one years or three lives. The second had validated conveyances made in circumvention of that prohibition by the interposition of the Queen (not named in the first enactment) as a nominal grantee charged with the duty to convey to the real party in interest. Magdalen College, Cambridge, had conveyed the Covent Gardens in this manner, and it now sought to recover them, decades after the event, and after an almost worthless fruit and vegetable farm had been improved into a smart residential settlement of some 130 houses.

The court decided that the conveyance was invalidated by the initial statutory prohibition, and that this defect was not cured by the curative act. No fewer than six reasons were given for the resolution of the first issue of statutory construction. Numbered seriatim, they were: (1) general statutes of a beneficial nature “shall be extended generally according to their words”; (2) the King “shall not be exempted by construction of law out of the general words of Acts made to suppress wrong”; “general words of a statute which tend to perform the will of the founder or donor, shall bind the King”; (4) the College was “disabled [to make] the grant,” and “the Queen cannot take from them who are so disabled”; (5) a statutory interpretation countenancing a corrupt design of the College by which the Queen, “should thereby be made the instrument of injury and wrong” was one which “the law will never make”; and (6) the statute, by authorizing only two types of leases of grants, “excludes all others.”

It is in connection with the fifth of these reasonings that the court is reported to have said: “[I]n Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the

85. 13 Eliz., ch. 10 (1570).
86. 18 Eliz., ch. 2 (1576).
87. For background, see KNAFLA, supra note 84, at 133-34; Baker, supra note 83, at 377-78.
89. Id. at 70b, 77 Eng. Rep. at 1241.
90. Id. at 72a, 77 Eng. Rep. at 1243.
91. Id. at 72b-73a, 77 Eng. Rep. at 1244.
92. Id. at 73a, 77 Eng. Rep. at 1244.
93. Id. at 73b, 77 Eng. Rep. at 1245-46.
94. Id. at 74b, 77 Eng. Rep. at 1247.
original intent and meaning is to be observed.95 This passage is followed immediately by a reference to the intent not of the "makers" of the act to be construed, but of the Master of Magdalen when attempting to do oblique what could not be done aperte, and with the considerations just mentioned.96 Coke went on to characterize this approach in terms of Heydon’s Case,97 which as reported by him laid down the "mischief rule" of statutory construction.98 The mischief here to be avoided (ascertained judicially without resort to indicia of actual legislative intent) was of course the squandering of the assets of charitable corporations. This is spelled out not only in the report itself, but also in Coke’s preface to this volume, in which he explained his reason for including the Magdalen College Case:

[It] tendeth to the maintenance of Gods true Religion, the advancement of Liberal Arts and Sciences, the supportation of the Ecclesiastical State, the preservation and prosperity of those two famous Sisters, the Universities of Cambridge and Oxford, and of all the Colleges within the Realm, and the establishment of Hospitals, and provisions for the Poor.99

Put more directly, the court construed the invalidating statute according to its words, i.e., literally and in accord with the first and sixth reasons. This would have disposed of the point but for the (judicially developed) canon of construction exempting the King (or, as here, the Queen) from the operation of statutes unless named expressly. The Magdalen College Case limited this canon of construction by holding it inapplicable to beneficial statutes, statutes effectuating the intent of donors, and abusive schemes interposing the Queen so as to evade statutory prohibitions enacted in the public interest.100 This analytic scheme was set forth about as transparently as could be, for Lord Chief Justice Coke, who presided over the Court of King’s Bench at the time, took the trouble to place all but two of the considerations moving that court in the order of logical sequence.101 How in the world can it be maintained, in

95. Id. at 73b, 77 Eng. Rep. at 1245.
96. Id.
100. In this respect the court applied reasons two, three, and five. See supra text accompanying notes 89-94.
101. Reason four avoids the issue focusing on the grantor rather than the—interim—grantee; reason six is really a reinforcement of reason one.
the face of this almost uniquely sequential exposition of judicial reasoning, that a passage in support of the fifth reason, expressly so numbered and designated, lays down a canon of construction overshadowing all others?102

