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**THE SUPREME COURT AND THE USES OF HISTORY.** By Charles A. Miller. Cambridge, Massachusetts: The Belkap Press, 1969. Pp. viii, 234. Cloth: \$6.95.

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## Book Review

THE SUPREME COURT AND THE USES OF HISTORY. By Charles A. Miller. Cambridge, Massachusetts: The Belkap Press, 1969. Pp. viii, 234. Cloth: \$6.95.

The unique place and special responsibilities of the Supreme Court were under an uncustomarily revealing light when the Senate, twice in recent months, chose to reject two potential Justices nominated by the President. As the most undemocratic branch of the federal government, the Judiciary, with the Supreme Court at its head, maintains a delicate position in our Constitutional system. But, precisely because it has no recourse to a public mandate in times of crisis, it has been bequeathed a quasi-permanent status of public acceptance which is accorded to neither the Congress nor the President. The Supreme Court, in the word of Alexander Hamilton, has neither purse nor sword, neither force nor will. Its powers are maintained only through respect for its virtue and rightness of judgment.

An indispensable element of this respect is the ability to rationalize Constitutional judgments in terms of principles readily acceptable and understandable by the public. For the power to command allegiance is in the belief that vagaries of the human spirit are controlled by principles higher and more enduring than the collective wisdom of nine men. Clearly, the precise principles of adjudication may not always be acknowledged or even identifiable. The Court's decisions, nevertheless, must be principled, rational, and candid. And they must have the backing of a Court capable of holding a modicum of public respect. Thus, a majority of the Senate was prompted to insist that nominees for the High Court exhibit a degree of intellectual and ethical quality, which is rarely required among more representative institutions in our society.

As the most tangible and permanent manifestations of the work of the Supreme Court, judicial opinions must be the strongest supports of the moral suasion which it seeks to command. These opinions are the vehicles of rationalization for the Court's work. In a sense, they are the intellectual exercise required of a policy-making body which is independent from public participation.

It is a principle of adjudication, commonly expressed in the Court's opinions, that the use of history and historical materials provides the basis for Constitutional interpretation. Paradoxically, as the original historical

materials grow older, this historical principle of interpretation seems to gain vitality. The uses and misuses of history are the subject of a first-rate book by Professor Charles Miller. Appropriately titled *The Supreme Court and the Uses of History*, it is the first book to my knowledge fully treating this often baffling area of the law.

The Court's use of history has been heartily criticized by members of both the historical and legal disciplines. Rarely, however, has anyone come to grips with the full complexity of issues raised by this subject. History in a constitutionally relevant sense is of two types. First, the historical facts behind the development, drafting, and adoption of Constitutional provisions are an essential element in ascertaining Constitutional intent. Second, history is often used to illustrate the development of American society in the attempt to bring meaning to a document written almost two centuries ago. Professor Miller calls this latter type "ongoing history."

Herbert Wechsler has said it is "subtle business" to appraise the value of history in Constitutional law. Such an appraisal unavoidably thrusts to the roots of Constitutional theory, for the uses of history involve choices among competing philosophies of Constitutional interpretation. Professor Miller deals very thoroughly with these subtleties and little of significance escapes his meticulous eye. He has used the case histories of five Supreme Court decisions to illustrate one or more of the potential benefits and disappointments of history as a method of interpretation. Perhaps the most interesting of the five is *Home Building & Loan Association v. Blaisdell*.<sup>1</sup> If one single case can point out the deep contradictions inherent in the use of history, *Blaisdell* is that case.

In April, 1933, the Minnesota legislature adopted an act providing for the temporary postponement of mortgage foreclosures. Less than a year later, in the depths of the great depression, the Supreme Court narrowly upheld the validity of this statute despite the Constitutional stricture against state actions impairing the obligations of contracts. The majority opinion in *Blaisdell* was reached in the face of a dissent which correctly pointed out that it was precisely this type of state legislation which the framers of the Constitution intended to prohibit. The historical background of this provision amply supported the conclusion of the minority. Chief Justice Hughes, writing for the majority, forged on uncomfortably despite the light of the historical proof to reach his result. As Miller points out, rarely, if ever, has the Court so overtly taken liberty with the historical intent of our Founding Fathers. Other case histories under Miller's careful scrutiny re-

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1. 290 U.S. 398 (1934).

veal further theoretical and practical difficulties hidden in the use of historical materials.

Perhaps the most appealing parts of Miller's book are the efforts to reach some philosophical middle ground and theoretical basis for the uses of history. Conversely, these parts are also the most difficult and open to criticism. Yet, Miller emerges relatively unscathed and presents some valuable insights.

