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Schwartz: Comment on Mathias

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COMMENT

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Senator Mathias' graceful and insightful commentary on some of the governing principles of our constitutional framework leaves little room for criticism, at least from me. I agree with almost everything he says and only wish that I could say it as well.[1] A few points occurred to me, however, not so much in comment on the paper, but as ideas stimulated by it.

First, I would cite a somewhat less admirable aspect of our lawyering trade as a reason for paying less attention to original intent than many of the original-intent zealots would have us do. In the adversarial context of our judicial system, lawyers are advocates. We are not historians, assuming that that breed has somehow miraculously escaped the curse of partisanship and predisposition with which lawyers are professionally charged. In preparing for an argument a lawyer looks for those things that support his or her position which are consistent with the obligation neither to hide nor to fabricate. Consequently, a trial becomes not two half-truths that together result in a full truth, but rather two partial truths in contention with each other. This may result in the trier of fact being presented with anything from the full truth to no truth at all. As Dmitri Karamazov noted in his scathing commentary on the legal profession, the lawyer had put together a brilliantly persuasive story, but it just was not what happened.[2]

Happily, I think that Karamazov's characterization is not a true reflection of most lawyers, but it cannot be denied that many of us are content with the partial truth that aids our client. This preference applies as well to an attorney's selection of historical evidence in evaluating the original intent surrounding the adoption of a stat-

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1. The *New York Times* carried a fascinating story about the discovery, over 200 years after the event, of an early version of the Bill of Rights by Roger Sherman, the existence of which virtually no one had suspected. The comment by the historian at the Library of Congress who found it could not be more apt. Commenting directly on what the Attorney General and other original-intent zealots have argued, he said, "To try to recover original intent from records that are nonexistent or not faithful to actual proceedings may be an impossible hermeneutic assignment." N.Y. Times, July 29, 1987, at A1, col. 4.

2. F. DOSTOYEVSKY, THE BROTHERS KARAMAZOV 632 (Grosset & Dunlap 1980).

ute or amendment, and so the judge may be faced with only these partial realities.

Judges also are not completely free of predispositions and inclinations. Indeed, on the Supreme Court, where the issues are frequently philosophical, and where it seems that decisions are often determined by a Justice's ideology, the inclination to choose the history that suits one's liking often seems well-nigh irresistible. I can recall few Supreme Court decisions of any consequence which have relied on history and in which the use of historical evidence has not been severely and justly criticized by professional historians. A remarkable example comes from one of the most important decisions of our time, *Baker v. Carr*,[3] which established the one person, one vote principle. Few cases have been as well received and as significant in our national life. The Court's decision in *Baker* relied heavily on history, yet historians who are sympathetic to the case's outcome have scathingly criticized the history cited by the Court.[4]

The same holds true for what to many of us is the Mount Everest of Supreme Court decisions in recent history, *Brown v. Board of Education*.[5] Although Chief Justice Earl Warren stated in *Brown* that the history surrounding the adoption of the fourteenth amendment was inconclusive,[6] this history was in fact quite clear. As Alexander Bickel, who prepared the basic memorandum on the history for the Court, pointed out, "The evidence of congressional purpose is as clear as such evidence is likely to be, and no language barrier stands in the way of construing the section in conformity with it."[7] Nevertheless, neither Warren nor Bickel liked what that evidence showed.

The reason for this frequent misuse of history is that once judges make decisions, they will be tempted to invoke all the arguments that conceivably support their view. Those of us who have been on the losing side of litigation have often been dismayed at how a judge packs in one argument after another, including those that seemed rather weak, to sink our cause and make a further appeal extremely difficult. The same holds true in matters involving history. The judge whose decision prevails will generally pick the history that supports his or her view.

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3. 369 U.S. 186 (1962).

4. *See, e.g.*, Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 134-37 (criticizing the Court in the federal appointment cases for misstating the content of comments made by the Constitution's framers).

5. 347 U.S. 483 (1954).

6. *Id.* at 489.

7. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955).

But why resort to history at all, particularly if the judge believes that the Constitution must respond to current problems and needs? One reason, I think, is that although vigorous judicial review was almost certainly part of the original intent, the framers were far less enthusiastic about majoritarianism than today's commentators allege. This is illustrated by the framers' intent that neither the Senate nor the President were to be directly elected by the people. Judges in particular have always had something of a guilty conscience about their power and its conflict with the traditional democratic model. Consequently, if judges can anchor their judgments in history, they at least look as if they are appealing to an objective reality and are not guilty of simply importing their own notions into the Constitution and the law.

