

## JUDGE JAMES A. WYNN, ORIGINALISM, AND THE JURIDICAL/JUDICIAL ROLE\*

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Ronnie Long spent more than forty years in prison for crimes that he did not commit.<sup>1</sup> The path to his unlawful conviction was strewn with lies and law violations by police and prosecutors.<sup>2</sup> The en banc Fourth Circuit held that his conviction was obtained by means of many constitutional violations.<sup>3</sup> Concurring, Judge Wynn wrote:

The violent racial history of this country necessarily informs the background of this case: a Black man accused of raping a white woman is tried in 1976 by an all-white jury in a county with strong ties to the woman's family, because defense counsel feared that any attempt to relocate the case would land them instead in a county with significant controlling influence by the *Klan*. Those historical facts lend gripping context to the egregious constitutional violations at the heart of this case.<sup>4</sup>

Judge Julius Richardson, joined by five other judges, filed a dissenting opinion, concluding with an assertion about judging that sweeps far broader than the issues in Ronnie Long's case: "The desire to right an apparent wrong is a natural tendency. The majority, in my view, succumbs to this noble urge. And in doing so, I think it oversteps the juridical role."<sup>5</sup>

There it is. The line in the sand. Does James A. Wynn understand and fulfill "the juridical role"? The answer is yes, as we can see from reading what Judge Wynn has written and by seeing how his own life experiences inform his judicial decision-making.

In the past half century, there has been an increasing diversity among the deciders. Woman and people of color have been appointed to the Supreme

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1. 972 F.3d 442 (4th Cir. 2020).

2. *Id.* at 446.

3. *Id.*

4. *Id.* at 471.

5. *Id.* at 506.

Court and lower federal courts. Juries have become more diverse in the wake of *Batson v. Kentucky*<sup>6</sup> and *Edmonson v. Leesville Concrete Co.*<sup>7</sup> One reason for celebrating diversity is our hope that deciders with different life experiences will lend different perspectives to the decisional process. I have a drawing by the nineteenth-century artist Honoré Daumier: A defendant accused of stealing has made his plea to the corpulent judge, who intones, “You were hungry?! You were hungry?! I myself am hungry three times a day and I don’t steal for that.”<sup>8</sup>

In this context, I regard “juridical” as equivalent to “judicial,” as the latter word appears in Article III of the Constitution. “Juridical” means “relating to, or involving law.”<sup>9</sup> “Judicial” betokens the job that judges do.<sup>10</sup> Surely the dissenting judge did not mean to say that “the law” has nothing to say about the issues in Ronnie Long’s case. To say that would evoke disturbing echoes of nineteenth-century cases now happily consigned to the trashcan of history.

Judge James A. Wynn fulfills the judicial role as that role was understood by the Framers of the Constitution. Their understanding was shaped by the events in two periods of English history, and by the separation of powers theory expressed by Montesquieu in *The Spirit of the Laws (L’Esprit des Loix)*.<sup>11</sup> The establishment of a judicial system that spoke truth to royal power was a signal accomplishment of the lawyers who influenced the English revolution of the 1600s.

The judicial role, as seen in Judge Wynn’s work, has two elements. The first is to recognize the Constitution-based concept of the powers given to Article III judges. The second is to use those powers—“judicial tools,” Judge Wynn called them in his Madison Lecture<sup>12</sup>—to provide redress to victims of injustice and not refuse to act based on timidity, undue deference to other branches, or—worse yet—some ideological predisposition.<sup>13</sup> For as we shall see, the Framers knew that judging was about the courage to act and the obligation to forswear personal concerns.

6. 476 U.S. 79 (1986).

7. 500 U.S. 614 (1991).

8. Honoré Daumier, *Vous aviez faim . . . vous aviez faim . . .* (illustration), in *Scholarly Commons*, U.N.D. ART COLLECTIONS, <http://commons.und.edu/uac-all/1925/> [<https://perma.cc/WWN8-L7CM>].

9. *Juridical*, BLACK’S LAW DICTIONARY (11th ed. 2019).

10. *Judicial*, BLACK’S LAW DICTIONARY (11th ed. 2019).

11. See Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 36–37 (1990) (analyzing Supreme Court cases that cite Montesquieu); see also *Mistretta v. United States*, 488 U.S. 361, 394 (1989).

