

Goldwin: Comment on Mathias

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Recommended Citation

Robert A. Goldwin, *Goldwin: Comment on Mathias*, 47 Md. L. Rev. 189 (1987)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol47/iss1/28>

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COMMENT

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I wish to ask only two questions. First, Senator Mathias offers “ordered liberty” as a “guiding principle for constitutional interpretation.”¹ Is this principle really helpful in interpreting the Constitution of the United States? Second, if we consider the many proposed principles or doctrines—whether it be “the original intent of the founders,” or Justice Brennan’s constitutional “vision . . . of human dignity,”² or Senator Mathias’ “system of ordered liberty”—what role can any such general principle play as a guide to interpreting the Constitution?

I will now try to answer those two questions.

Senator Mathias rejects the principle of “the original intent of the founders” for plausible reasons which need not be repeated. But he goes on to say, “We cannot reject the theory of ‘original intent’ without adopting some other guiding principle for constitutional interpretation. . . . [W]e must look behind the words of the Constitution. The answer may be embedded in the underlying principles and doctrines of the document.”³ What he discovers when he looks “behind the words” is that “[f]or the founders and for us, the Constitution . . . was and is a system of ordered liberty.”⁴

Let us agree that the Constitution intends to provide a system of ordered liberty. But does that system provide a useful guiding principle for constitutional interpretation? I think not. As proud as we justifiably are of the Constitution of the United States and its pioneering role in teaching the world the benefits of a written constitution, we surely can acknowledge that ours is not the only system of ordered liberty. Many other nations, especially the western democracies, are also political systems of ordered liberty, yet the constitutions of most of those nations share few, if any, of the main

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1. See Mathias, *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174, 177 (1987).

2. W. Brennan, *The Constitution of the United States: Contemporary Ratification 9* (Oct. 12, 1985) (lecture delivered at the Text and Teaching Symposium at Georgetown University) (available at the *Maryland Law Review*).

3. Mathias, *supra* note 1, at 177-78.

4. *Id.* at 178.

structural and institutional features of the Constitution of the United States.

Great Britain, for example, is a nation also characterized by ordered liberty, but very differently constituted. It does not have a written constitution which is contained in a single document, a federal structure, judicial review of national legislation, separation of the executive and legislative branches, executive veto, checks and balances, calendar elections and fixed terms of office, a written bill of rights, or a truly bicameral legislature—and these are only a few of the differences. A similar observation can be made for a dozen or more other parliamentary democracies that are also systems of ordered liberty.

If it is possible to have ordered liberty without major features of our constitutional system, is it not clear that there is no *necessary* connection between the principle of “ordered liberty” and our Constitution, however compatible the two may be? In seeking to establish a system of ordered liberty the authors of the Constitution could have made many structural and institutional arrangements quite different from the ones upon which they finally agreed. We know that, committed as they were to the principles of ordered liberty, the authors considered many other very different constitutional features, and it was not always clear, even to them, why they settled on the one they did rather than on another.

Because there is no necessary connection between the principle of ordered liberty and the chief features of our Constitution, there are many ways of conducting the business of government that will pass the test of ordered liberty but will not pass the test of constitutionality. For example, the two-year term of office for Representatives⁵ could just as well have been set as a term of one year, or three, or even four, but not, consistent with the principles of the Constitution, as a term of ten or twenty years.

It was not foolish or irrational for the terms of office for Representatives, the President, and Senators, to have been set at two, four, and six years. Nevertheless, those numbers are partly if not entirely arbitrary and could, consistent with the principle of ordered liberty, have been set at four, six, and eight years, or even four years for all. From this example we see that the principle lacks precision. The only way to understand the constitutional provisions regarding terms of office, and many other parts of the Constitution, is to read

5. U.S. CONST. art. I, § 2, cl. 1.

the text, not consult some guiding principle for constitutional interpretation.