Distressingly, this is not an isolated instance. Recently Professor Ackerman has called attention to Raoul Berger's resort to "selective quotation and italicization so egregious that it shakes confidence in his basic reliability."103 The former of these charges can hardly be avoided in regard to Berger's choice of English authorities supporting "originalism."104 To start with Sir Edward Coke: His published work includes, in addition to some works now regarded as less significant, eleven volumes of Reports and four books of Institutes (three of which were published posthumously).105 Some twenty English-language maxims and the same number of Latin-language maxims on statutory interpretation drawn from these works are reproduced, with source reference, in Wood's Institute.106 More Latin-language maxims are accessible through Edward Trotman's index to an abridgment of Coke's Reports in Law French.107

Berger makes no attempt to quantify and to evaluate these references, and neither will I, at least in these pages. I note, however, that the use of "original" in conjunction with intent in the Magdalen College Case108 appears to be isolated, and that a number of canons of statutory interpretation are prefaced by adjectival value judgments. Two such Latin-language maxims seem at war with each other: contemporaneous exposition is called fortissima,109 but custom is called optima interpretis.110

102. See Berger, supra note 1, at 118.
104. Berger, supra note 1, at 117-18.
105. There also are two volumes of posthumously published law reports. See J. H. Baker, Coke's Note-Books and the Sources of His Reports, 30 CAMBRIDGE L.J. 59, 80-83 (1972).
106. THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 8-10 (photo. reprint 1979) (1724).
107. EDWARD TROTMAN, UN EXACT ALPHABETICAL TABLE DE TOUT L'PRINCIPAL MATTEIRES, MAXIMES, ET AXIOMES, CONTENYNS EN ED ABRIGMENT DE LA SIEGNEUR COKE'S REPORTES (London 1664). There is also an extensive "Index of Maxims and Rules" preceding the alphabetical index of the Second Institute, as well as an annex titled "The Rules and other Expressions Alphabetically composed," following the alphabetical index of the Fourth Institute, in the editions printed for E. & R. Brooke. London 1797 (reprint ed. 1986). These list almost 200 pages of reference for well over 100 maxims.
109. 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND *10, *136 (using contemporanea expositio in lege est fortissima, which may be translated as "contemporaneous exposition is the strongest"); 4 id. at *138.
110. Lord Cromwel's Case, 2 Co. Rep. 69b, 81a, 76 Eng. Rep. 574, 597 (C.P. 1601); 2 COKE, supra note 109, at *18, *281 (using optimus interpretis legum consuetudo); 4 id. at *75.
Not surprisingly, Thomas Wood commends the “mischief” rule for the “true” interpretation of the law, but the highest accolade, remarkably enough, goes to contextual interpretation. In Coke’s own words: “[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers.” In the face of this plenitude of maxims on statutory interpretation penned (and occasionally evaluated) by Coke, I am unable to consider the unquantified and unevaluated selection of one of these, and its elevation to an “ism” overshadowing all others, as responsible scholarship.

Berger’s treatment of Plowden and of Matthew Bacon shows a like penchant for selectivity or, to quote Ackerman again, “shoddy work.” Plowden appears indirectly, through a passage quoted from Bacon’s Abridgment. Even a cursory study of Plowden’s Reports would have led to an index with eighty-one keynotes in its section “Concerning Statutes in general,” most of which relate to statutory construction. No fewer than fourteen of these invoke the “equity” of the statutes; two additional ones call for “benign” or “soft” interpretation where appropriate. Five address the restrictive interpretation of penal statutes, and the same number deal with the rights and liabilities of the King if mentioned or omitted. The “intent of the makers” of the enactment to be construed figures in only three entries, and at least the same number encapsulate rules for the determination of the intent of the statute. The remaining entries recite an assortment of canons of statutory construction familiar to students of Roman and canon law. How can one passage from Plowden, quoted indirectly at that, establish a “practice” of “originalism?”