I hope that this discussion does not sound excessively cynical. It is, however, reality, for it reveals that truth is a very difficult thing to determine. Even when there is no axe to grind between advocates, truth is hard to find. One of the most significant studies of free speech in recent years was Leonard Levy's history of the United States at the time of the adoption of the first amendment.[8] In his 1960 study of the period, Levy concluded that the framers did not have a very exalted view of what that amendment should do because, in Levy's opinion, they saw the amendment as prohibiting only prior restraint.[9] That eventually became the prevailing view.

A few years ago, Levy changed his interpretation of the framers' intent. Responding to criticisms, he conceded that the framers had a much more expansive view of the first amendment than he had initially asserted because the public debate with which they were familiar, and which they certainly did not intend to curb, allowed a much broader scope for speech than is reflected simply in protection against prior restraint.[10]

Levy's reassessment demonstrates that in history, as in all the other social sciences, our notion of truth is built on often shifting sands. Sociology, history, economics—all are subject to rethinking and re-evaluation. This is certainly true of law as well. Thus, there is no absolute truth about what happened 200 years ago in 1787, or 120 years ago in 1866-1868, to guide a court in the difficult job of

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8. L. LEVY, LEGACY OF SUPPRESSION—FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

9. *Id.* at 185-86.

10. *See* L. LEVY, EMERGENCE OF A FREE PRESS at xi (1985) (this is the revised edition of Levy's 1960 work, *supra* note 8).

determining what the Constitution means in the context of our society today.

It is thus hard to believe that these original-intent enthusiasts, such as Attorney General Edwin Meese, really believe what they say. For example, in a recent address, Meese stated:

> There is a frank proclamation by some judges and commentators that what matters most about the Constitution is not its words but its so-called "spirit." These individuals focus less on the language of specific provisions than on what they describe as the "vision" or "concepts of human dignity" they find embodied in the Constitution. This approach to jurisprudence has led to some remarkable and tragic conclusions.
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> In the 1850's, the Supreme Court under Chief Justice Roger B. Taney read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery. The *Dred Scott* decision, famously described as a judicial "self-inflicted wound," helped bring on the civil war.[11]

The absurdity of Meese's argument is obvious to anyone who takes the trouble to read *Dred Scott v. Sandford*.[12] Apart from the inherent implausibility of the notion that a decision "read[ing] blacks out of the Constitution" could be based on "concepts of human dignity," Taney in fact did precisely what Meese wants judges to do: Taney engaged in an extensively researched, strict reading of the framers' original intent, explicitly rejecting any "more liberal" views.[13]

Taney first pointed out:

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. . . . The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[14]

After an elaborate analysis of what the framers and others thought and legislated about blacks in 1787, he concluded:

> What the construction was at that time, we think can hardly

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11. E. Meese, Address Before the D.C. Chapter of the Federalist Society, Lawyers Division 7 (Nov. 15, 1985) (available at the *Maryland Law Review*).

12. 60 U.S. (19 How.) 393, 405 (1857).

13. *Id.* at 426.

14. *Id.* at 405.

> admit of doubt . . . . Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States [because members of] . . . the African race were not included under the name of citizens of a state . . . and [were] so far inferior, that they had no rights which the white man was bound to respect.[15]

Taney admonished:

> No one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.[16]

Meese's speech writers have never said it better.

Or consider *Brown*. Meese has praised it as an example of loyalty to the original intent behind the fourteenth amendment. But if anything is clear from the murky history of that enactment, it is that the amendment was not meant to outlaw segregated schools. Indeed, as I mentioned earlier, in his article tracing the history of the amendment, Alexander Bickel concluded that the fourteenth amendment "was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation."[17]

On the other hand, the historical record shows with equal clarity that the amendment's framers had no objection to racial preferences and affirmative action. For example, the Freedmen's Bureau Act,[18] adopted in July 1866, was bitterly opposed by some because, as one Senator complained, it "gives [blacks] favors that the poor white boy in the North cannot get."[19]

Obviously, Meese would not try to justify school segregation or anti-miscegenation statues today, and he certainly is not impressed by the thirty-ninth Congress' approval of racial preferences. But if there is discretion to pick and choose which original intentions to honor and which to reject, by what criteria are those choices to be made? Except by exercising a contemporary moral and practical

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15. *Id.* at 426-27.

16. *Id.* at 426.

17. Bickel, *supra* note 7, at 58.

18. Ch. 200, 14 Stat. 173 (1866).

19. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 397 (1978) (Marshall, J., concurring in part and dissenting in part) (quoting Remarks of Sen. McDougall, CONG. GLOBE, 39th Cong., 1st Sess. 401 (1866)).

judgment, how can one reject the framers' views on some things, but not on others?

