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Introduction

Original Constitutionalist: Reconstructing Richard S. Kay’s Scholarship

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Introduction

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“The fundamental principles of [a] society . . . are not the products of the law. They determine what the law is.”


I.

I am more than thrilled to introduce this issue celebrating the work of Prof. Richard S. Kay, the Wallace Stevens Professor of Law at the University of Connecticut School of Law (UConn Law). Prof. Kay joined the Law School faculty after clerking on the Supreme Judicial Court of Massachusetts. He holds a B.A. from Brandeis University, an M.A. in economics from Yale University, and a J.D. from Harvard Law School. During his time at UConn Law, Prof. Kay has taught basic and advanced courses in constitutional law, comparative law, evidence, commercial law, and European Human Rights. From 2014 to 2016 he served as Associate Dean for Research and Faculty Development. He has held visiting professorships at Boston University School of Law, the University of Exeter, the University of San Diego School of Law, and Boston College Law School. Prof. Kay is an elected member of the International Academy of Comparative Law and is a past chair of the Constitutional Law Section of the Association of American Law Schools. Currently, he is the President of the American Society of Comparative Law.

Prof. Kay’s contribution to constitutional law is enormous and it would be an impossible task to summarize it in this brief introduction. He has written over 50 articles and 17 book reviews, co-edited (with Anthony W. Bradley and Law School colleague Mark Weston Janis) a textbook on *European Human Rights Law: Text and Materials* now in its third edition with Oxford University Press, and one edited collection on *Standing to Raise Constitutional Issues: Comparative Perspectives* published by Bruylant. He also authored an important monograph: *The Glorious*

* Associate Professor; Harry Radzyner Law School, Interdisciplinary Center Herzliya. I would like to take advantage of this star note and thank Rick Kay for his contribution, support, and inspiration.
Revolution and the Continuity of Law, published by the Catholic University of America Press, which is a historical study of the relationship between revolution and legality.¹

Prof. Kay has greatly influenced, to my mind, constitutional law, constitutional theory, constitutional history, and comparative constitutional law, mainly in the areas of constitutional interpretation and the creation and change of constitutional orders.

II.

In his many studies, Prof. Kay explores fundamental questions of constitutional theory: what are the foundations of constitutional orders, what is their source of authority, and how they change. Thus, for example, Prof. Kay examined the paradox of illegality that produced the foundation of American constitutional order, explaining that within this paradox there is no contradiction because:

[I]t is exactly its break with prior legality that invested the Constitution with the power it still exercises over us and with its, at least formal, primacy in our legal system. Moreover, this phenomenon is perfectly general. Every legal system is governed, at the end, by principles whose authority cannot be found in law.²

Indeed, this is not unique to the American story; the binding nature of the constitution does not derive from a higher positive law but must be found in a non-legal occurrence. Accordingly, such non-legal rule is described by Prof. Kay as the “preconstitutional” rule.³ “At the end of the day,” Prof. Kay concluded one of his articles, “the authority of all law rests on a political foundation.”⁴

The “preconstitutional rule is always provisional, subject to change when social and political factors require it,” Prof. Kay writes, because the legitimacy of the constitution changes over time and “is always a current matter.”⁵ Legitimacy changes over time because perceptions may change over time. And accordingly, the legitimacy of the constitutional authority itself may change over time:

Authority involves an evaluation of the rightness of the constituent events. In this way, it incorporates what may be properly called moral reasons. This does not make its

¹ See his full publication list in the final section of this Introduction.
⁵ Kay, The Illegality of the Constitution, supra note 2, at 80.
existence any less a fact but it is a certain kind of fact, one that includes the collective critical judgments of some number of individuals in certain times and places. It is this continuing normative attitude that distinguishes constituent authority from simple constituent power.6

So, the idea (or the mere fact) of change is thus critical for the authority of the constitution and also to considerations of “constitutional fundamentals.”7 Since the social and political ‘pre-legal’ sources upon which law is built change over time, such changes are also manifested in the application and interpretation of law.8