Last but unfortunately not least, there is Berger’s representation of a passage (from Plowden) as reproduced in Matthew Bacon’s Abridgment as “epitomiz[ing]” anything. Through the systematic reproduction of excerpts from the pertinent authorities in topical and alphabetical order,

111. WOOD, supra note 106, at 9.
112. 1 COKE, supra note 109, at *381a.
113. ACKERMAN, supra note 103, at 336 n.21.
116. E.g., id. (“Where the intent of a Statute may be collected from the practice and usage of former times”; “The life of a statute does not consist in the words, but in the sense and meaning of it”; “Where the intent of a clause in an act may be collected from other branches or clauses therein, when the express letter fails.”).
117. Berger, supra note 1, at 118.
Bacon epitomized (i.e., he abridged) English law as it stood in the mid-eighteenth century.\textsuperscript{118} He did not, however, epitomize (i.e., state the essence of) the topics themselves, any more than the compiler of a passage in the Centennial Digest “epitomized” the law as stated in that passage.

Berger’s quotation from Bacon’s \textit{Abridgment} is from the topic of “Statute,” which is divided into eleven headings.\textsuperscript{119} The ninth of these, entitled “Rules to be observed in the Construction of a Statute,” is divided into no fewer than ten sub-headings.\textsuperscript{120} The \textit{fifth} of these latter is captioned: “The intention of the Makers of a Statute ought to be regarded in the construction of a Statute.”\textsuperscript{121} The passage chosen by Berger is located in the middle of that subsection, bypassing a passage from Plowden indicating the sources from which the intention of the makers of a statute is to be collected.\textsuperscript{122} So much, then, for the place of “original intent” in English law as documented by the works of Plowden, Coke, and Matthew Bacon.

6. “PETRIFICATION” OR ORGANIC GROWTH

Finally, I turn to the problem of interpretation encapsulated in the image of a “living tree,” employed by the Judicial Committee of the Privy Council\textsuperscript{123} and by the Supreme Court of Canada\textsuperscript{124} in relation to the British North America Act of 1867.\textsuperscript{125} (Its opposite, we may assume safely, is a petrified forest.) Even if fifteenth- to seventeenth-century judicial references to the “true intent of the Makers of the Act” were addressed to the actual intent of the very Parliament that had enacted the statute to be construed, there remains the question whether this specific understanding, isolated and identified in place and time, was to govern the interpretation of that enactment in perpetuity. That, I take it, is the essence of Raoul Berger’s thesis of “Original Intention.” Although that

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\textsuperscript{118} For background, see Peter R. Glazebrook, \textit{Matthew Bacon, in Biographical Dictionary}, supra note 74, at 27.
\textsuperscript{119} 6 Bacon, supra note 49, at *364-400.
\textsuperscript{120} \textit{Id.} Letter I, No. 5, at *379-92.
\textsuperscript{121} \textit{Id.} at *384-86.
\textsuperscript{122} \textit{Id.} at *384, *385. The reference omitted by Berger is a well-known passage from Stradling v. Morgan, Plo. 199, 205, 75 Eng. Rep. 305, 315 (Ex. Ch. 1559), stating that judges have collected legislative intent “sometimes by considering the Cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances.” \textit{Id.}
\textsuperscript{123} Edwards v. Attorney Gen., 1930 App. Cas. 124, 136 (P.C.) (appeal taken from Can.).
\textsuperscript{125} 30 & 31 Vict., ch. 3 (1867).
\end{flushleft}
specific term was apparently not in general use in the Tudor and early Stuart eras, Sir Edward Coke's report of the *Magdalen College Case* contains the passage that "in Acts of Parliament que sont deste construe selonque l'intent & meaning des fesors de eux, l'original intent & meaning est de(v)e observe." Let us leave aside the twin facts that the passage just quoted is the fifth reason assigned in support of the statutory interpretation there adopted, and that the "intent & meaning" there envisaged are the purpose of the enactment as judicially ascertained through the "mischief rule." Did the use of the word "original" indicate the judicial acceptance of what is now known on the Continent as the "petrification" theory, i.e., the view that (some) enactments have to be viewed by successive generations of interpreters as petrified forests rather than living trees? The *Magdalen College Case* itself answers that question in the negative.