12. See generally James Andrew Wynn, *When Judges Throw Out Tools: Judicial Activism in Rucho v. Common Cause*, 96 N.Y.U. L. REV. 607 (2021) (arguing that there are long-recognized decision-making principles that comprise a judge’s “toolkit”).

13. *Id.* at 624–31.

In a sometimes-overlooked passage in *Marbury v. Madison*,<sup>14</sup> Marshall wrote:

The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection . . . . The government of the United States has been emphatically termed a government of law and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.<sup>15</sup>

This comment, as I have noted, has a long lineage in the law as the Framers understood it.

In 1215, the barons compelled King John to accept limitation on the exercise of royal power, in a document known as the Magna Carta.<sup>16</sup> While many parts of the Magna Carta have become outdated, been repealed by Parliament, or have fallen into desuetude, Chapter Twenty-Nine was a beacon of light through the centuries and endures to this day:

No free man shall be arrested or imprisoned . . . , nor will we judge him or condemn him, except by the lawful judgment of his equals or by the law of the land. To none will we sell, to none deny or delay right or justice.<sup>17</sup>

The promise of this language was not consistently kept, as any student of English history will have observed. But beginning in the early 1600s, under the leadership of Edward Coke, the Magna Carta became an ideological rallying cry as well as a textual source of guidance.<sup>18</sup> Coke and his allies championed the common law, as distinct from law based on royal prerogative, and the maintenance of courts who were not simply tools of royal power.<sup>19</sup> As a Common Pleas Judge, he held in *Dr. Bonham's Case*<sup>20</sup> that a judicial tribunal

14. 5 U.S. 137 (1803).

15. *Id.* at 163.

16. On the signing and influence of the Magna Carta, see STEPHEN SEDLEY, *LIONS UNDER THE THRONE: ESSAYS ON THE HISTORY OF ENGLISH PUBLIC LAW 177–78*, 214 (2015); MICHAEL E. TIGAR, *LAW AND THE RISE OF CAPITALISM* 125, 207, 232, 234, 237, 243 (2d ed. 2000) [hereinafter TIGAR, *LAW AND THE RISE OF CAPITALISM*]. In 2014–2015, the Library of Congress did an exhibit about the role and history of the Magna Carta. See *Magna Carta: Muse and Mentor*, LIBR. CONG., <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/interpreting-the-rule-of-law.html> [<https://perma.cc/J9ND-DKJH>].

17. SEDLEY, *supra* note 16, at 176–78 (quoting the Magna Carta ch. 29 (1215)).

18. *Id.* at 177.

19. *Id.* at 178.

20. (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113b; see SEDLEY, *supra* note 16, at 143–44, 150, 152–53. As Sedley (who is a retired Lord Justice of Appeal) notes, debate continues in the United Kingdom over the extent of judicial power to hold an Act of Parliament invalid. SEDLEY, *supra* note 16, at 143–44.

must be impartial and not in a position to protect its own personal interests.<sup>21</sup> Dr. Bonham had been tried before a regulatory agency that was financed in part by the fines that it levied.<sup>22</sup> Coke also prefigured *Marbury v. Madison* by asserting a judicial power to hold acts of Parliament void if they conflicted with fundamental principles of the common law.<sup>23</sup>

In Parliament, Coke derided the royal claim of unreviewable power in matters of military policy and national security: “God send me never to live under the law of conveniency or discretion. Should the soldier and the Justice sit on one bench, the trumpet will not let the cryer speak.”<sup>24</sup>

In short, all exercises of royal power were subject to judicial review.<sup>25</sup> The English Revolution carried Coke’s theory into law. Almost all the courts that depended on royal prerogative were swept away, and many specialized tribunals were subjected to common law principles of decision.<sup>26</sup> The plenary power of review has been reasserted in reply to the Crown’s claims as recently as 2019, when the United Kingdom Supreme Court reaffirmed that the Queen’s Order in Council is reviewable.<sup>27</sup>

All of this lore was part of lawyers’ and scholars’ understanding in 1787. The Framers were also influenced by *The Spirit of the Laws*.<sup>28</sup> Montesquieu wrote: “[T]here is no liberty, if the judiciary power be not separated from the legislative and executive powers.”<sup>29</sup> He believed that the consolidation of power in the executive branch would be “the end of everything.”<sup>30</sup> Indeed, founding

21. Dr. Bonham’s Case (1610) 77 Eng. Rep. 646, 646–47; 8 Co. Rep. 113b, 113b–14a.

22. *Id.* at 648; 8 Co. Rep. at 115a.

