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Peter Gabel

New College of California

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Founding Father Knows Best: A Response to Tushnet*

PETER GABEL**

MARK Tushnet's critique of Ed Meese's "jurisprudence of original intention" is an example of the kind of work being done by a number of scholars in the critical legal studies movement, an influential left wing force in contemporary American legal scholarship. Most liberals (including not only Justice Brennan but also well-known legal theorists like Ronald Dworkin and Owen Fiss) think that Meese's call for a return to the intent of the framers in interpreting the Constitution is "wrong." They believe that the correct method of constitutional interpretation requires that the meaning of the Constitution's language be drawn from a contemporary understanding of the nation's political morality as that understanding has developed over two hundred years, and that such a method tends (correctly in their view) to favor the enlightened expansion of altruistic and egalitarian ideals expressed in liberal case-results. Meese, they argue, is just trying to disguise his desire for more conservative outcomes on such issues as abortion, affirmative action, and school prayer, by advocating an interpretive theory that is at best outmoded and at worst hokey and disingenuous.

Tushnet's point is that the liberals' position is just as wrong as Meese's because there is no such thing as a correct method of interpretation that can properly determine the outcomes of cases. He shows that the intent of the framers' view can be used to legitimize not only conservative results, but liberal results as well, and that the liberal notion of principled adjudication informed by an enlightened, modern ideal of justice—although it has been used to justify liberal outcomes—could, with a little conceptual finesse, be invoked in the service of conservative ends. The thrust of Tushnet's argument, in other words, is that it is futile to seek salvation from having to make difficult ethical or political judgments by calling upon some higher interpretive scheme that could "correctly"

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** President of New College of California, San Francisco, California.

tell us what to do because such schemes are inherently indeterminate and are themselves open to multiple interpretations. The critique of Meese is, therefore, not that his position is wrong but that it is incoherent, internally contradictory, and essentially meaningless, just as is its liberal counterpart.

Other critical legal scholars have developed critiques similar to Tushnet's in virtually every important area of American law, arguing, for example, that there is no such thing as a distinctively "legal" way of deciding when workers have the right to strike under the National Labor Relations Act, or whether industries that dump toxic wastes into rivers and lakes are creating a "nuisance" giving rise to actions for money damages under tort law. Since the law itself is always indeterminate in its application with a stock range of arguments on all sides, Critical Legal Studies writers assert that the resolution of these issues always requires frank political choices, that a legal argument is simply an opinion about right and wrong dressed up in an elite, technical discourse. The radical aim of this work is not simply to show that all legal decisions are actually political decisions, but to undermine the legitimacy of "legal reasoning" itself as a powerful symbol of cultural authority, a symbol that tends—along with other such fetishized symbols as flags, black robes, and the elevated judicial "bench"—to reinforce people's passivity before imposing cultural institutions like the Supreme Court, which is imagined to be the repository of a wisdom inaccessible to the average person and the oracle of American political truth. In alliance with the deconstructionist work of Jacques Derrida and the related work of Michel Foucault on the multiple ways that "official" forms of knowledge tend to crush people's self-confidence and sense of self-activity, this strand of critical legal scholarship means to undermine the notion that the law embodies a special, rational method for resolving social problems, and to empower people to think and feel for themselves. If we are to decide important social questions by reference to a constitution, then only a democracy of interpretations emerging from genuine political debate can give the document and its words an authentically democratic content.

If we return to the question of the meaning of Meese's current efforts, however, we can see that there is a limitation to the form of criticism that Tushnet puts forward, and, in fact, to the entire deconstructionist enterprise. This limitation is that a critique demonstrating the indeterminacy and essential irrelevance of interpretive method in relation to judicial results cannot account for the *meaning* of the debate over method itself. Tushnet says that Meese's haranguing

about the intent of the framers seems "particularly pointless" since Meese knows the results his judicial allies will reach no matter what theory they use; but to Meese there seems to be something very important at stake, something that goes beyond naked results and focuses on the world view to which he wants those conservative results to be linked. It would not be enough, in Meese's eyes, for the Court to simply overrule its prior liberal rulings on, say, abortion (which it could easily do without a jurisprudential revolution); he wants an anti-abortion ruling to be based on a belief in a particular vision of how we are "constituted" or united or brought together through the Constitution and through our relationship to the Founding Fathers who framed it. Why?