First, Miller points out the essential problem of Constitutional interpretation: the delicate balance between popular sovereignty and judicial review. The authority of the Court to construe and perhaps alter the meaning of Constitutional provisions is always circumscribed by the existence of a far more democratic means of change—the amendatory process. Yet, the interpretive authority exists and has been accepted. Thus, the principles of interpretation employed by the Court must bear the burden of maintaining that acceptable authority.

The most deeply rooted difficulty in the use of history by the Court is the constant confrontation between Constitutional intent and Constitutional change. Here Miller runs into difficulties. He is for change. Regrettably and unnecessarily, he gives short shrift to the value of Constitutional intent. Constitutional intent, to Miller, is a roadblock to progress. Therefore, it can, without much ado, be conveniently ignored.

In a legal sense our Constitution is a statute. Undoubtedly, more pervasive and superior than the ordinary law, it is, nevertheless, the work of a rule-making body expressed in specific words and phrases. A basic and sound doctrine of statutory interpretation is that the intent of the enacting body controls. When available and relevant, this intent provides the ground rules for judicial interpreters. But, the interpretation of the founding document of our Union, written almost two hundred years ago, poses difficulties for the intent theory of interpretation. This nation has changed; its people have changed; and most importantly, the great public questions to be resolved by the Court are today's issues—not yesterday's.

Thus, Miller is with Oliver Wendell Holmes in saying that, "the present has a right to govern itself so far as it can."<sup>2</sup> Surely this is so, but Miller concludes further that in the final analysis "Justices of the Supreme Court are ultimately bound only by contemporary wisdom, perhaps largely their own."<sup>3</sup> This is a broad grant of power which at its extremes negates all value of a written Constitution as a law which is binding on all, even Justices.

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2. O.W. HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 139 (1920).

3. C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 200 (1969).

Miller does admit that the clear intent of a Constitutional provision recently enacted would control its interpretation. But, he implies that this is so only because the intent and meaning are contemporary—not because intent itself has the power to bind. This may be progressive thinking, but it falls far short of providing the principled analysis which the Court must provide.

Miller, regrettably, never comes to grips with the intent theory of construction because he fears its potential to bind the present to antiquity. This failure stems from an imprecise perception of the true relevance of Constitutional intent. A full understanding of the intent theory must respect what intent is—and what it is not. Once understood, it becomes not an 18th Century straight jacket, but a source of the principled and candid reasoning so necessary to permit the exercise of “contemporary wisdom.”

The intent of the framers is a phenomenon of the past.<sup>4</sup> Thus, its “discovery” must involve some knowledge and research of historical data. Concomitantly, use of these materials demands respect for their limitations. If history teaches us anything it is that the great bulk of the past is beyond our knowing. The most perfect knowledge gained from the bits and pieces of antiquity that are historical materials is that we will know very little and that, imprecisely.

In ascertaining the intent of a Constitutional provision one must recognize the consequences of both the nature of the Constitution itself and the circumstances under which it was drafted and adopted. Most importantly, it does not denigrate the effect of Constitutional intent to find that in many cases there is simply no evidence of a relevant intent to deal with a specific question. The Court found itself in this situation when, after an exhaustive historical search, it concluded in *Brown v. Board of Education*<sup>5</sup> that the framers of the fourteenth amendment had simply not considered the question of segregated schools.

Other circumstances in 1787 hinder the discovery of a relevant intent. As Pierce Butler of Georgia said:

We had clashing interests to reconcile—some strong prejudices to encounter . . . view the system than as resulting from a spirit of Accomodation to different interests, and not the most perfect one.

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4. In speaking of Constitutional intent one seems always to refer to “framers.” Actually, the relevant intent must be found not only with the men at Philadelphia in the summer of 1787 (framers) but also from the many members of state ratifying conventions (ratifiers). James Madison in 1796 suggested that as it came from Philadelphia, the Constitution was “nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.” 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 374 (rev. ed. Farrand 1937) [hereinafter cited as RECORDS].

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

Improvement was the byword, and Butler continued, "If we can secure tranquility at Home and respect from abroad, they will be great points gain'd."<sup>6</sup>

It was a pragmatic group of men that met that hot summer in Philadelphia. Most were more concerned with making a Union than deciding every point of debate. Some questions were clearly left open for subsequent resolution. Among these was the question of whether to provide a jury trial in certain civil cases. The failure to include language on this point was not, in fact, meant to abolish jury trials in these cases; it simply meant that the varied practices in the states of Confederation made final resolution of the question impossible.<sup>7</sup> Similar open provisions concern the issuance of legal tender<sup>8</sup> and the interpretation of Presidential disability provisions which happily has never come before the Court.<sup>9</sup> Other questions were not precisely decided because of fear that such a decision might hinder the eventual adoption of the full Constitution.<sup>10</sup>