As I have said elsewhere, when Mr. Meese criticizes the *Brown* case for its infidelity to original intent, then and only then will he be entitled to be taken seriously.

Next, I would like to address an ancillary issue. The original intent theorists, like Judge Robert Bork, for example, stress that the criteria for appropriate judging are original intent, text, and structure.[20] But these theorists apparently do not take these criteria too seriously either, for they apply them selectively. They ignore one of the four explicit rules of construction given to the courts and to the American people as to how the Constitution is to be interpreted. It is the ninth amendment.

Let me read it to you. It is very simple and among the clearest of constitutional texts: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[21]

For some reason or another the original intent-textual literalists disdain this amendment. And yet it was one of the most crucial elements in the entire set of compromises that made our Constitution possible. The Federalists had argued against a bill of rights because they feared that an enumeration of specific rights would imply that there were no others. In order to forestall any such possibility the ninth amendment was adopted. As John Hart Ely, Leslie Dunbar, and others have demonstrated, the purpose of this amendment was to ensure that any shortfall in the enumeration of rights would not prevent enforcement of rights not listed.[22] Because, as Madison put it, the courts were to be "impenetrable bulwarks" charged with the protection of those rights, the courts would be left with the task of discovering and applying them.

This does not mean that the ninth amendment *creates* any rights. It is not like the first or even the eighth or fourteenth, with their expansive phrases like "cruel and unusual," "equal protection," and "due process." Instead, the ninth is a rule of construction which has a rather simple *negative* meaning. But this meaning constitutes an almost complete rebuttal of those who argue that the only rights that may be enforced are those with explicit textual support: the

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20. *See* Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 57 WASH. L.Q. 695, 695 (1979).

21. U.S. CONST. amend. IX.

22. *See* J. ELY, DEMOCRACY AND DISTRUST 34-41 (1980); Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 630-31 (1956).

amendment says that it is inconsistent with the constitutional scheme to limit the rights of Americans to those specifically listed.

Where do rights come from, if not from the text? Senator Mathias raises that question and provides part of the answer: from our traditions, our history, and our moral development. As that great conservative justice, Justice Harlan, put it when speaking of due process:

> [T]hrough the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[23]

With respect to the argument restricting the judicial role to the textually enumerated "specific provisions," he stated that such " '[s]pecific' provisions of the Constitution, no less than 'due process,' lend themselves as readily to 'personal' interpretations by judges."[24] Various Justices' opinions illustrate the truth of this latter point. Consider Chief Justice Rehnquist's uniquely narrow interpretation of the equal protection clause as limited to racial groups,[25] or the Black-Douglas view that the first amendment should be given an "absolute" interpretation.[26]

Arguably, the ninth amendment could direct us to nothing more than those rights of which the framers were aware, for that amendment tells us nothing about the nature or source of those rights, but only that we are not limited to those specifically enumerated. A recent debate between two of our most noted proponents of judicial restraint, Judge Robert Bork and Justice Antonin Scalia,

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23. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

24. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

25. *See* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

26. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J.; Douglas, J., concurring); Roth v. United States, 354 U.S. 476, 513 (1957) (Douglas, J.; Black, J., dissenting).

who are also among those most hostile to the creation of so-called "new rights," shows how unhelpful such limitations are.

Judge Robert Bork's primary claim to civil libertarian credentials is his concurring opinion in *Ollman v. Evans*,[27] a case particularly worth recalling here for it involved an invitation to Professor Ollman to become Chairman of the Political Science Department at the University of Maryland. The question was whether Ollman's libel suit against two nationally syndicated columnists, Rowland Evans and Robert Novak, was to be thrown out because the columnists had not made any *factual* statements but rather published "opinion," which was not actionable under the libel laws. The particular line in question was as follows: "[Ollman's] pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. 'Ollman has no status within the profession, but is a pure and simple activist,' he said."[28] A letter from Ollman's counsel, demanding retraction by Evans and Novak, stated that " 'a poll of 317 leading and representative political scientists' ranked him 'tenth in the entire field of all political scientists in terms of occupational prestige.' "[29] The question was whether or not a libel suit would lie.

