Original Intent: The Rage of Hans Baade

Raoul Berger
RESPONSE

ORIGINAL INTENT: THE RAGE OF HANS BAADE

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Publication of my Government by Judiciary\(^1\) in 1977 ignited an ongoing debate, leading Richard Saphire to remark in 1983 that responding to Raoul Berger had become a “cottage industry.”\(^2\) Of refutations there is no end; Hans Baade is one of the latest to enter the lists. His recent salvo is entitled “Original Intention”: Raoul Berger’s Fake Antique.\(^3\) Activist criticism is becoming meaner and uglier; one who palms off fakes is a faker, a swindler. Baade’s conclusion, he tells us, is summarized by an article’s title, Misrepresentation in North Carolina;\(^4\) “misrepresentation” is a false statement by one who knows it to be false. Not content with his own assessment, Baade calls to witness a Yale guru, Bruce Ackerman, who, on the basis of my use of an ellipsis (for purpose of compression, followed before long by my publication of the entire quotation) in one of thousands of quotations, charges me with “selective quotation and italicization so egregious that it shakes confidence in [Ber-

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\(^4\) Fake Antique, supra note 3, at 1542 (citing Robert G. Byrd, Misrepresentation in North Carolina, 70 N.C. L. REV. 323 (1992)). Baade’s diatribe recalls Justice Holmes’ remark, “I came to loathe in the Abolitionists . . . the conviction that anyone who did not agree with them was a knave or a fool.” 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1291 (Mark D. Howe ed., 1953).
This ratcheting up of violent rhetoric indicates that my studies have hit home, and it brings scholarly differences of opinion into the gutter. Such worthies need to be reminded that to savage one in his professional reputation is libelous. The fact is, as Eric Foner wrote in a similar case, that my thesis "remains important precisely because a generation of scholars has directed its energies to overturning it."

What manner of man is it that Baade and Ackerman revile? Let Baade tell us for he is "a long-time admirer of this splendid (let it be said) old man now in his ninety-second year of age," whom he describes as a "genuine legal scholar with important contributions," which unhappily do not carry over to "his more recent contributions to American constitutional history." What caused this "splendid old man" to become a

5. Fake Antique, supra note 3, at 1536 (quoting BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 91 (1991)). Not satisfied, Ackerman impugns my "basic ethics as historian." BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 334 n.21 (1991). Judge Richard Posner "agrees with [Robert] Bork that there is a 'new class' . . . of left-liberal academics . . . predominant in American universities," Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1049 (1992) (quoting Richard A. Posner, Bork and Beethoven, 42 STAN. L. REV. 1365, 1381 (1990) (book review)), and Professor Lino A. Graglia places Ackerman in this class. Id. at 1022. Enchanted by Earl Warren's free-wheeling fulfillment of libertarian hopes, academe, on one ground or another, has endeavored to discredit "original intention" to free us from the "dead hand of the past." For citations, see BERGER, supra note 1, at 314 & n.9, 367 & n.21. Paul Brest, a leading activist, pleaded with his fellows "simply to acknowledge that most of our writings are not political theory but advocacy scholarship . . . designed to persuade the Court to adopt our various notions of the public good." Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1109 (1981). My Government by Judiciary stands athwart such advocacy and therefore became the butt of activist obloquy.

In a forthcoming article, Bruce Ackerman on Interpretation: A Critique, 1993 B.Y.U. L. REV., I pay my respects to Ackerman.


The "ablest, most attentive, and most practised men, may deceive themselves, and inferre false [c]onclusions." THOMAS HOBBES, LEVIATHAN *18. Baade too hastily attributes mala fides to an opinion different from his own.


9. Fake Antique, supra note 3, at 1542-43. Sanford Levinson, himself an activist, wrote, "[I]t is naive to pretend that . . . we can so easily shed the view of the Constitution, and its limits, articulated by Berger." Sanford Levinson, Wrong But Legal?, 236 NATION 248, 250 (1983) (reviewing RAOUl BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982)). "Berger's uncomfortable and unfashionable analysis is an important one. It will not do, as some have already done, to brush it aside in a peremptory manner." Henry P. Monaghan, Commentary: The Constitution Goes to Harvard, 13 HARV. C.R.-C.L. L. REV.
faker, to make knowingly false statements?

Baade’s deluge of Latin maxims, Year Books, and nineteenth-century English law beclouds the basic issue: Are American judges authorized to revise the Constitution? All the to-do about canons of interpretation is but a facade for the accomplishment of this goal. Looking to continental practice, Baade chastely states that “permanent legislation [is] continuously applied by custom and by judicial construction” in the course of “customary interpretation.” Even in Coke’s view, Baade remarks, change “could only come . . . through the praxis jurispritorum, the brethren of the coif.” This is the “evolutive process of adjudication,” a “hallmark[ ] of the common-law method.” Citing a Latin maxim, Baade intones “as the purpose changes, so does the law.” In contrast, there is what the continentals label as “petrification theory,” whereunder successive generations must view “permanent” enactments as “petrified forests rather than living trees.” Let Justice Story speak


11. Fake Antique, supra note 3, at 1540. Since continental law in large part follows Roman law, it needs to be noted, as Maitland stated, that “the scheme of Roman jurisprudence is not the scheme into which English law will run without distortion.” FREDERIC W. MAITLAND & SIR FREDERICK POLLOCK, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1895), reprinted in part in 3 PETER GAY & VICTOR G. WEXLER, HISTORIANS AT WORK 322 (1975) [hereinafter HISTORIANS].