How constitutions endure and function over time is another (albeit related) question Prof. Kay has been exploring. He has written on the various mechanisms of constitutional change, such as formal mechanisms of constitution-making and constitution-amending, but also on informal mechanisms as constitutional interpretation.9 For Prof. Kay, these routes result in a different understanding of constitutional rules; constitutional rules intentionally created through formal constitutional change are different than “the rules that are attributed to the Constitution by courts and other public actors.”10 Prof. Kay’s scholarship thus deeply engages with the concept of time. He wrote of “Constitutional Chrononomy,” in which every constitution is forward-looking, in an attempt to guide and limit future governmental actions but also backward-looking, in order to comprehend the meaning and applicability of constitutional rules and limitations, mainly through courts’ interpretation, which is another major field of study by Prof. Kay.11

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8 Id. at 447.
9 See, e.g., Richard S. Kay, The Creation of Constitutions in Canada and the United States, 7 CAN.-U.S. L.J. 111, 111 (1984) (comparing the process by which changes were made to the Canadian constitution in the 1980s with the institution of the United States constitution); Kay, Constituent Authority, supra note 6, at 117 (discussing the underlying authority for creating constitutions); Richard S. Kay, Formal and Informal Amendment of the United States Constitution, 66 AM. J. COMP. L. 243 (2018) (discussing formal and informal mechanisms for amending the United States Constitution).
III.

Judicial interpretation has been a major focus of Prof. Kay’s work, particularly developing the now dominant constitutional approach (with its various streams) to constitutional interpretation—originalism.

And Prof. Kay was described as “[t]he first academic defender of ‘originalism’” after Paul Brest published his now well-known critique of originalism.

Prof. Kay is considered one of the most prominent and notable originalists, defending an original intention version of originalism, according to which (very simply put), judges should apply the rules of the Constitution “in the sense in which those rules were understood by the people who enacted them.”

According to Prof. Kay, whereas we never know with full certainty the original intentions of authors, “it is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgment about which result is more likely consistent with that intent.”

Prof. Kay’s seminal and widely cited article from 1988 on “Original Intentions in Constitutional Adjudication,” is a must-read for anyone interested in constitutional interpretation. Lee J. Strang describes this work as a “significant scholarly contribution[] to originalist theory.”

Regarding this work, Randy E. Barnett wrote, “Richard Kay is one defender of originalism . . . who deserves special mention for the thoughtfulness and cogency of his analysis.” Or as Lawrence Solum described it: “an eloquent and well reasoned defense of originalism.” Further, Bret Boyce writes that “any consistent originalist theory must adopt something like

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16 Kay, Adherence to the Original Intentions, supra note 15, at 244.

17 Id.


Kay’s approach.” As Michael Perry concludes, when addressing the questions “[w]hat is originalism?” and “[w]hat is the best originalist approach?”, one can “hardly do better than to follow the lead of Richard Kay.” Accordingly, as elaborated below, we dedicate a substantive part of this special issue to the question of originalism and constitutional interpretation.

IV.

Finally, there is Prof. Kay’s contribution to comparative constitutional law. In 1976, Donald Kommers remarked that “comparative constitutional law . . . hardly exists as a taught discipline in the United States. . . . The state of affairs of comparative constitutional law is beginning to change, however.”

Indeed, nowadays, as part of ‘the renaissance of comparative constitutional law’ and its appearance as “the new frontier of constitutional law scholarship,” the place of comparative constitutional law in the United States is completely different from what Kommers described. Much of this, I believe, is thanks to scholars such as Richard Kay. Writing on issues and jurisdictions beyond the American constitutional landscape, including the United Kingdom, Canada, Australia, Ireland, European Union, Hong Kong, and more, Kay’s scholarship was a refreshing voice, and one that influenced and inspired generations of scholars. Following in his footsteps, we aimed to include in this symposium comparativist constitutional law scholars from different jurisdictions who write in the tradition of Prof. Kay.

V.