Constitutional provisions may be deliberately ambiguous. Abraham Baldwin, from Georgia, stated before the House of Representatives in 1796 that some subjects were left a little ambiguous and uncertain.<sup>11</sup> Governor Morris, one of the principal drafters of the text, subsequently admitted that parts of the document were purposely equivocal.<sup>12</sup>

In order to appreciate the bounds of intent we must above all look at the Constitution as a whole. Clearly, it was not designed to decide all cases. Provisions for change are inherent in its very structure. Charles Curtis has described it as "chapter headings" and indeed they are, with the contents to be filled in with the passage of time. One need not downgrade the authority of intent to recognize that when soluble problems are not solved the inference is that the future must decide for itself.

A last word about intent involves the use of general language to express

6. 3 RECORDS 103. Similar views were expressed by Madison and Washington. 3 RECORDS 136, 242.

7. See comments by General Pinckney, 2 RECORDS 628 and James Wilson, 3 RECORDS 101. Alexander Hamilton touched on this subject in THE FEDERALIST No. 84. Thomas Jefferson chided the delegates from Paris, where he was ambassador, for their failure to establish, in explicit terms, a general right to a jury trial in all cases.

8. See Thayer, *Legal Tender*, 1 HARV. L. REV. 73 (1887).

9. 2 RECORDS 427.

10. 3 RECORDS 363-64. Farrand has collected excerpts from opinions by Secretary of State Thomas Jefferson and Secretary of Treasury Alexander Hamilton on the constitutionality of a national bank. Both opinions written to President Washington agree that a provision giving the federal government powers to grant corporate charters was dropped at the Convention because inclusion in specific words would endanger the ultimate ratification of the Convention.

11. 3 RECORDS 369-70.

12. 3 RECORDS 419-20. Morris refers specifically to parts of Article III.

a more specific and narrow intent. The point can best be made by use of language not from the Constitution, but from the Declaration of Independence. In the famous *Dred Scott* decision<sup>13</sup> Chief Justice Taney interpreted the phrase, "all men are created equal" not to include the enslaved black man. In the same breath, however, the beleaguered Taney admitted that if the phrase had been written in 1857, it would have embraced all men.<sup>14</sup>

Taney's tragic error was to define principle by practice. Ideals are the best means to overcome human frailties. To equate the ideals of 1787 with the practice of 1787 is unsupportable. Solicitor General Erwin Griswold, when he was Dean of the Harvard Law School, pointed out that, "history, like the law, has many fictions. . . . In a very real sense, the fiction becomes real, and has a significance of its own."<sup>15</sup> Abraham Lincoln had the proper answer to Taney's dilemma when he said, "The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use."<sup>16</sup> The old teachers' maxim 'Do as I say, not as I do' is sound interpretative theory.

The foregoing examples serve to erase the fear that Constitutional intent is a force of the *status quo*. While it may not have the instant acceleration of "contemporary wisdom" as a vehicle for Constitutional change, it is nevertheless perfectly capable of moving from yesterday to tomorrow.

One must remember that reason and "contemporary wisdom" alone are not always sufficient arbiters of national policy in democracy. For better or worse, we have not chosen to follow the ideal of Plato's *Republic*. We have given judicial review great latitude in our Constitutional system. But, the price of this freedom is strict adherence to accepted principles of judicial interpretation. These principles are not barriers to change but safeguards of popular sovereignty.

The force of Constitutional intent is one of those principles whose impersonal discipline serves in the final analysis to unfetter a judge and court to be, in the words of Professor Henry M. Hart, "a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles. . . ."<sup>17</sup> Such freedom would be

13. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

14. *Id.* at 410.

15. S. THORNE, W. DUNHAM JR., P. KURLAND, & I. JENNINGS, *THE GREAT CHARTER* vii (1965).

16. LINCOLN, *SPEECH AT SPRINGFIELD, ILL., JUNE 26, 1857*, in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS*, 352, 360-61 (Basler ed. 1946).

17. Hart, *Foreword: The Time Chart of the Justices*, 73 *HARV. L. REV.* 84, 99 (1959).

unthinkable without the public confidence in the final authority of the people.

Professor Miller has chosen to work where others have generalized. Awareness of this work, however, will make it difficult to generalize with impunity in the future. This is a thoughtful and perceptive little book which offers us far more than the normal quota of insights. Miller has treated an area of judicial practice which was badly in need of definition. In the process he has provided us with a fascinating and authoritative study.

Oliver Wendell Holmes discussed the usefulness of history in the law as follows:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.<sup>18</sup>

Thanks to Professor Miller, the "dragon" is now in the open for all to see.

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18. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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