

Book Reviews

Simon J. Gilhooley: *The Antebellum Origins of the Modern Constitution: Slavery and the Spirit of the American Founding*. (Cambridge: Cambridge University Press, 2020. Pp. viii, 273.)

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What is the spirit of America's founding, and should we remain committed to it? These questions have gripped public discourse in recent years. For example, the 1619 Project would have us locate the spirit of the founding in the moment chattel slavery was introduced to the continent; the 1776 Series, alternatively, aims to locate the real spirit of the founding in the Declaration of Independence. Gilhooley's book serves as a timely reminder that this debate is hardly novel; we can find it in constitutional debates almost two centuries past.

Gilhooley argues that the constitutional bouts between abolitionists and defenders of slavery birthed "a mode of appealing to the spirit of the founding" in constitutional interpretation, what Gilhooley calls "originary constitutional spirit" (3, 245). Both defenders of slavery and abolitionists looked to the past for answers to their constitutional dilemma: the Constitution's posture towards slavery. Defenders of slavery invoked the "spirit of 1787–88" as a safeguard for preserving slavery; abolitionists responded by invoking natural rights and the "spirit of '76." As the book's title suggests, defenders of slavery ostensibly appealed to the *true* spirit of America's founding. Gilhooley makes his case by diving into the annals of history, investigating the debates surrounding slavery's existence in the District of Columbia (158–86). He then traces the early products of this mode of interpretation in the Supreme Court's infamous cases, *Prigg v. Pennsylvania* and *Dred Scott v. Sandford* (237–44).

Gilhooley thereby presents the legacy of originary constitutional spirit as inexorably linked with the preservation of slavery. He concludes that we ought to move *beyond* the debate and abandon originary constitutional spirit, which haunts us today in the form of originalism (245–49). In its place, Gilhooley turns to Jefferson, who championed a mode of constitutionalism where the past has no weight; only people in the ever-present here and now define constitutional meaning (252–53). Such would be a "radically democratic and radically continuous constitutionalism" (257). Before we jettison originary constitutional spirit and take the Jeffersonian dive, however, it would behoove us to consider carefully what the DC debate over the spirit of the founding teaches us and what we stand to lose in pursuing radical

democracy. The spirit of the founding may offer us something more than pro-slavery advocacy, and its ends, therefore, may still have something of value.

Gilhooley begins the story with the Missouri crisis and the northern and southern responses. The Missouri crisis turned Americans' minds towards history, "the spirit of the founding," to determine the Constitution's posture towards slavery (26–29). While giving voice to those who lay forgotten in the past, Gilhooley wonderfully illustrates how several themes arose from this turn to the past. From the North, free Black writers picked up on the spirit of the founding, advocating for citizenship by invoking the Declaration of Independence (43). Past literature identified white abolitionists as the progenitor of these ideas, but Gilhooley notes that white abolitionists would *later* pick up on free Black writers' arguments and popularize them (57). Gilhooley astutely depicts how, at the same time, the South struggled to reconcile their peculiar institution with natural law and natural rights principles articulated in the Declaration of Independence. The South shifted to a position of slavery as a positive good and located its sanction in the higher law of constitutionalism (91, 115). Where free Black writers clung to the "spirit of '76," southerners firmly grasped the "spirit of 1787–88."

These disparate visions of the founding set the stage for the book's focal study: the clash in DC. The question, put simply, was: Did Congress have power to regulate slavery in DC? Gilhooley traces the arguments in the Twenty-Fourth Congress and locates originary constitutional spirit's origins in those put forward by the defenders of slavery. Abolitionists used a *textual* approach to the Constitution, informed by the Declaration of Independence. Gilhooley highlights Samuel Hoar, who argued that Congress had power to regulate slavery owing to the plain, unambiguous words of the document (173). Defenders of slavery responded with a constitutional argument unconstrained by the text, aided by *original intentions* located in the "spirit of 1787–88" and the supposed intentions of Virginia and Maryland when they ceded the land to the federal government. Clearly, these defenders argued, the Constitution was intended to protect slavery, and Virginia and Maryland would not have ceded land unless it was mutually understood that slavery would persist unabated (176–78).

Gilhooley briefly mentions abolitionists' responses to southern originary constitutional spirit. In the aftermath of the DC debate, abolitionists splintered in their approach to the Constitution. Garrison and his followers, focusing on original intent, agreed with the southerners but, rather than seeing it as a "positive good," the former saw the Constitution as a "covenant with death." Others tried to best southerners at their own game, peddling an alternative story of original intent based on the Constitution's text and the "spirit of '76" (225–33).

Despite abolitionist opposition, the defenders of slavery emerged victorious and the Constitution's text regrettably was restrained in favor of supposed original intentions. It is here we can see clearly the tainted nature of appealing to history as a constitutional authority. In Gilhooley's telling, this

mode of interpretation has operated as an impediment to democracy and liberty. Its blemished history can be seen in the immediate aftermath of the DC debate, perhaps the most notorious case being *Dred Scott*, which determined, based on the supposed intention of the Founders, that Blacks could not be citizens (243).

Is Gilhooley's assessment correct? Is the spirit of American founding tainted with the indelible mark of slavery? Perhaps. But perhaps not—and the splintering among abolitionists holds the key. Garrisonians followed southerners in a mode of interpretation based on *original intent*. Gilhooley does not specify, however, that the other camp, which included the likes of Frederick Douglass, used a textual approach to the Constitution based on *the plain meaning of the words at the time of adoption*, or original public meaning (see Randy E. Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," *Journal of Legal Analysis* 3, no. 1 [2011]: 165–263). Originalists today (Keith Whittington, Lawrence Solum, and Randy Barnett, to name a few) make a similar distinction. Originalists have largely abandoned the southern equivalent of original intent and, in its place, have moved on to what Keith Whittington called the "new originalism," which focuses on original public meaning.

Gilhooley's account of the development of constitutional thought from the 1820s through the 1840s is sound. But his analysis of how it relates to our current constitutional situation leaves something to be desired. Original constitutional spirit today may have more to do with *abolitionists* than with the defenders of slavery. One may say we have naturally evolved (again) from *original intent* to *original public meaning*. Some may respond that the defenders of slavery got it right—that the spirit of America's founding is unassailably proslavery. (This view has been challenged, however, by Sean Wilentz in his arresting book *No Property in Man* [Harvard University Press, 2018].) For this reason, Gilhooley suggests that we abandon the past in favor of a radical, democratic constitutionalism.

But before we embrace Jeffersonian constitutionalism (257), perhaps we should first clarify what we would be losing. Frederick Douglass thought there was at least one reason to recognize the constitutional authority of the founding: it teaches us (contra the southern account) the true purpose of the Constitution, namely, the protection of natural rights. Unlike Gilhooley, who elevates democracy as the *end*, Douglass relied on the constitutional authority of the founding to recognize that democracy was the *means* to the Constitution's true end of securing natural rights. Perhaps the real question is not whether original constitutional spirit is "good," but what is the true end of government.

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