23. *Id.* at 655–58; 8 Co. Rep. at 119b–21a.

24. MICHAEL E. TIGAR, THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY 170 (2007) (quoting JOHN RUSHWORTH, HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE 81 (1721)).

25. See SEDLEY, *supra* note 16, at 127–28; see also Case of Proclamations (1611) 77 Eng. Rep. 1352, 1354; 12 Co. Rep. 74, 76 (“[T]he King hath no prerogative but that which the law of the land allows him”). Note Coke’s care to quote the Magna Carta. In 2019, the U.K. Supreme Court reaffirmed the tradition of robust review, saying: “[T]he courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.” *R v. Prime Minister*, [2019] UKSC 41 [31] (appeals taken from Eng. & Scot.). The Court also cited an important case on review of royal prerogative—*Entick v. Carrington*. *Id.* at [32] (citing *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 2 Wils. KB 275). This case is well-known to the American colonists who referenced it as they justified resistance to royal power. See *Boyd v. United States*, 116 U.S. 616, 625–27 (1886), *overruled on other grounds by* *Warden v. Hayden*, 387 U.S. 294, 294 (1967).

26. See TIGAR, LAW AND THE RISE OF CAPITALISM, *supra* note 16, at 24–38.

27. *R v. Prime Minister*, [2019] UKSC 41 [69] (appeals taken from Eng. & Scot.); see SEDLEY, *supra* note 16, at 141 (discussing his own opinion in a human rights case).

28. See generally CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (1748).

29. *Id.* at 199.

30. *Id.*

father Patrick Henry opposed the Constitution because he believed that the judicial power might not be strong enough to resist a tyrannical president.<sup>31</sup>

So there we have it: any originalist or textualist, studying the Constitution of 1787, will see that at least one part of Judge Wynn’s “juridical role” in Ronnie Long’s case, is textually and by evident original intent well within the Framers’ design.

In order to take this analysis a bit further, let us examine some other of Judge Wynn’s judicial work and his writings on the juridical/judicial role. In *Roe v. Department of Defense*,<sup>32</sup> the Fourth Circuit held in an opinion by Judge Wynn that the military’s blanket policy of discharging HIV-positive soldiers was unlawful.<sup>33</sup> His opinion rejected the military’s claim of unreviewable discretion.<sup>34</sup>

Judge Wynn concurred in *Grimm v. Gloucester County School Board*.<sup>35</sup> The issue in that case was discrimination against transgender students, arising from the schools’ bathroom policy.<sup>36</sup> Judge Wynn’s concurrence reminded us that the school board’s policy justification was unfortunately reminiscent of the old “separate but equal” language of an earlier day.<sup>37</sup> Judge Wynn’s recognition of this historical parallel reflects a deep understanding of how the Constitution requires that the juridical/judicial role be exercised.<sup>38</sup>

You need not rely on my description. In the interview cited at the beginning of this essay, Judge Wynn describes how he considered that those cases presented the issue of historical marginalization.<sup>39</sup>

Additionally, writing for the three-judge trial court in *Common Cause v. Rucho*,<sup>40</sup> Judge Wynn held that partisan gerrymandering violates the Constitution.<sup>41</sup> His opinion begins:

[A] common thread runs through the restrictions on state election regulations imposed by Article I, the First Amendment, and the Equal Protection Clause: the Constitution does not allow elected officials to enact laws that distort the marketplace of political ideas so as to intentionally favor certain political beliefs, parties, or candidates and

31. See Michael E. Tigar, *The National Security State: The End of Separation of Powers*, 66 MONTHLY REV. 136, 137 (2014).

32. 947 F.3d 207 (4th Cir. 2020).

33. *Id.* at 212.

34. *Id.* at 226–28.

35. 972 F.3d 586, 620–28 (4th Cir. 2020) (Wynn, J., concurring).

36. *Id.* at 593 (majority opinion).

37. *Id.* at 620 (Wynn, J., concurring).

38. See Am. Bar Ass’n Ctr. for Hum. Rts., *The Arc of the Moral Universe: A Conversation with Judge James A. Wynn*, YOUTUBE, at 41:35 (Apr. 2, 2021), <https://www.youtube.com/watch?v=olfKV2hs0rM> [<https://perma.cc/V7ZE-MCFN>].