The principle of ordered liberty, therefore, would be of no use in any practical effort to find out what the Constitution requires of us except in conjunction with a careful scrutiny of the text of the Constitution itself. In proposing it as a guiding principle for constitutional interpretation, one must be advocating first a careful reading of the text for the purpose of finding its intent, or else the proposal makes no sense.

I turn now to the second question: What role, if any, can such a guiding principle for constitutional interpretation play?

There are many reasons usually given for rejecting the principle of the original intent of the founders. The principle requires dubious long-distance analysis of the thoughts and motives of members of a highly diverse group who may have had many differing reasons for agreeing to the same wording. This and other considerations make it difficult to use the original intent of the founders as a guide to the Constitution.

But it is also possible to understand the word "intent" not as referring to the intent of the founders but to the intent of the constitutional provisions themselves. The legal term "intendment" is defined as "the true meaning, understanding, or intention of a law or other legal instrument."⁶ Senator Mathias uses this meaning when he speaks of "the intent of the contracting parties."⁷ It is what most people mean when they say "intent." The Beatles, for example, in a contract dispute, accused a recording company of "an unconscionable distortion of the language and intent of the manufacturing and distribution agreement."⁸ With this use of the word intent, we can see that it makes a big difference if we speak of "the intent of the text of the Constitution" instead of "the intent of the founders."

It may sound naive and old-fashioned, and very much against scholarly trends, but still I would argue that words have meaning and that the text of the Constitution has a meaning. Any text can be understood differently by different persons at the same time, or understood differently generally at different times. That is why the Supreme Court has many Justices and not just one, why so many decisions are split decisions, and why earlier decisions are reversed from time to time. But when two people dispute the meaning of a

6. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1175 (3d ed. unabr. 1976).

7. Mathias, *supra* note 1, at 187.

8. Wash. Post, Aug. 9, 1987, at H1, col. 1.

text, one saying it means this, the other something else, they still both assert that the text means something (especially if there are important interests involved); that it means what they think it means not because they say so but because they have detected the true meaning; that its meaning is not arbitrary; and that no one, especially not a judge, has the right to say "it means what I say it means because I say so," or any other formulation that indicates that the text itself is beside the point.

In short, I think the right way to read the Constitution is to honor the intent of the text, including, of course, the explicit intent of article V, that the amendments "shall be valid to all Intents and Purposes, as Part of this Constitution."⁹

Senator Mathias himself, deny it as he will, is an "original intent of the text" man. According to his argument, time has not changed the important things. He says that "for the founders and for us"—equally, I assume—"the Constitution] was and is,"—that is, now as much as then—"a system of ordered liberty."¹⁰ The founders were able "to transcend the moment"¹¹ and as the preamble states, "secure the blessings of liberty to ourselves and our posterity."¹²

The bulk of Senator Mathias' argument is based on the Constitution's text. Consider his discussion of the Gramm-Rudman-Hollings legislation. He says he has always opposed it; his reasons are all drawn from the intent of the constitutional text. "Legislative decisions about where to spend, where to cut, and where to tax are for the Congress to make. . . ."¹³ How does he know? He has considered the clear intent of the text, of course. He wishes the Supreme Court had not relied on "the separation of powers principle," not because he has doubts about the separation of powers but because the decision could have been grounded more solidly in explicit provisions of the Constitution. "Deficit reduction," Senator Mathias points out, in true intent-of-the-text style, "is a legislative responsibility that Congress has no power to delegate to anyone else."¹⁴ He even concludes by musing on "how the founders would have viewed

9. U.S. CONST. art. V.

10. Mathias, *supra* note 1, at 178. I will skip over the abundant evidence that Senator Mathias is also an original-intent-of-the-founders man, citing only his repeated references to the constitutional debates and his many citations of *The Federalist* Nos. 5, 10, 47 and 51 to bolster the authority of his interpretations of the Constitution.