12. Fake Antique, supra note 3, at 1541 (citation omitted).

13. Id. at 1524, 1541.

14. Id. at 1541.

15. Id. at 1539. Baade’s accomplished colleague at Texas, Lino Graglia, wrote, “[F]lexible interpretation” is a euphemism for short-circuiting the amendment process. A ‘living Constitution’ is, in a sense, no Constitution at all.” Graglia, supra note 5, at 1030. I heartily recommend Graglia’s article to Baade as a dose of astringent realism.

Blackstone stated, “Though in many other countries everything is left in the breast of the judge to determine, yet with us he is only to declare and pronounce, not to make or new-model the law.” 3 WILLIAM BLACKSTONE, COMMENTARIES *327. Chief Justice Holt earlier declared, “We cannot make a law, we must go according to the law; that must be our role and direction.” The Trial of Sir William Parkyns, How. St. Tr. 63, 72 (1696).

The Massachusetts Constitution of 1780, Art. XXX, drafted by John Adams, provided that the “judicial [department] shall never exercise the legislative . . . power[ ] . . . to the end [that is] may be a government of laws, and not of men.” MASS. CONST. OF 1780, art. XXX, reprinted in 1 BENJAMIN P. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL
for the American view:

[T]he policy of one age may ill suit the wishes or the policy of another. The Constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be . . . not dependent upon the passions of parties of particular times, but the same yesterday, to-day, and forever.16

This "petrification" is compelled by basic considerations.

In the welter of Latin maxims and continental practices, Baade overlooks the fact that the "common law method" proceeds from very different premises than those that underlie the Constitution. Long since, Chief Justice Thomas Cooley stated that "there can be no such steady and imperceptible change in their [constitution's] rules as inheres in the principles of the common law."17 Parliament delegated to the courts the task of fashioning the law of torts, contracts, and such like, subject to its revision or abrogation by Parliament. Those rules, as Cardozo observed, were "the creation of the courts themselves, and . . . [could] be abrogated by [the] courts."18 Statutes, however, could not be set aside or revised by the courts. As Lord Ellesmere stated, "Statutes of Parliament ought to be revers'd by Parliament (only), and not otherwise."19 No delegation was made to our courts to revise the Constitution. To the contrary, the judicial power, said Chief Justice Marshall, "cannot be the assertion of a right to change that instrument."20 And in Marbury v. Madison,21 where Congress had attempted to enlarge the jurisdiction of the Court, he declared that it could not "alter" the Constitution.22

What lay behind this approach? Jefferson Powell, a favorite Baade

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20. JOHN MARSHALL'S DEFENSE OF McCulloch v. Maryland 209 (Gerald Gunther ed., 1969) [hereinafter MARSHALL'S DEFENSE]. In the Convention, John Dickinson said, "[T]he judges must interpret the laws, they ought not to be legislators." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 108 (Max Farrand ed., 1911) [hereinafter RECORDS].
21. 5 U.S. (1 Cranch) 137 (1803).
22. Id. at 177.
authority, observed that the English Puritan's fear of the "judges' imposition of their personal views," of "twisted . . . construction" travelled to America and influenced the Revolutionaries. Early America, Gordon Wood found, had a "profound fear of judicial . . . discretion." There was a gnawing dread of the greedy expansiveness of power. The Constitution, Marshall declared, was designed to "establish certain limits not to be transcended"; hence, the powers "are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose . . . is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" These restraints may not be "transcended" by labelling judicial revision "evolutionary change."

Original intention, if ascertainable, serves as a brake upon illimitable judicial discretion. An apologist for judicial activism, Lawrence Church, noted that original intention would force judges "to adhere to standards beyond their definitional control," that if judges "are not bound by the intent of the founders . . . then there may be no limits at all to their power."


25. Marbury, 5 U.S. (1 Cranch) at 176-77.

26. Kent wrote that without the common law "the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations." 1 James Kent, Commentaries on American Law 373 (William Kent ed., 9th ed. 1858). In The Federalist No. 78, Hamilton said, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ." The Federalist No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Judge Posner summarizes the argument for originalism: it "is implicit in our democratic form of government" because it is "necessary in order to curb judicial discretion, and curbs on judicial discretion are necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people's representatives." Richard A. Posner, Bork and Beethoven, 42 Stan. L. Rev. 1365, 1369 (1990). For a refutation of Posner's critique of this view, see Graglia, supra note 5, at 1024-29.

Richard Kay stated:
To implement real limits on government the judges must have reference to standards that are external to, and prior to, the matter to be decided. This is necessarily historical investigation. The content of those standards are set at their creation. Recourse to "the intention of the framers" in judicial review, therefore, can be understood as indispensable to realizing the idea of government limited by law.


27. W. Lawrence Church, History and the Constitutional Role of Courts, 1990 Wis. L. Rev. 1071, 1087-88. Justice Story praised the "rules . . . for the construction of statutes . . . to
proclaims, is founded on "the consent of the governed"; the terms of that consent are spelled out in the Constitution. "The people," averred Justice James Iredell, one of the ablest Founders, "have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit upon any other . . ." Some maintain that it was the text alone that was adopted. But adoption was touch and go; the text aroused fears, and to allay distrust the Federalists were constrained to explain that the text did not entail the dreaded consequences. When, therefore, the people adopted the Constitution, it was upon the basis of those representations. To repudiate them by shutting off access to them would be a fraud upon the people.