After examining the common usage of the specific language, the extent to which the statement was capable of being verified objectively, and the full context of the statement both in general and in the column,[30] the majority concluded that the statement was opinion, not fact, and therefore was not actionable.[31]

Judge Bork wrote a concurring opinion in which he erected a highly protective barrier around public, political speech against those who enter "a political arena in which heated discourse was to be expected and must be protected. . . . It is the kind of hyperbole that must be accepted in the rough and tumble of political argument."[32] Judge Bork admonished, "We must never hesitate to apply old values to new circumstances."[33]

Bork went on to talk about the great threat that the burgeoning number of libel suits posed to press freedom. Quoting *New York Times* columnist Anthony Lewis, he noted that this was

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27. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).
28. *Id.* at 973.
29. *Id.* at 1030.
30. *Id.* at 986-90.
31. *Id.* at 990.
32. *Id.* at 998 (Bork, J., concurring).
33. *Id.* at 996.

> a time of growing libel litigation, of enormous judgments and enormous costs. The press and its lawyers are deeply worried; the protection that they thought was one for free expression in *New York Times v. Sullivan* seems to them to be crumbling. Some would say that libel actions are a more serious threat than ever.[34]

And, of course, the recent suits by such public figures as Ariel Sharon,[35] William Westmoreland,[36] and many others lend some support to this fear.

The essence of the debate, however, was whether the judiciary should respond to changing needs and times. Judge, now Justice, Antonin Scalia was appalled by both the result and by Judge Bork's

> creative approach to first amendment jurisprudence. It is an approach which embraces a "continuing evolution of doctrine," not merely as a consequence of thoughtful perception that old cases were decided wrongly at the time they were rendered . . . and not even in response to a demonstrable, authoritatively expressed development of public values . . . but rather in reaction to judicially perceived "modern problems" which require "evolution of the law in accordance with the deepest rationale of the first amendment." It seems to me that the identification of "modern problems" to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment; and that the remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before.[37]

Rarely has a strict constructionist-original intent theorist such as Scalia been more critical in a comment. One would have thought that the target of such comments was Justice William Brennan or some other benighted "subjectivist" who was willing to take off into the wild blue yonder of "personal value choices." But no, the target was Judge Bork and his belief that

> [w]hen there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amend-

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34. *Id.* at 996-97 n.1 (quoting Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 603 (1983)).

35. Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984).

36. Westmoreland v. CBS, Inc., 596 F. Supp. 1170 (S.D.N.Y. 1984).

37. 750 F.2d at 1038 (Scalia, J., dissenting) (citations omitted).

> ment—whose core is known but whose outer reach and contours are ill-defined, face a never-ending task of discerning the meaning of the provision from one case to the next.[38]

But why is this different from equal protection or due process? Why are not privacy and abortion rights an "evolution" from sterilization and family rights? Why is not protection for homosexuality an evolution from protection for contraception?

Admittedly, Judge Bork does not like many of these cases, but they are the law, and they are no less precise than either the equal protection clause or many aspects of the first amendment. After all, the framers evinced no intent to use the first amendment to curb the reach of libel suits. It was the 1960s Court that did that. Consequently, the judge-made law of *New York Times v. Sullivan*,[39] which Bork applied in *Ollman*, is just as deviant from the original-intent approach as is the judge-made law of the privacy rights cases such as *Skinner v. Oklahoma*,[40] *Griswold v. Connecticut*,[41] *Pierce v. Society of Sisters*,[42] and others. Judge Bork may disapprove of these cases, but they are as much law as *New York Times v. Sullivan*.

What it all comes down to, I think, is that there is no way to avoid responding to what Holmes in *The Common Law* so beautifully termed "the felt necessities of the time."[43] This has always been the role of the courts and this is why De Tocqueville could say 150 years ago that in America the great social questions all come to the courts.[44] The framers may not have planned that, but they probably would not have been too surprised—that is, after all, why they gave federal judges life tenure and freedom from salary reductions.

The most basic "original intent" of the framers was to create a free republic that would last for centuries. They accordingly created a Constitution—consisting of both the original seven articles and the first ten amendments—that was sufficiently open-ended to accommodate the evolving conscience of our society. As Woodrow Wilson said, the Constitution was intended to be "a cornerstone, not a complete building; . . . a root, not a perfect vine."[45]

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38. *Id.* at 995 (Bork, J., concurring).
39. 376 U.S. 254 (1964).
40. 316 U.S. 535 (1942).
41. 381 U.S. 479 (1965).
42. 268 U.S. 510 (1925).
43. O.W. HOLMES, THE COMMON LAW 1 (1963).
44. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 74 (R. Heffner ed. 1956).
45. *See* J. COOPER, THE WARRIOR AND THE PRIEST 45 (1983) (quoting W. Wilson, Congressional Government (unpublished manuscript)).