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ORIGINAL INTENT AND THE CONSTITUTION

INTRODUCTION BY WHITMAN H. RIDGWAY*

The question of the founding fathers' original intent in drafting the language of the Constitution has been problematic for politicians and scholars since the creation of the Republic. Thoughtful individuals differed on what was permitted as the young federal government undertook innovative programs or acquisitions, such as Hamilton's fiscal program or Jefferson's Louisiana Purchase. Evolving federal policies altered the early relationships between the national and state governments; great debates erupted over topics such as Calhoun's Nullification Doctrine[1] or the South's justifications for secession on the eve of the Civil War. Each side claimed that the Constitution supported its position.

The debate has continued into the twentieth century with the dispute over the proper role of the judiciary in our constitutional system of government. At a time when a conservative Supreme Court was eviscerating his New Deal legislation, President Franklin D. Roosevelt appealed for public support for his program in a fireside chat:

> We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court, and the Court from itself . . . . We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.[2]

President Richard M. Nixon echoed this sentiment in his criticism of the liberal decisions of the Warren Court.[3] Today the Attorney General of the United States has taken the position that the Court ought to be more attentive to the original intent of the founding

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1. Under Calhoun's Nullification Doctrine, each sovereign state had the power to declare a congressional act unconstitutional and therefore inapplicable to that state. *See* ANDREW JACKSON, NULLIFICATION, AND THE STATE-RIGHTS TRADITION 1-7 (C. Seller ed. 1963).

2. F.D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), *reprinted in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKIN D. ROOSEVELT 122 (S. Rosenman comp. 1941).

3. *See The Power of the Court*, N.Y. Times, May 26, 1969, at A46, col. 1.

fathers in deciding constitutional issues.[4]

No matter which side is correct, each must confront a Constitution that is silent on a number of important points. It does not direct scholars to the records of the Philadelphia Convention to resolve ambiguities nor does it specify where one should look to clarify omissions in the document itself. Indeed, even judicial review is not provided for explicitly in the text.

James Madison, commonly referred to as the father of the Constitution, was ambiguous on the issue of original intent. He observed that the framers' intentions cannot be regarded as an oracular guide in explaining and construing the Constitution, and that judges should interpret the Constitution according to the sense in which the Nation accepted and ratified it.[5]

The contemporary battlelines are drawn between the strict constructionists, who argue that the Constitution ought to be strictly interpreted as the framers would, and those who believe that the Constitution permits more flexible judicial interpretation as unforeseen problems arise. This division is especially evident in the area of privacy. Strict constructionists argue that a whole line of Supreme Court cases, from *Griswold v. Connecticut*[6] through *Roe v. Wade*[7] and its progeny,[8] created judge-made rights unauthorized by the Constitution. They are happier with the Court's decision in *Bowers v. Hardwick*,[9] which refused to recognize consensual homosexual activity as being protected by a constitutional right to privacy. On the other side, the proponents of the privacy right argue that certain fundamental rights are protected by the broad sweep of the fourteenth and ninth amendments, and that the modern court is correct to recognize these rights.

Not surprisingly, the issue of original intent arose in each of the other articles in this symposium. Authors examined the merits of original intent analysis as applied to equality, Presidential powers, and the role of the judiciary in interpreting the Constitution. Sena-

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4. *See* Rakove, *Mr. Meese, Meet Mr. Madison*, THE ATLANTIC MONTHLY, Dec. 1986, at 77.

5. *See id.* at 79.

6. 381 U.S. 479 (1965) (statute prohibiting use, or aiding or abetting use, of contraceptives violates constitutional right to privacy).

7. 410 U.S. 113 (1973) (right to privacy is broad enough to encompass a woman's decision to terminate pregnancy).

8. Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983); Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986).

9. 106 S. Ct. 2841 (1986).

tor Mathias addresses a more fundamental question—whether the doctrine of original intent itself is a viable tool for constitutional analysis. He concludes that the current focus on the original intent of specific constitutional words and phrases is misplaced. Rather, the original intent of the framers was to establish a new *system* of government—a system shaped by the lessons of history and founded on the principles of ordered liberty.