ENGLISH LAW

Baade belabors me with views I never held: Berger "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," which he labels an "unforgivably late concession." The veriest tyro knows that modern English courts have barred resort to legislative history. Certainly I never held the contrary, and had no reason to do so. For my focus was on events that influenced the Framers in 1787; what lay beyond was not germane. Nevertheless Baade, after spending several pages proving the uncontroverted present English practice, triumphantly closes, "So much, then, for the 'Anglo' component of Berger's claimed 'Anglo-American practice'" of 600 years. My reference, as my studies plainly disclose, was to 400 years of early English practice, and to the subsequent 200 years of American usage.

Baade discovered that the English exclusion of legislative history limit the discretion of judges." Joseph Story, Law, Legislation and the Codes (1831), reprinted in James McClellan, Joseph Story and the American Constitution app. III, at 362-63 (1971).

28. The Declaration of Independence para. 2 (U.S. 1776).

29. 2 Griffith J. McRae, Life and Correspondence of James Iredell 146 (New York, D. Appleton & Co. 1857-1858). "If governmental power is legitimate only with the consent of the governed, nonoriginalist judicial review will not be legitimate until the American people make a deliberate, knowing decision that judicial policymaking is preferable to legislative policymaking on at least some issues." Graglia, supra note 5, at 1039.

30. "If the Constitution was ratified under the belief, sedulously propagated . . . that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers?" 2 Story, supra note 16, § 1084, at 33.

31. Fake Antique, supra note 3, at 1529 (emphasis added).

32. Id. at 1526.

33. Baade notes my "asserting that '[f]or 400 years prior to Millar a succession of English judges had declared that "actual intent" is controlling." " Id. at 1529 (alteration in original); see also id. at 1530 (discussing the assertion).
"was first articulated in Millar v. Taylor," a copyright case decided in 1769. This citation illustrates Baade's sloppy way of dealing with the facts. Millar was not a holding by the court; Baade quotes a remark by Justice Willes in one of four separate seriatim opinions, three of which made no mention of Willes' point. Lord Mansfield, Baade notes, "made brief mention to an alteration of the Bill in Committee." The House of Lords reversed the Millar copyright doctrine in Donaldson v. Beckett (1774) without noticing the Willes point.

The heart of Baade's diatribe is his assault on the early English cases I mustered—the "Fake Antiques." Just as a hen by dint of much scratching finds a grain of corn, so Baade came up with an illuminating Year Book citation:

In 1305, in Aumeye's Case, Lord Chief Justice Bereford cut off comment of counsel on the Statute of Westminster II with the words [in Baade's translation] "Don't bother interpreting the statute for us: we know it better than you do, for we made it."

That represents sturdy common sense—who knows better what the maker meant by the words than he who uttered them. So said John Selden, a preeminent seventeenth century scholar: "[A] man's writing has but one true sense; which is that which the Author meant when he writ it." Earlier, Thomas Hobbes and John Locke had written to the same effect. Here then we have a fundamental principle of interpretation

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35. Critical Glosses, supra note 3, at 1008.

36. 1 Eng. Rep. 837 (H.L. 1774). Although cognizant of Millar, appellant conceded, after referring to respondent's reliance on "a pamphlet, said to have been given to the members [of the Parliament who enacted the copyright statute] in 1709," that

[c]ontemporary exposition will, no doubt, deserve attention. To this end, the history of the bill, as it stands upon the Journals of the House of Commons, together with the account of the conference with the Lords, will clearly evince, that the legislature were not employed in securing an antecedent property.

Id. at 843. Baade relies upon an "assumption of counsel" in the United States 65 years removed from the English Millar. See infra text accompanying notes 90-91. The citation to Willes by an English judge, proffered by Baade presumably as the earliest, Fake Antique, supra note 3, at 1525, was in 1887.

37. Fake Antique, supra note 3, at 150 & n.63.

38. TABLE TALK OF JOHN Selden 12-13 (Sir Frederick Pollock ed., 1927) (1696).

39. Hobbes stated that the judge is to be guided by "the final causes, for which the Law was made . . . the knowledge of which final causes is in the Legislator." HOBSES, supra note 6, at *143. Locke wrote,

When a man speaks to another, it is that he may be understood . . . [to] make known
that judges can apply to changing facts in "evolutionary" manner, not in "petrification" style. We must keep in mind, however, that while the terms of the Constitution can be changed only by amendment, they may be applied to changing facts. Concretely, we cannot apply "interstate commerce" to all commerce interior to a State; "interstate commerce" does not change in meaning, however, because goods are transported by railroad rather than oxcart.

Not being a familiar of the Year Books, I began with Chief Justice Frowyck (ca. 1460-1506), who was accounted "the oracle of law" in his own age, and who, also speaking of Westminster II, said:

[I]t was demaunded of the statute makers whether a warrantie with assettz shulde be a barre, & they answered that it shulde. And so, in our dayes, have those that were the penners & devisors of statutes bene the grettest lighte for exposicion of statutes. If they have not gyven anie declaracion of theire myndes, then is to be sene howe the statute hathe bene put in use, & theire authoritye muste persuade us that were mooste neerest the statute.