The answer to this question seems to me to require a critical method that goes beyond the detached, analytical skepticism of deconstruction, to one that seeks to grasp and unveil the social meaning of Meese's world view itself as an aspect of the New Right's effort to fashion a lasting ideological hegemony. Seen in this light, the question of whether the "jurisprudence of original intention" is somehow rationally required for judges to reach conservative results is really quite irrelevant. The desire for a shift in judicial philosophy must, rather, be understood as an attempt to reshape prevailing cultural images about how "we" are constituted as a political-legal group, a reshaping that conservatives like Meese feel is needed if they are to retain their momentum during the current phase of their ascendancy, and consolidate their hold on popular consciousness. For however strong the New Right's cultural dominance may seem today, we should not forget that the vitality of its evocative appeal has yet to channel itself (at least at the level of "mass," or national culture) into legitimated institutional forms that might enable this dominance to reproduce itself without reliance on Reagan himself or on an endless series of contrived emotional highs. To achieve this degree of anchorage in mass consciousness, the Right must generate and sell a new mythic, historical narrative about the origins and nature of "our society" that can then serve as what might be called the psycho-political foundation for a passively accepted, conservative legal order. This kind of transformation in the national belief-system is a part of what is needed to convert the passion of the Reagan revolution into a set of habitually-obeyed conventional norms.

The jurisprudence of original intention is intended to accomplish this transformation by seizing upon certain emotionally charged fragments of New Right ideology and integrating them into the conventional imaginary account of the source of our connection to one another as

political beings. The imaginary account is roughly what everyone is taught in eighth grade civics class—that there was a group of “Founding Fathers,” that they came together in certain sanctified buildings, that they created this great document, and that “We, the People” were born as a result. I describe this account as imaginary not because the historical events on which the account is based did not occur—obviously, they did. The account is imaginary because it is communicated in a way that transforms these actual historical events into a symbolic fantasy that has a mass-psychological significance independent of the events themselves. The people who wrote the Constitution are presented as exceptionally wise and virtuous; the document they produced is treated with great awe and reverence; and the feeling conveyed is one of belonging and oneness, as if by virtue of their words we were rescued from alienation and homelessness and brought into connection and harmony. The content of this fantasy, in other words, is that “We Americans” are magically bound together in a great democratic group, and that we owe this bond to the will of idealized father-figures who transfigured us by the frame they provided for our existence. And the mass psychological significance of this fantasy is that it generates in our consciousness an image of social connection that compensates for the feeling of disconnection and loss that suffuses our actual experience of each other in everyday life—at work, on the street, and even in our most intimate relationships—while allowing us also to deny that this lack of connection exists.

It is at this symbolic level that Meese’s call for a return to the intent of the Founding Fathers must be understood, but understanding it requires some sense of how the fantasy functions psychodynamically in relation to the sense of alienation and loss that underlies and gives rise to it. Here we need to draw a contrast between a real sense of “we” and the false sense of “we” that acts as a substitute for it. A real sense of “we” emerges from the realization of a desire, immanent within each of us as social beings, for mutual recognition and confirmation; it is a feeling-bond that is grounded in the actual connection of those who generate it, and as a result, it has no need of a ground or source outside of itself in order to exist. The false sense of “we” is quite the opposite: it emerges in social contexts where the feeling-bond between people is for various reasons blocked, and it can only come into existence as a relation of withdrawn selves to a fantasized common image of connection whose fantasy-based nature is collectively denied. Since the actual relation underlying the false sense of “we” is one of mutual isolation and withdrawal, and since those who create it are therefore incapable of affirming its pseudo-

reality on the basis of an underlying experience of mutual reciprocity, this false sense of "we" must always be supported by the projection of an "outside authority" invested with the power to constitute it. It is here that we find the function of the Founding Fathers in the fantasy of our own "constitution": since we know by virtue of our own alienation that we are unconstituted and feel incapable of generating a real "we" based on true reciprocity, we give ourselves over to the fantasy of being "united as a people" and invent the Founding Fathers to provide the authorship for this unity that we cannot provide ourselves. We then invest these imaginary figures with a "belief" that makes them seem as if they really exist, so that we can deny that our sense of national connection is a fantasy and sustain our own belief that we are a genuinely constituted, real group. Since the continuation of our false sense of "we-ness" depends upon the continuation of our belief in their authority, this belief becomes "reified," or collectively insisted upon as being true on pain of excommunication from the false group. Any sign of disbelief in the authority of the projected source upon whom the group's false sense of "we-ness" depends threatens to revive the underlying experience of loss, isolation and pain that the group's common image of connection is created to deny.