11. Mathias, *supra* note 1, at 179.

12. U.S. CONST. preamble.

13. Mathias, *supra* note 1, at 186.

14. *Id.*

this dilemma."¹⁵

This version of the principle of intent is one on which Senator Mathias and I can agree. I think he is at his best as an "intent of the text" man. It is a good principle because it requires a careful reading of the text as the first step. As Senator Mathias demonstrates, one must look not only for what the Constitution says but also for what it does not say. He looks for the power to delegate certain legislative responsibilities, and seeing none in the text, he is willing to say that the Supreme Court missed the point and should have told Congress, very simply, that they cannot exercise a power the Constitution does not give them. Further, he does not ask whether this power is in accord with current sentiments. Whether constitutional powers are in accord with present day beliefs about how powers should be allocated is a question that should be asked only for the purpose of deciding whether to advocate an amendment to the Constitution, not for deciding whether the President or the Congress has authority to act.

For example, the two-year term for Representatives is a different matter now than it was in 1787. Consider how things have changed: the costs of campaigning, the size of districts, the nature of campaigning, and the distance to travel to one's district from Washington, D.C. Because two years no longer means to a member of Congress what it used to mean and because time seems to pass so much faster now, many thoughtful observers conclude that the term of office for Representatives should be four years, not two. But should we just legislate the change on the basis that times have changed and the meaning of two years then really translates to four years now? Or should we stick to the intent of the provision, the obvious strict meaning of the text, and insist that if we want to change the Constitution we should amend it using the procedure the Constitution provides? The correct answer seems perfectly clear—use the amending procedure.

How is this example different from the problem Justice Brennan speaks of frequently—capital punishment? The Constitution has three or four explicit provisions relating to capital punishment, yet Justice Brennan says that now, unlike then, capital punishment is "cruel and unusual punishment" under the eighth amendment and violates the fundamental principle of the Constitution—the "vision of human dignity."¹⁶ Does he mean that, therefore, we should

15. *Id.* at 187.

16. *See Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring)

amend the Constitution to eliminate capital punishment? No. He means that the other Justices ought to join him and Justice Marshall in declaring, without resort to the amending procedure, that, because times have changed, the explicit capital punishment provisions of the Constitution are now invalidated by our newly acquired awareness that executing murderers violates the "constitutional vision of human dignity," and that capital punishment is therefore unconstitutional. This is an example of how a general principle can be used to alter the clear intent of the text, bypassing the amending procedure provided by the Constitution.

Unlike Senator Mathias and Justice Brennan, the founders resisted efforts to include in the Constitution statements of principles such as were found in many state constitutions. Even in drafting the initial amendments, the members of the First Congress repeatedly defeated proposals to affix words of principle to the preamble. The apparent intent was for the Constitution to establish offices and institutions, assign and limit powers, and remain silent about the principles. There are no words in the Constitution about "separation of powers" or "federalism" or "checks and balances" or even "created equal" and "unalienable rights," but no able reader of the Constitution should doubt that they are embedded in the Constitution. We uncover these principles by reading the text and what it says about how the government and the people are to be constituted.

The error of those who seek to interpret the Constitution by principle is that they have the procedural order backwards. We cannot say what the provisions are by starting with the principle; we must start with the provisions and derive from them what the principles are. Only in that way will the Constitution have a sufficiently steady meaning to provide the kind of guidance that we expect to derive from it.

Will such a Constitution be able to keep pace with the times? Of course. The question is not whether the Constitution is to be timely or not, but rather *how* the Constitution and new circumstances will be reconciled. We must reject the position that the Constitution is so pliable that it can be shaped and reshaped by the intellectual and legal fads that come and go. Instead, we should adopt the position that the Constitution has a steady meaning, a reliable and knowable arrangement of institutions, offices, and pow-

("Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any general purpose more effectively than the less severe punishment of imprisonment.").

ers, of such ingenuity and suitability that it provides the necessary guidance for the future.

We do not want a Constitution that is constantly changing in a frantic effort to keep up with new circumstances. We want a Constitution that represents principles that are changeless and timeless, that enable us to make the new circumstances conform to the Constitution. That is the purpose of the Constitution: to enable Americans to govern themselves and keep their rights secure in the rapidly changing unforeseen circumstances of the dangerous world in which we live.