Mark that if the "penners" had given no "declaracion of theire myndes," the judges would look to those that were "mooste neerest the statute," our own doctrine of respect for contemporaneous constructions. Baade does not question Frowyck's authority; indeed, he says that "[s]imilar instances are related in Professor Plucknett's authoritative study of statutory interpretation." A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 151-52 (Samuel Thorne ed., 1942) (emphasis added) [hereinafter DISCOURSE]. This is at war with Baade's finding that after the mid-fourteenth century, judges no longer looked to actual intent. See Fake Antique, supra note 3, at 1531.

Around 1585 Lord Chancellor Christopher Hatton wrote, "when

his ideas to the hearer. That then which words are the marks of are the ideas of the speaker ... this is certain, their signification, in his use of them, is limited to his ideas, and they can be signs of nothing else.


40. DICTIONARY OF NATIONAL BIOGRAPHY 733 (1950).

41. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 151-52 (Samuel Thorne ed., 1942) (emphasis added) [hereinafter DISCOURSE]. This is at war with Baade's finding that after the mid-fourteenth century, judges no longer looked to actual intent. See Fake Antique, supra note 3, at 1531.

42. Chief Justice Prisot stated in 1454 that "the [j]udges who gave these decisions in ancient times were nearer to the making of the statute than we now are, and had more acquaintance with it." CARELETON K. ALLEN, LAW IN THE MAKING 193 (6th ed. 1958) (quoting Chief Justice Prisot). Our own Justice William Johnson explained that contemporaries of the Constitution "had the best opportunities of informing themselves of the understanding of the framers ... and of the sense put upon it by the people when it was adopted by them." Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 290 (1827) (Johnson, J., concurring). Chief Justice Marshall stated, "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

43. Fake Antique, supra note 3, at 1530.
the intent is proved, that must be followed . . . but whenever there is a departure from the words to the intent that must be well proved that there was such meaning."

Are we to return to the words after the "departure from the words" in search of the intent? Proof of what the words meant must be sought outside the words if we are not to engage in circular reasoning. Hatton also stated that "when the words express not the intent of the Makers, the Statute must be further extended than the bare words." Instead of commenting on these statements Baade relies on a Hatton remark to show that Tudor lawyers rejected "the judicial practice of seeking legislative interpretations from Parliament . . . precisely because the elective (and hence ephemeral) nature of the House of Commons prevented the ascertainment of any genuine legislative intention." Effectuation of the clearly discernible intention of the enacting Parliament is not to be equated with a "legislative interpretation" by a later Parliament. Interpretation of an Act is a judicial function, not that of a subsequent Parliament. Justly, therefore, did Hatton state that "it would not be theirs to interpret."

After quoting Frowyck, Hatton, and Coke, I closed with the conclusion of Professor Samuel Thorne, an eminent specialist in the field, that "[a]ctual intent . . . is controlling from Hengham's day to that of Lord Nottingham (1678)." Baade ignores Thorne's statement and quotes instead an article Thorne wrote six years earlier: "It is only after the middle of the fourteenth century, when judges find themselves no longer able to draw either upon the actual intention of the legislator . . . that they are forced to construct a body of rules of statutory interpretation." One might expect Baade to account for the discrepancy, the more because he makes absurdly extravagant demands on me. So, in discussing an une-

44. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES AND ACTS OF PARLIAMENT AND EXPOSITION THEREOF 14-15 (1677).

45. In his Institutes of Natural Law, published in 1754-1756, a work known to the Founders, Thomas Rutherforth said, a "rational interpretation" is "to be called . . . intention from something else beside his words." 2 THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 316 (Cambridge, J. Bentham 1756).

46. HATTON, supra note 44, at 28.

47. FAKE ANTIQUE, supra note 3, at 1531-32.

48. Id. at 1532 n.72 (translating HATTON, supra note 44, at 29). Baade's statement that judges had abandoned the "practice of seeking legislative interpretations from Parliament," id. at 1531, is misleading. That is not what Frowyck described as asking the makers of a statute what they meant. I would not urge that a later Parliament should interpret the Act of an earlier one. Originalists seek the maker's intention.

49. DISCOURSE, supra note 41, at 60 n.126 (emphasis added); see RAOUl BERGER, FEDERALISM: THE FOUNDERS' DESIGN 193-97 (1987) [hereinafter BERGER, FEDERALISM] (collecting the cases on legislative intent during this period).

50. FAKE ANTIQUE, supra note 3, at 1531 (quoting Samuel E. Thorne, The Equity of a Statute and Heydon's Case, 31 NW. U. L. REV. 202, 207 (1936)).
quivocal reference to "original intent" by Coke in the *Magdalen College Case*,\(^1\) he stresses that Coke published "eleven volumes of Reports and four books of Institutes," which I should have attempted "to quantify and to evaluate."\(^2\) Mark that Baade does not charge me with misquoting or distorting the quotation; instead, he insists that I should have gone behind Coke's unequivocal language and measured it by the entire body of his works. This would place a paralyzing burden on scholarship; one would have to comb all fifteen volumes before daring to quote a clear statement, a peculiar requirement from a devotee of the "plain meaning" rule as a "bar" to legislative history.\(^3\) Baade demands more from me than did the Bacon, Viner, and Comyns Abridgments of Chief Justice Hobart and Chief Justice Holt. For they cited Coke's statement in *Bonham's Case* that an Act of Parliament contrary to "common right and reason" would be adjudged void\(^4\) without even considering Coke's subsequent statement in his *Institutes of the Law of England* that Parliament was "so transcendent and absolute, [that] it cannot be confined either for

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\(^{1}\) 11 Co. Rep. 66b, 77 Eng. Rep. 1235 (K.B. 1615). For the Coke quotation, see infra text accompanying note 58. The case is discussed infra notes 57-61 and accompanying text.