39. *Id.* at 27:20.

40. 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484, 2508 (2019).

41. *Id.* at 801.

disfavor others. In particular, Article I preserves inviolate the right of “the People” to elect their Representatives, and therefore bars the States from enacting election regulations that “dictate electoral outcomes” or “favor or disfavor a class of candidates.” Similarly, the First Amendment prohibits election regulations that “restrict the speech of some elements of our society in order to enhance the relative voice of others.” And the Equal Protection Clause embodies the foundational constitutional principle that the State must govern “impartially”—that “the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.” That the framers of the Constitution and the Reconstruction Amendments sought to protect this principle through three different constitutional provisions only reinforces its centrality to our democratic system.<sup>42</sup>

As Judge Wynn eloquently noted in his Madison lecture, the Supreme Court’s reversal of *Rucho* reflected a refusal to decide far more than a reasoned response.<sup>43</sup>

I turn now to the second aspect of the “juridical/judicial role,” the duty to use what Judge Wynn has called the “judicial tools” that Article III judges are given. The outlines of this duty ought properly to be found in the Constitution itself. The terms “textualism” and “originalism” can guide the search, but only if one understands what those terms mean.

Judge Wynn has rejected the term “textualism,” but I take him to mean that he would not adopt the grudging, narrow-minded and ultimately foolish version of claimed textual fidelity espoused by some judges and writers, and roundly criticized by Judge Posner.<sup>44</sup> He is faithful to the constitutional text and considers how it can support readings that serve as well as disserve the Constitution’s fundamental promises.

The Framers did not intend that later generations would give their words a narrow-minded and grudging interpretation. They knew that it was a constitution they were writing, not a set of fetters they were forging. James Madison wrote in 1824:

42. *Id.* at 800 (citations omitted) (first quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995); then quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam); and then quoting *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring)).

43. *Id.* at 940. In an op-ed in 2020, Judge Wynn criticized the judicial refusal to enforce the civil rights statutes that provide a remedy for unlawful police violence. James Andrew Wynn, Jr., Opinion, *As a Judge, I Have To Follow the Supreme Court. It Should Fix This Mistake*, WASH. POST, <https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/> [<https://perma.cc/TL2Y-U6PG> (dark archive)] (June 12, 2020).

44. See Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/T7YN-2ZZE>].

What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption.<sup>45</sup>

Indeed, Frederick Douglass believed for a time that the Constitution of 1787 could be read to forbid slavery.<sup>46</sup> Justice Story wanted to get to such a result, but in the end did not.<sup>47</sup> No, the Constitution of 1787 had no room for recognizing enslaved people and their descendants, as Chief Judge Taney held in *Dred Scott v. Sandford*.<sup>48</sup> It had no place for the indigenous Native Americans, as the Court held in *Cherokee Nation v. Georgia*.<sup>49</sup> As for the poor, the Court in 1837 derided “the moral pestilence of paupers.”<sup>50</sup> Yes, the Constitution of 1787 was deeply flawed.

And so, there was a Civil War. Out of that war came the Thirteenth, Fourteenth, and Fifteenth Amendments, and the legislation that carried them into effect with the Enforcement Acts of 1870 and 1871 and the Ku Klux Klan Act of 1871. These amendments and their statutory expression represented promises to those who had been excluded from the right to juridical/judicial attention. These are promises, without the keeping of which the nation had no right to exist and (some would say) its laws no just claim to obedience.

The Constitution of 1787 heralded a new birth, ostensibly of a government of, by, and for the people. Pursuing that apt expression, the Thirteenth, Fourteenth, and Fifteenth Amendments are a rebirth. They are part of Abraham Lincoln’s Gettysburg promise of a “new birth of freedom.”<sup>51</sup> Of course, even the clear language of these amendments was not heeded by judges and Justices for decades, as one can see by examining the record of agitations for the rights of women, Native Americans, the disabled, the poor and the other marginalized communities that Judge Wynn has recognized. One can also see in those decades of judicial action and inaction a studied refusal to accept those words for all the promise they contain and instead an embrace of the narrowest reading they might bear.

Any claim to “originalism” or “textualism” is disingenuous and fraudulent unless one takes in the original words and intent of *both* constitutional incarnations. To repeat, those amendments were not adjustments of the

45. Michael E. Tigar, *Original Understanding and the Constitution*, 22 AKRON L. REV. 1, 3 (1988).

46. *See id.* at 4–5.