The first issue of statutory construction there to be decided, we recall, was whether an Elizabethan statute invalidating certain dispositions of property by charitable corporations encompassed conveyances to the Queen herself, who was not named in the statute. In more practical terms, could this statutory prohibition be avoided (or evaded) by the expedient of conveyances in which the Queen was interposed as a "strawman"? There was a powerful practical argument in the affirmative: "the number of the leases which have been made since the statutes of 13 Eliz. by masters and fellows of colleges, deans and chapters, masters of hospitals, &c." The court met this point at several levels, three of which are directly relevant here. First, it characterized this conveyance practice as arising "more ex consuetudine clericorum, who initiated precedents of leases made before 13, than of any sage advice of men learned in the law.""  

129. *See supra* text accompanying notes 123-27.
131. *Id.* (translated as "of the custom of clerics").
Thus, there was no interpretive custom to be considered. Second (and quite the contrary), it had "been often resolved in the highest Court of justice, that Queen Elizabeth was bound by the said Act." Finally, the "resolution of the Judges as to this point" had been "approved" by the "whole Parliament" through the Act of Confirmations, enacted more than three decades after the statute to be construed.

Students of the history of English property law will hardly fail to note the distinction between a prior practice continued by custom of the clergy and a postenactment custom based on the "sage advice of men learned in the law." Such "sage advice" by the conveyancing bar already had emasculated the Statutes of Uses and of Enrolments by the covenant to stand seised and the lease and release (attributed to Serjeant Moore). Six years hence, the family settlement "completed in the privacy of a lawyer's office" was to find judicial approval. The very notion that the actual "original intent" of the Parliament that enacted the Statutes of Uses and of Enrolments in 1536 should continue to govern their construction forever would have seemed as absurd to Plowden or to Coke as it seemed grotesque to Christopher Tiedeman three and a half centuries later.

Again as shown by the reference to prior judicial interpretations and to another statute enacted thirty-one years later, the court here quite obviously followed one of Sir Edward Coke's favorite maxims: optimus interpres consuetudo. That maxim, we noted, was seemingly at war with another of his Latin-tag favorites: contemporanea expositio in lege est fortissima. The obvious reconciliation of these two maxims lies in the time element. Contemporary exposition is a useful guide for the interpretation of older statutes as a matter of first impression, but the construction of permanent legislation continuously applied by custom and by judicial construction follows the course of its customary interpretation.

This, too, is reflected in the maxims employed by Sir Edward Coke.

132. Id. at 75b, 77 Eng. Rep. at 1248.
133. Id. (quoting 43 Eliz. I, ch. 1 (1601)).
134. See supra text accompanying note 131.
136. Id. at 189-90.
137. Id. at 190 (citing Lutwich v. Mitton, Cro. Jac. 604, 609, 79 Eng. Rep. 516, 518 (1621)).
139. See supra notes 109-10 and accompanying text.
140. See supra note 109 and accompanying text.
Another one of his favorites was *cessante ratione legis, cessat ipsa lex*. Borrowed from thirteenth-century canon law, this maxim was conceived initially in static rather than dynamic terms, and served to cut down the generality of statutory language so as to exclude (especially in penal statutes) cases manifestly not covered by the (unchanging) purpose of the enactment as conceived judicially. Coke, however, also adapted this maxim, in conjunction with another well-known one, to give it a dynamic dimension: *ratio legis est anima legis, et mutata legis ratione, mutatur et lex*. The soul of the law is its purpose, and as the purpose changes, so does the law.