\(^{2}\)  *Fake Antique*, supra note 3, at 1536. Baade does not leave the matter there. To demonstrate my "penchant for selectivity . . . 'shoddy work,'" he turns to my citation of Matthew Bacon, who refers to Plowden:

> Even a cursory study of Plowden's Reports would have led to an index with eighty-one keynotes [concerning statutes], most of which relate to statutory construction. . . . The "intent of the makers" . . . figures in only three entries, and at least the same number encapsulate rules for the determination of the intent of the statute [i.e., of the makers]. The remaining entries recite an assortment of canons of statutory construction . . . .

*Id.* at 1537. Thereby he would exercise my reliance on "one passage"—albeit it was accompanied by statements by others—to "establish a 'practice' of 'originalism.'" *Id.*

Baade employs a similar calculus to discredit my quotation from Bacon's *Abridgment*. Bacon's . . . topic of "Statute" . . . is divided into eleven headings. The ninth of these . . . is divided into no fewer than ten subheadings. . . . The passage chosen by Berger is located in the middle of [the fifth] subsection, bypassing a passage from Plowden indicating the sources from which the intention of the makers of a statute is to be collected.

*Id.* at 1538 (citing 6 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW *364-400*).

\(^{3}\) *Id.* at 1527-29. Baade notes that the "Supreme Court discarded the plain meaning rule in 1940." *Id.* at 1529.

His petty pedantry is exemplified by the lecture he reads me on my statement that Bacon's Abridgment "epitomized" the law. *Id.* at 1537-38. Now an "epitome" is a "compact summary," and to "abridge" is to "epitomize." The fact that Bacon employed terse extracts without quotation marks does not make it less a summary. Justice Story stated that "Bacon's Abridgment title, Statute I. contains an excellent summary of the rules for construing statutes." 1 STORY, supra note 16, § 400, at 305 n.2.

causes or persons within any bounds."\textsuperscript{55} Baade exempts himself from such demands for he made no attempt to evaluate the two apparently incompatible Thorne statements, notwithstanding it required no evaluation of fifteen volumes. And though so tender about my "[d]istressingly . . . ‘selective quotations,’”\textsuperscript{56} he chose to ignore the later Thorne quotation that deflated his argument.

For the moment I defer consideration of Thorne’s statements and pass to the crown jewel of Baade’s analysis, the \textit{Magdalen College Case},\textsuperscript{57} on which he lavishes almost four of his nineteen pages. There Coke stated, "[I]n Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed."\textsuperscript{58} Baade downgrades this clear statement. First he notes that "[n]o fewer than six reasons were given for the resolution of the first issue of statutory construction."\textsuperscript{59} In "connection with the fifth of these reasonings,” the “court is reported [by Coke himself] to have” uttered the above quotation in volume 11 of his reports.\textsuperscript{60} To deprive it of force, Baade states that it "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.”\textsuperscript{61} What the Master “intended” hardly diminishes the “makers’” original intention. Baade would attribute to Coke a splendid non sequitur. Coke then went on to the “mischief rule” of \textit{Heydon’s Case}, the “mischief” being the “squadering of the assets of charitable corporations.”\textsuperscript{62}

"How in the world,” asks Baade, “can it be maintained” that the fifth reason “lays down a canon of construction overshadowing all others?”\textsuperscript{63} Like many another judge, Coke was not satisfied to rest his case on any one ground; citation of one does not vitiate any other. For

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\textsuperscript{55} \textsuperscript{4} \textit{Edward Coke, The Institutes of the Law of England} *36 (1634).
\textsuperscript{56} \textit{Fake Antique, supra} note 3, at 1536. Few are more “selective” than Baade. Thus he remarks that “a well-known jurist has called Berger’s Fourteenth Amendment history ‘wrong.’” \textit{Id.} at 1542 n.156 (quoting John G. Gibbons, \textit{Intentionalism, History and Legitimacy}, 140 U. Pa. L. Rev. 613, 632 (1991)). Scholarly impartiality called upon Baade to note that eminent academicians took a contrary view, \textit{see supra} note 9, and that I had plucked Gibbons’ scanty “scholarly” feathers in my response, “Government by Judiciary”: \textit{Judge Gibbons Argument Ad Hominem}, 59 B.U. L. Rev. 783 (1979).
\textsuperscript{59} \textit{Id.} at 1534.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 1535.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 1535-36.
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Baade, however, my Coke citation exemplifies “selective quotation.” Because of the “plentitude of maxims on statutory interpretation” employed by Coke, Baade is “unable to consider the unquantified and unevaluated selection of one of these, and its elevation to an ‘ism’ overshadowing all others, as responsible scholarship.” For Chief Justice Marshall, however, “original intention” did “overshadow all others”; he said that he could cite from the common law “the most complete evidence that the intention is the most sacred rule of interpretation.”