Meese is putting his ideas forward during the rise of a movement whose aim is to restore people's loyalty to the false sense of "we-ness" embedded in the patriotic imagery of Americanism, a loyalty eroded by the social dynamics of the last twenty years. This erosion has in part been due to the success of the movements of the 60's, which were able to generate a powerful "movement" of actual, embodied community, multiple hints of real social connection spinning more or less out of control on a world-wide level. And it was eroded even further by the failure of these movements, leaving people feeling that the Vietnam War, for example, had been a "defeat for America" rather than a victory for a movement of humanity that no longer existed. The rise of the New Right was in part made possible, in other words, by the fact that the countercultural energy of these movements, which went far toward stimulating people's hopes for, and actual experience of, social transformation in the direction of creating deep and genuine connection between people, was defeated—and defeated in a way that led people to feel, however unconsciously, that they had been seduced and betrayed. Whatever the confluence of pre-existing cultural conditions that make them possible, social movements are founded fundamentally on an outbreak of desire that resonates throughout the social body and that cannot but revive, precisely because

of its vitality, the memories of loss and disappointment associated with this desire that stems from our earliest childhood experiences. This is why people like Meese so fiercely resist the development of these movements, and it is also why such movements tend to defeat themselves by losing confidence in themselves from within. While the collapse of the movements of the 60's did not lead directly to the consciousness of the 80's in some simple, causal sense, the heightened vulnerability produced by these movements has played an important role in people drawing themselves back from the risks associated with the revelation of desire—a drawing back that in some cases is manifested in a commitment to a kind of hopelessness or spiritual deadness, and in other cases, especially in those who struggled to resist the utopian aspirations of the 60's, is manifested in a desire for revenge against these aspirations and ultimately against the desire for deep connection itself.

Taken as a whole, this historical experience has generated a social reaction in the direction of reclaiming the paranoiac and defensive social armor that is meant to keep us from feeling even the possibility of another revival of our wounds. At a surface level, this reaction has taken the form of a middle-class populist revolt against liberal entitlement programs, but at the deep psychological level, the revolt is against the "permissiveness" that allowed too much vital and spontaneous social connection to be released in social relations, generating a renewed need to reconstitute the old authorities that could provide the vehicle for reconstituting a "false-we" requiring obedience to proper boundaries.

Understood against this background, Meese's call for a return to the intent of the framers should be seen as an attempt to reconstitute these old authorities by revitalizing their mythological appeal. He does this first by blaming our current sense of collective isolation, of not feeling part of something anymore, on the actions of judges like Brennan who have substituted their own interpretation of the Constitution for that of the Founding Fathers. This symbolically transposes the real historical experience I described in the last paragraph into an imaginary narrative in which "we" are imagined to exist by virtue of how authority figures interpret the Constitution and in which "our" present non-existence or sense of disconnection is imagined to have been caused by the failures of these authority figures. Such a transposition or imaginary re-narration has the effect of acknowledging people's real experience of desire and loss while denying the real source of this experience, placing the blame instead on the keepers of the false-we. At the same time, it acknowledges that we have tried to generate a real movement toward each other on the

basis of our own ontological power and capacity for love, but it “transfers” this generative movement to the actions of those bad judges who have given in to their impulse to “substitute their own interpretation” for that of the Founding Fathers, thus transforming our own desire and actual effort to create a real-we into a transgression by the priests we select from among ourselves to maintain the boundaries of the false-we, against the higher authority of the “outside source” whose will creates the false-we. The imaginary schema that Meese is offering has mass-psychological appeal, in other words, because it allows people to recognize their own historical experience of, and continuing need for, true social connection, but in a symbolic form which disguises this need, characterizes it as giving rise to the very impulses which must be suppressed if we are to maintain our “national unity,” and channels the energy generated by this need toward the re-creation of an imaginary pseudo-community based on a revitalized shared belief in authority. The political message is that passivity and dependency on the authority of the framers is required for continued membership in the false group, and that the false group is the only group there is.