The Issue includes contributions from various authors who are friends, colleagues, co-authors, students, or simply scholars admiring the work of Prof. Kay. It is structured as follows:

The first section, includes articles that focus on the substantive themes related to Prof. Kay’s work. Starting, first, on questions surrounding

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constitution-making and constitutional change, Mikolaj Barczentewicz opens this section with his article *Constituent Power and Constituent Authority* that explores the relationship between Kay’s constituent authority, constituent power, and Hartian rules of recognition. Joel I. Colón-Ríos follows with *Of Omnipotent Things*, an article that develops a distinction between ‘constituent authority’ and ‘sovereignty,’ and applies these concepts to constituent assemblies. Then, in his *Facts, Fictions and Other Artifices: “Constituent Authority” as the Work of Imagination*, Zoran Oklopcic explores the relationship between constituent authority, beliefs, and fictions. Still on the question of constituent authority, Yaniv Roznai explores possible limitations on constitution-making power in his article *The Boundaries of Constituent Authority*.

Moving to more comparative perspectives, in her article *Ad Hoc Constitutional Reform in the UK*, Alison Young explores the various constitutional changes that are taking place in the United Kingdom’s constitutional order. From a Canadian perspective, Warren J. Newman writes on *Constitutional Chronometry, Legal Continuity, Stability and the Rule of Law: A Canadian Perspective on Aspects of Richard Kay’s Scholarship*.

Ending this section with a more intellectual history scholarship, Peter Oliver writes on *RTE Latham and Change in the Ultimate Rules of a Legal System*. And in his article *Institutional Change and the Continuity of Law: An Essay in Tribute to Rick Kay*, Peter L. Lindseth draws mainly on the work of the famous French institutionalist Maurice Hauriou.

The next group of articles focuses on questions of legal and constitutional interpretation. Laurence Claus opens with *Authority and Meaning*, emphasizing the connection between legal meaning and legal status. Addressing the foundations of legal systems and legal interpretation, Larry Alexander writes on *Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay*. James Allan continues with *The Special Kay Defence of Non-Originalist Judges: A Serial with an Unhealthy Final Ingredient*. Jeffrey Goldsworthy then analyzes *Legislative Intentions in Antonin Scalia’s and Bryan Garner’s Textualism*. And writing on the challenges of interpreting constitutional provisions in light of original intentions or expectations, Mark Graber’s *Original Expectations* concludes this group of articles. Still in the realm of judicial review, Michael J. Perry’s *Two Constitutional Rights, Two Constitutional Controversies*, explores judicial controversies surrounding equal protection and the right to privacy. This section ends with Carol Weisbrod’s *Brahmin Connections: A Note on the Vocation of the Law Professor*.

The third section includes a selection of shorter essays. This section opens with Aviam Soifer, with his article *The Paradox of Texts and Constitutional Authority: For Rick Kay, Wallace Stevens Professor*. It is then followed with Mark Weston Janis, *Connecticut 1818: From Theocracy to Toleration*. The final article: *Rick Kay: And Now for the Rest of the Story* by Richard D. Pomp—a long-time colleague of Prof. Kay at UConn Law—concludes this section with a personal view of Prof. Kay’s career.

Finally, in section four, we have the privilege to include brief responses and thoughts by Richard S. Kay himself.

Before ending, I wish to thank then Dean Timothy Fisher and Associate Deans Peter Siegelman and Leslie Levin for their support in organizing this special issue and the conference surrounding it, and Zitmarie Mestre and Deborah King for their organization of a successful academic event. And, above all, I wish to thank the wonderful editorial board of the *Connecticut Law Review* (Volume 52)—especially Editor-in-Chief Alexandria Madjeric, Managing Editor Adam J. Kuegler, and Assistant Managing Editor Hannah F. Kalichman, for their hard and dedicated work on this Issue. In the conference held at UConn School of Law on September 13, 2019 celebrating the work of Prof. Kay, he told the audience:

> The process of scholarship to me has been like writing notes, and then putting them in a bottle and sealing the bottle and tossing it over the side into the sea, in the hope, usually the vain hope, that someone somewhere will find that bottle, open it up and read what I said.

He then thanked those in attendance for “noticing those bottles on the beach, picking them up, and taking a look.” Well, we thank you, Rick, for writing these notes and tossing these bottles. All the participants in this special issue, and many others, are grateful that we had the opportunity to learn from you and we are honored to pay tribute to one of the giants in our field.

VI. PROF. RICHARD S. KAY’S PUBLICATION

A. **Books**


**STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES** (2005) (with International Academy of Comparative Law).
B. Articles

42. The Illegality of the Constitution, 4 CONST. COMMENT. 57–80 (1987).
C. Book Reviews