In truth, *Magdalen* (1615) is not a solitary expression by Coke. In *Edrich's Case* (1603), he had said that “it would be dangerous . . . to make a construction in any case against the express words, when the meaning of the makers doth not appear to the contrary.” He had a striking precedent before him—and no man was more respectful of his predecessors—in *Throckmerton v. Tracy* (1555), a case reported by Plowden with whom Baade thwacks me lustily. To begin with the argument of Serjeant Dyer, before long to be Chief Justice of Common Pleas:

to cavil about the propriety of words, when the intent of the parties appears, is not commendable, nor has it been practiced by the Judges in former times, but on the contrary they have applied the words to fulfill the intent, rather than have destroyed the intent by reason of the insufficiency of the words.

Dyer carried the day. Justice Staunford stated, “[T]he words shall be construed according to the intent of the parties and not otherwise.”

Judges “ought to avoid” pursuing the words “and rather pursue the intent.” Justice Saunders said that “to cavil about the words in subver-

64. *Id.* at 1536.

65. *Id.* at 1537. Horace Gray, no mean historian, later to be a Justice of the Supreme Court, entered into no such abstruse calculations in explaining colonial reliance on Coke's statement in *Bonham's Case* for judicial review of Parliament's statutes. After referring to statements by Coke, Hobart, and Holt, he stated:

The law was laid down in the same way, on the authority of the above cases, in Bacon's Abridgment, . . . in Viner's Abridgment, . . . from which Otis quoted it; and in Comyn's Digest . . . . So that at the time of Otis's agreement his position appeared to be supported by some of the highest authorities in the English law.

66. MARSHALL'S DEFENSE, *supra* note 20, at 167; see also 1 WILSON, *supra* note 15, at 75 (describing the “governing maxim” of statutory interpretation as the discovery of “the meaning of those, who made it”).


70. *Id.* at 247.

71. *Id.* at 248.
sion of the plain intent” was “meer injury and injustice.” Coke himself had said in *Matthew Manning’s Case* (1586) that “in a will the intent and meaning of the devisor is to be observed, and the law will make construction of the words to satisfy his intent.” It is wrong to charge one who relied on such pronouncements with palming off “Fake Antiques.”

Let us now consider Thorne’s statement that it “is only after the middle of the fourteenth century, when judges find themselves no longer able to draw . . . upon the actual intention of the legislators . . . that they are forced to construct a body of rules of statutory interpretation.” How is this reconcilable with Frowyck’s reference toward the end of the fifteenth century to the established judicial deference to the makers’ “declaracion of their myndes,” and with Thorne’s later statement that “actual intent” is controlling until 1678? Deprived of access to those “myndes,” the judges resorted to what Baade describes as “ascertainment of presumed legislative intent.” Let Plowden explain:

Judges must, once the words of the statute are to be extended in light of the legislative will, approach that as closely as may be by acting as the lawmaker would have acted had the case presented for decision been brought before him rather than the court.

Here is striking evidence of the extent to which “legislative intention” continued to haunt the common law, leading the courts to engage in a game of “let’s pretend.” Would a common-law judge have rejected evidence of actual intent, once it became available, because his predecessors had resorted to “presumed” intent in its absence? Why should we?

Little less curious is Baade’s reliance on Plowden. He taxes me with “bypassing,” “omitting” a Plowden passage: 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 an-

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72. Id. at 249.

73. 77 Eng. Rep. 618, 620-21 (K.B. 1586). This statement is followed by: “And always the intention of the devisor expressed in his will is the best expositor . . . of his words.” Id. If this is read to turn back to the words, it negates the “construction of the words to satisfy his intent.” Id.

74. See supra note 50 and accompanying text.

75. So, too, Dyer had referred to “when the intent . . . appears,” and to the fact that “[i]judges in former times . . . have applied the words to fulfill the intent.” Throckmerton v. Tracy, 75 Eng. Rep. 222, 246 (C.P. 1555); see supra note 69 and accompanying text.

76. *Fake Antique*, supra note 3, at 1531. Samuel Thorne stated, “As Acts of Parliament take on the attributes of modern legislation, the intention of the legislator must grow in importance and take the place of equity, conjectured purpose, or reason that had controlled earlier.” DISCOURSE, supra note 41, at 59 (emphasis added).

77. DISCOURSE, supra note 41, at 64.
other, and sometimes by foreign circumstances." Baade himself "by-passed" the immediately following Plowden sentence: "So that they have ever been guided by the intention of the makers, which they have always taken according to the necessity of the matter and according to that which is consonant with reason and good discretion." Consonant with reason, "foreign circumstances" need not be forever frozen in time; they need not be read as an interpretive strait-jacket. Indeed, Baade indignantly rejects the notion that Coke's "original intent & meaning" should be "petrif[ied]," should bind "successive generations" "forever." Baade, who sings the praises of common-law judges for "evolving" the common law, is poorly positioned to object to judicial application of a basic principle to new facts. We need to remember, as Hamilton put it, that "[t]he rules of legal interpretation are rules of common sense." Why should we bar records of legislative intention now accessible because in earlier times they were unavailable? Justice Holmes counselled us to the contrary:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. . . . [I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it . . . .