47. A good account of Story’s tergiversations is Douglas O. Linder, *Justice Joseph Story*, FAMOUS TRIALS, <https://famous-trials.com/amistad/1228-ami-bsto> [<https://perma.cc/BR7R-URF3>].

48. *Dred Scott v. Sandford*, 60 U.S. 393, 393–94 (1857) (enslaved party).

49. *Cherokee Nation v. Georgia*, 30 U.S. 1, 48–49 (1831).

50. *Mayor of New York v. Miln*, 36 U.S. 102, 142.

51. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

constitutional design. They fundamentally altered that flawed original design. This “new birth of freedom” was purchased at the cost of more than 620,000 lives.<sup>52</sup> Judge Wynn reads words such as “equal protection,” and “due process” as requiring judges to look at the professed constitutional objective of a society in which the rights of all are protected.<sup>53</sup>

Judge Wynn is the only kind of originalist to whom that term may properly be applied. He demonstrates that fidelity to original intent in many ways and iterations: noting the Klan’s historic role in the case of Ronnie Long, objecting to the judicial weakening of the post-Civil War civil rights statutes, noting the more ample lesson to be learned from the *Grimm* decision, and honoring his own life experience as a young man born and raised in eastern North Carolina.

To see the power and mandatory character of the Civil War amendments, consider Section One of the Fourteenth Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>54</sup>

First, *Dred Scott* is overruled. Citizenship is broadly defined.<sup>55</sup> Then, in an echo of Magna Carta, we read “equal protection” and “due process.” The Magna Carta words “law of the land” were regarded as the equivalent of, and meaning the same thing as, “due process of law” in many colonial constitutions and those of the original states. I find these echoes of Magna Carta a signal to judges: here is language that invites one to look to, learn from, and apply the lessons of centuries in the struggle for human liberation from arbitrary power.

To return to the Ronnie Long dissenters’ challenge: in that case, Ronnie Long had not been judged by “equals,” nor given the protections afforded by “the law of the land.”<sup>56</sup> His right to relief, and to have judges exercise the juridical/judicial role to that end, was clear from the study of texts dating to 1215. The student in *Grimm* has the same equal right to live in the world as anyone else. The soldiers with HIV had the right to have judges independent of the military establishment decide their case. Judge Wynn’s admonitions—to

52. Jenny Goellnitz, *Statistics on the Civil War and Medicine*, OHIO ST. U. DEP’T HIST., <https://ehistory.osu.edu/exhibitions/cwsurgeon/cwsurgeon/statistics> [<https://perma.cc/4KJB-PG5J>].

53. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 627 (4th Cir. 2020) (Wynn, J., concurring).

54. U.S. CONST. amend XIV, § 1.

55. See *id.*

56. *Long v. Hooks*, 972 F.3d 442, 488 (4th Cir. 2020).

the parties, and at times to his colleagues, is that one should not let generalized expressions about social theory blot out an appreciation of the injustices that occurred in the real world.<sup>57</sup> One of my favorite quotes is from Justice Felix Frankfurter, chiding his colleagues for failing to see how days of solitary confinement and relays of interrogation might overcome a young prisoner's will to resist. He wrote "And there comes a point where this Court should not be ignorant as judges of what we know as men."<sup>58</sup>

Judge James A. Wynn exemplifies the juridical/judicial role with distinction, principle and eloquence. His concurring opinion in *Ronnie Long's* case demonstrates fidelity to the common law judging tradition. Edward Coke wrote, noting the duty to study the lessons of history, "out of the old fields must come the new corn."<sup>59</sup> He meant, and Judge Wynn understands, that one studies history to learn what it has to offer and also to avoid repeating its mistakes.

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57. See *Grimm*, 972 F.3d at 620–28.

58. *Watts v. Indiana*, 338 U.S. 49, 52 (1949).

59. EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* 109 (4th ed. 1669). The Institutes were originally published between 1628 and 1644. See Paul Azel-Lute, *Finding English Statutes & Cases & Selected "Books of Authority" at the Rutgers-Newark Law Library*, RUTGERS (Jan. 4, 2020), <https://web.archive.org/web/20130507082337/http://law-library.rutgers.edu/resources/english-statutes-and-cases.php> [<https://perma.cc/4USG-96XD>].