It should be added, perhaps, that Sir Edward Coke was hardly what would now be called a judicial activist. Judging by his selection of civil-law maxims, he would seem to have favored the stately pace of legal evolution associated with the late Principate. *Minime mutanda sunt quae certam interpretationem habuerunt*, he quotes Paul (leaving out, nevertheless, the fossilizing word *sempers*); *non est recedendum a communi observantia*, he quotes another well-known maxim. He manifestly was not an advocate of creative statutory interpretation in aid of social engineering. Just as clearly, he denied neither the fact of nor the need for the evolutive interpretation of statutory texts. Change, however, could only come, in his view, through the *praxis jurisprutorum*, the brethren of the coif. From them, it was likely to come without haste.

I continue to believe that this cautiously evolutive view of the process of statutory interpretation as applied to enactments of some permanence and frequency of application in a changing world is one of the hallmarks of the common-law method. The prime example on point is, of course, the Statute of Frauds, enacted in 1677. Its legislative history was painstakingly reconstructed by Crawford Hening. Writing in 1913, he found it “strange that in the many years of controversy as to [the] meaning [of the Statute of Frauds] no one has sought to interpret
the statute by examining the bills which were tentatively introduced and
modified by successive rejection of parts and by insertion of new provi-
sions.” Strange, perhaps, for an American legal historian by 1913, but
surely not for an English lawyer. This is the very enactment singled out
by Dicey as the classic illustration of statutory enactments that, “though
they originally introduced some new rule or principle into the law of
England, have been the subject of so much judicial interpretation as to
derive nearly all their real significance from the sense put upon them by
the Courts.” This process, we may add, continues to the present.

So much, then, for the “Anglo-American practice” supporting
Raoul Berger’s notion of “originalism” as a mandate for the static rather
than the evolutive interpretation of permanent statutes.

CONCLUSION

The title of a more recent article also appearing in these pages may summarize my conclusion about Raoul Berger’s earlier efforts to
pursue here his notion of “original intention” as “root[ed] in 600 years of
Anglo-American history.” As a historical artifact, this notion is a
fake. Mr. Berger is a Renaissance man and a genuine legal scholar
with important contributions, especially to American administrative
law. His more recent contributions to American constitutional history
are increasingly coming in for severe criticism. His still more recent

149. Crawford D. Hening, The Original Drafts of the Statute of Frauds (29 Car. II ch. 3)
and Their Authors, 61 U. PA. L. REV. 283, 283 (1913).
150. ALBERT V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC
OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 362 (2d ed. 1914).
151. Section 4 of the original Statute of Frauds was most recently interpreted in Elpis
Eng.).
152. See Robert G. Byrd, Misrepresentation in North Carolina, 70 N.C. L. REV. 323
153. Berger, supra note 1, at 117.
154. He was a soloist with the Cleveland Orchestra in 1927, and served as second concert-
master of the Cincinnati Symphony Orchestra and as the first violinist of the Cincinnati String
Quartet before embarking on his legal studies. See WHO’S WHO IN AMERICA 252 (45th ed.
1989-90).
155. Berger’s impressive early contributions to administrative law include Exhaustion of
Administrative Remedies, 48 YALE L.J. 981 (1939), and Intervention by Public Agencies in
Private Litigation in the Federal Courts, 50 YALE L.J. 65 (1940). His article From Hostage to
Contract, 35 U. ILL. L. REV. 154, 281 (1940), is an insightful study of a subject in early
Continental and English legal history, totally at variance with his recent treatments of English
legal history.
156. Berger’s account of the adoption of the Fourteenth Amendment, for instance, has
been called “bad history,” reinforced to signify “really bad.” ACKERMAN, supra note 103, at
91. Also, a well-known jurist has called Berger’s Fourteenth Amendment history “wrong.”
forays into statutory interpretation in Anglo-American legal history must, unfortunately, be judged even more harshly. Occasional echoes in the past do not make one’s favorite ditty the *leitmotif* of six centuries of composition. As a long-time admirer of this splendid (let it be said) old man now in his ninety-second year of age, I must follow my sincere *ad multos annos, magister* with a regretful *si tacuisses*. 