The rationale of associated rules also speaks against barring a clear record of the legislative aim. Consider the weight given to "contemporaneous constructions." Chief Justice Frowyck stated that if the makers "have not gyven anie declaracion of theire myndes then . . . their authoritye must persuade us that were mooste neerest the statute." This bespeaks a preference for the makers' own "declaration of their myndes." It is unreasonable to defer to a version of "theire myndes" derived at second hand while rejecting the makers' own explanation of their purpose. The same result is dictated by a related rule, which is associated with *Heydon's Case* (1586): the judge must seek the mischief

78. *Fake Antique*, supra note 3, at 1538 & n.122.
79. *Discourse*, supra note 41, at 62 (emphasis added). Plowden also stated that "[t]he legislators alone know what they had intended, and therefore the 'life of the statute rests in their minds.'" *Id.* at 63.
81. *Id.* at 1541.
82. *The Federalist* No. 83, supra note 26, at 559 (Alexander Hamilton). "If a legal rule fails to satisfy the untechnical requirements of ordinary common sense the premises behind the rule had better be carefully examined." *Gavin v. Hudson & M. R.R.*, 185 F.2d 104, 105-06 (3d Cir. 1950).
84. *Discourse*, supra note 41, at 151-52; see supra notes 41-42 and accompanying text.
the framers were seeking to alleviate. That mischief was collected from extrinsic facts. Why are such data entitled to more respect than the makers' own explanation of what they sought to accomplish?

**AMERICAN LAW**

The Founders had before them Thomas Rutherforth's *Institutes of Natural Law*, wherein he wrote, "The end, which interpretation aims at, is to find out what was the intention of the writer; to clear up the meaning of his words." On the heels of the Convention, Justice James Wilson, a leading participant, said, "The first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it." Initially Baade based his assertion that the contrary "rule of *Millar v. Taylor* [Willes solitary statement] did prevail here in the formative era of American law," first, on an assumption of counsel in 1834 that *Millar* was known to the Framers, a position he no longer presses. Second, he asserted that "[t]his assumption is corroborated by James Madison's statement, in *Federalist* No. 43, that the copyright of authors 'has been solemnly adjudged in Great Britain, to be a right at common law.'" If that "copyright" reference was to *Millar*, it does not follow that Madison rejected the prevailing original intention rule. To the contrary, he cited to that intention in the 1791 Bank debate. Baade no longer repeats Madison's "corroboration."

His latest treatment of the early American materials marks him as a veritable paragon of "selectivity." He opens with Hamilton's statement in the Bank debate (1791) that "[w]hatever may have been the intention of the framers . . . , that intention is to be sought for in the instrument itself . . . ." According to Baade, that rule was "first articulated" in *Millar v. Taylor* (1769); yet, Hamilton, a practiced lawyer, doubtless eager to cite some supporting authority, did not even notice *Millar*. Hamilton was driven to naked assertion because, as he well knew, the

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85. See *Fake Antique*, supra note 3, at 1535.
86. ROBERT M. COVER, JUSTICE ACCUSED 12 (1975) ("Rutherforth's Institutes of Natural Law [was] a work well-known to the colonists.").
87. 2 RUTHERFORTH, supra note 45, at 309.
88. 1 WILSON, supra note 15, at 75.
89. *Fake Antique*, supra note 3, at 1530.
91. *Id.*
92. *Id.* at 1021. For some examples of shifts in response to political pressures by Madison, only subsequently to reaffirm his attachment to original intention, see Berger, *Response to Hans Baade*, supra note 3, at 1542.
93. *Fake Antique*, supra note 3, at 1526.
Convention had rejected a national Bank corporation.94 Jefferson, who opposed the Bank, cited this history, as did Madison.95 Although these citations were before Baade, he chose to ignore them. Who is "selective"?96

Next Baade cites a statement by Justice Story on circuit in 1843,97 ignoring the Supreme Court's statement to the contrary in Rhode Island v. Massachusetts (1838):

[Construction] must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification . . . and to which this Court has always resorted in construing the Constitution.98

True, Aldridge v. Williams (1845) rejected statements "by individual members of Congress"99—which does not preclude, for example, votes by either House rejecting a proposed change, or a committee report.100 "Remarkably enough," Baade states, "[the Aldridge] view prevailed" beyond 1897.101 It is indeed "remarkable," for Baade himself noted that in Carpenter v. Pennsylvania (1855),102 the Court relied on debates of the Convention.103

That such occasion might arise had been anticipated by James Wilson, second only to Madison as an architect of the Constitution. He urged that the Journal of the Convention be preserved because "as false suggestions may be propagated it should not be made impossible to con-

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94. The evidence is collected in BERGER, FEDERALISM, supra note 49, at 108-10. Justice Harlan observed that "[t]heir subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight." Oregon v. Mitchell, 400 U.S. 112, 195 (1970) (Harlan, J., concurring in part and dissenting in part).

95. Jefferson answered in the Bank debate: "It is known that the very power now proposed as a means, was rejected as an end by the Convention which formed the Constitution." Thomas Jefferson, Jefferson's Opinion on the Constitutionality of the Bank (Feb. 15, 1791), in DOCUMENTS OF AMERICAN HISTORY 158, 160 (Henry S. Commager ed., 7th ed. 1963) (emphasis added). In the First Congress, Madison stated that he "well recollected that a power to grant charters of incorporation had been proposed in the General Convention and rejected." 3 RECORDS, supra note 20, at 362. Powell recognizes that the Republican victors viewed the "revolution of 1800" as the people's endorsement of their "search for the Constitution's underlying and 'original intent.'" Powell, supra note 23, at 927.

96. See supra note 56.

97. Fake Antique, supra note 3, at 1527.


99. 44 U.S. (3 How.) 9, 24 (1845) (emphasis added).

100. See Fake Antique, supra note 3, at 1527-28.

101. Id. at 1527.

102. 58 U.S. (17 How.) 456, 463 (1854).