At the same time that it transposes our real history into a symbolic history that acts as a defense against our awareness of real historical meaning, Meese’s jurisprudence revitalizes the erotic appeal of the image of the Founding Fathers by infusing our imaginary relationship to them with a new sado-masochistic fervor. I use the phrase “sado-masochistic” here in the same sense that I have used the word “desire” throughout this essay, to refer to an organization and movement of social energy that is not strictly sexual in the Freudian sense but is nonetheless erotic in that it designates the “pull” that impels us toward each other as social beings. Meese’s imagery is sado-masochistic because it seeks to redirect our desire away from the immediacy of real relations (in which we might form a real-we by developing our own “interpretation” of our constitution) and toward the safe arena of controlled, internalized images of connection based upon our carrying out the framers’ will in its most essential and undiluted form. The symbolic message is that we must sweep away the impurities that we have allowed to accumulate in our law, impurities that have resulted from a succession of judges who have allowed our constitutional connection to dissipate in a thousand directions, and we must return to the original state of obedience to the Founding Fathers that gave us our original unity. But the real message is that we must: a) stop seeking vital recognition and confirmation in real life by withdrawing from each other; b) fuse our withdrawn desire with the rage that

results from the disallowal of its expression; c) channel this eroticized aggression into an image of a punitive authority sadistically controlling a masochistically obedient and dependent group of subjects; d) act this sado-masochistic identification out through a rigid compliance with the dictates of social hierarchies. Within Meese's symbolism, we are to displace our potency onto the Founding Fathers and direct our eroticized aggression against the liberal judges who are symbolic carriers of our own authentic impulses for connection, impulses which, if followed, lead to betrayal and loss. In the real world we are to command ourselves and each other to conform to an artificial social facade characterized on the one hand by passivity and role-compliance, and on the other by repeated elicitations of "evil" impulses which are repeatedly subjected to control and punishment.

It is in this last respect that the call for a return to the intent of the framers is related most closely to the rest of the New Right's program—to the call for a return to a docile vision of the family of which "Father Knows Best" is perhaps the model, a vision of religion founded upon obedience to the will of God, a righteous and nationalistic militarism that stamps out evil empires wherever they appear, and a domestic policy that seeks to disassociate the State from "programs for the weak" while associating the State with the effort to cleanse the social body of such exciting impurities as drugs and oral intercourse. Whatever valid elements there may be in some of these positions (and these elements certainly receive sufficient attention in the pages of *Tikkun*), they are all directed in their symbolic dimension to the intensification of sado-masochistic control over our fundamental desire for spontaneous and genuine social connection. The distinctive meaning of Meese's jurisprudence is to be found in its attempt to place this perverse passion for control at the heart of our social and political bond, to make it part of "the law" in a way that would extend its cultural power beyond the appeal of any particular issue and, as I suggested earlier, beyond the appeal of Reagan himself. For if a generation of college students, for example, can be induced to revere the intent of the Founding Fathers at the expense of their own human needs, they will be less likely to challenge the many more secular forms of authority whose legitimacy is linked to this intent by law and onto whom their reverence is therefore likely to be transferred.

The symbolic reading of the "jurisprudence of original intention" that I am proposing here is representative of a competing critical method within Critical Legal Studies to the deconstructive method exemplified by Mark Tushnet. It seeks to understand—by recourse to a kind of

socio-psychoanalytic theory of alienation—how cultural phenomena acquire and “hold” social meaning at non-rational levels, and I believe it therefore complements the deconstructionism which goes in quite the opposite direction in seeking to undercut the pseudo-rational surface meaning attributed to oppressive ideologies by those who advocate them. Tushnet shows that the call for a return to the intent of the framers is irrational, since what evidence there is of such an intent is so vague as to be inherently inconclusive in resolving any important legal question, and since to the extent that the evidence is clear it reveals contradictory intentions that would be likely to support opposing results. My claim is that this “call,” however irrational in appearance, is nonetheless expressive of an intelligible non-rational meaning that must be comprehended if it is to be effectively opposed. Both strains of CLS work seem to me important in providing the forces of humanity with the kind of articulable insight that must be partly constitutive of any confident movement that seeks to challenge the level of estrangement that we face today.