In other words, the Journal should be available to rebut misinterpretation of the Constitution. Not surprisingly, Washington, who had served as President of the Convention, referred to the Journal in the 1791 Jay Treaty debate.

If the Court’s last word in Carpenter v. Pennsylvania (1855) represented the law, resort to the original intention was established at the 1866 framing of the Fourteenth Amendment. Since the great bulk of constitutional litigation arises under that Amendment, we may put to one side medieval maxims and continental practices and look instead to the views of the Reconstruction Congress. Senator Charles Sumner, a leader in the struggle for the broadest protection of the freedmen, said that if the meaning of the Constitution “in any place is open to doubt, or if words are used which seem to have no fixed significance, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question.” This was the approach of the confreres who sat with him in the thirty-ninth Congress. In 1871, John Farnsworth said of the Amendment, “Let us see what was understood to be its meaning at the time of its adoption by Congress . . . .” James Garfield, later to be the martyred president, rejected an interpretation that went “far beyond the intent and meaning of those who framed and those who adopted the Constitution.”

Such sentiments found powerful expression in 1872 by a unanimous Senate Judiciary Committee Report that passed on the Fourteenth Amendment and was signed by Senators who had voted for the Thirteenth, Fourteenth, and Fifteenth Amendments in Congress:

In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed it and the people who adopted it.

. . . . A construction which should give the phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution in any other particular. This is the rule of interpretation adopted by all commenta-

104. 2 Records, supra note 20, at 648.
106. “By the outbreak of the Civil War, intentionalism in the modern sense reigned supreme . . . .” Powell, supra note 23, at 947.
109. Id. at 528.
tors on the Constitution, and in all judicial expositions of that instrument . . . .\textsuperscript{110}

What price "petrification"?

CONCLUSION

Despite Baade's scurrility, I am indebted to him for impelling me to look behind the words of the early English sources upon which I relied. Early English law, I found, is like a stream that frequently changes course.\textsuperscript{111} For hundreds of years, however, it was haunted by a search for the makers' intention, for the reason stated by Lord Bereford in 1305: he well knew what the statute meant for he had made it. Whatever the changing scene, the judges, as Plowden observed, "have ever been guided by the intention of the makers,"\textsuperscript{112} for the "legislators alone know what they intended."\textsuperscript{113} Cut off for a time from knowledge of that intention they resorted to divers stratagems, e.g., "presumed intention" founded on imaginary conversations with ghostly makers,\textsuperscript{114} or, not content with the "plain meaning" of the words, they sought to divine the makers' intention by peering into them as if they were a crystal ball. When we have access to the makers' own contemporary explanation of what they meant by the words, it would be slavery to circumstances that have disappeared to turn away from that explanation.\textsuperscript{115} That would resemble the conduct of a herd of sheep, the first of whom jumps over an obstacle, prompting those that follow to continue to jump after it has been removed. "When aid to construction of the meaning of [statutory] words . . . ," said the Supreme Court, "is available, there certainly can be no 'rule of law'


\textsuperscript{111} Maitland wrote, "Times of inventive liberality alternated with times of cautious and captious conservatism." 3 HISTORIANS, supra note 11, at 313.

\textsuperscript{112} DISCOURSE, supra note 41, at 62; see supra text accompanying note 77.

\textsuperscript{113} DISCOURSE, supra note 41, at 63. "[I]nterpreting a document means to attempt to discern the intent of the author; there is no other 'interpretive methodology' properly so called." Graglia, supra note 5, at 1024.

\textsuperscript{114} See Fake Antique, supra note 3, at 1532-33 (quoting Plowden). Paraphrased by Thorne, Plowden considered that "[j]udges must, since the words of statutes are to be extended in the light of the legislative will, approach that as closely as may be by acting as the lawmaker would have acted had the case been presented for decision before him rather than the courts." DISCOURSE, supra note 41, at 64. Suppose that instead of summoning a ghost, Plowden had obtained authentic records of the law makers' intention; would he have insisted that imaginary spectral conversations were better?

\textsuperscript{115} Note the steady expansion of evidence of intention as circumstances changed. See supra note 76. Justice Holmes observed that "the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual." OLIVER W. HOLMES, The Theory of Legal Interpretation, in COLLECTED LEGAL PAPERS 203, 206 (1920).
which forbids its use . . . ."\textsuperscript{116}

We are not, however, to assimilate the application to changing facts of a basic principle—e.g., the maker best knows what he means—to judicial change of the principle itself. The Constitution was designed to serve countless generations; it spelled out the consent of the governed. To repudiate representations made to secure adoption would be a fraud upon the people.\textsuperscript{117} Should the people desire to change its principles, Article V provides the exclusive machinery for amendment.\textsuperscript{118} It is not for the judges to usurp that function. \textit{That} is the issue.

\textsuperscript{116} United States v. American Trucking Ass'ns, 310 U.S. 534, 534-44 (1940).

\textsuperscript{117} See supra note 30. "Over the past four decades . . . [a] majority of the Justices substituted their policy preferences for those that prevailed in the ordinary political process on a wide array of basic policy social issues. The debate is over the propriety of that role." Graglia, supra note 5, at 1048.

\textsuperscript{118} Hamilton stated in \textit{The Federalist} No. 78:

Until the people have, by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.

\textit{The Federalist} No. 78, supra note 26, at 527-28 (Alexander Hamilton).