

ON ORIGINALISM AND JUDICIAL ACTIVISM

Stephen L. Bakke – February 12, 2011



*Scene at the signing of the
Constitution of the United States*
By Howard Chandler Christy

The Tenth Amendment to the Constitution

In terms of the powers of the federal government, it's not difficult to read what the Tenth Amendment says, or originally intended to say. First the words:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

There it is. It's that simple. It not really argued what the amendment says – that the federal government can do only what it has been specifically authorized to do by the Constitution. Everything else is left to the states or to the people themselves. What is argued in this day and age is whether this should even apply today.

Some examples of skeptics of “originalism”: First, when then Speaker Pelosi was asked if the federal government had constitutional authority for certain aspects of Obamacare she said, most incredulously “*Are you kidding?*”; California Rep. Pete Stark, when asked about limits on the federal government stated “*The federal government really can do anything it wants to do*”; And several years ago the current North Carolina Rep. David Price, when asked about what lines the federal government can't cross in eliciting desired results in the various states, said “*I see no lines.*”

Therein lies the debate. Liberals consider the Constitution somewhat less than relevant.

Judicial Activism

We have heard much recently about judicial activism and its relationship to our Founders' original intent when developing our form of government as expressed in the Declaration of Independence and ultimately the Constitution of the United States. The Federalist Papers and the other early comments of those Founders are heavily relied on for understanding the concept of “original intent.”

Originally the term “judicial activism” was used to describe judges who made rulings based on their own beliefs of what is right and consistent with their philosophical preferences. Often this characteristic was assigned to liberal judges who were thought to ignore the Constitution as written. Now, liberals consider the jealous guarding of our Founders’ “original intent” as “activist.” The debate about “Who’s the activist?” has received recent emphasis while arguing whether parts of “Obamacare” are constitutional.

Originalism – Frought With Nuance!

Darn! I thought a simple definition of “originalism” might easily fall into this report. No such luck! As I tried to pin down a proper definition, one thing led to another. And that other thing led to confusion. And finally there was a measure of chaos in my mind about what originalism means. There were different nuanced definitions for: originalism, textualism, original intent, original meaning, strict constructionism, formalist, plain meaning, and more. I defer to Justice Antonin Scalia for help(?) with a definition:

Justice Scalia has emphasized that he is “*not a strict constructionist, and no-one ought to be*. He goes on to call strict constructionism “*a degraded form of textualism that brings the whole philosophy into disrepute the Constitution, or any text should be interpreted neither strictly nor sloppily; it should be interpreted **reasonably**.*”

Scalia provides us with some more information on originalism which is the category to which he claims to adhere:

The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.

Now, wasn't that helpful?! Not really! I think I'll assume the reader readily understands what I mean by “originalism” and be done with it. Nuance aside, you get the idea!

A Disclaimer When Introducing Our Constitution? What's Next?

I recently heard about a published reprint of The United States Constitution and other founding documents. I had heard that the publisher introduced the material using a disclaimer as to the current relevance of these historic documents. I easily found the book for sale at Amazon.com and was able to access the copyright page where the “warning/disclaimer” appears. Here is what I found on page 3:

This book [The U.S. Constitution!!!!] is a product of its time and does not reflect the same values as it would if it were written today. Parents might wish to discuss with their children how views on race, gender, sexuality, ethnicity, and interpersonal relations have changed since this book was written before allowing them to read this classic work.

The publisher is Wilder Publications and the book was published in 2008. **Good Bleepin' Grief!** Our Founding Documents are treated like some outdated pieces of radical prose!

So Where Are We?

William Murchison did a good job of framing our situation, and how we got here:

The Constitution was written and ratified by men who saw it as a means of enabling and restricting government – balancing the requirements of efficiency and freedom Since the New Deal, the general idea has been, yes, if Congress wants to do something for the supposed good of all, then such a plan must be good for all. Mustn't it?"

We are now at a point in time when the Founders' reasoning and logic is considered, by some, of secondary importance. What really is important to some is the question: "Do I believe this law/policy/regulation/proposal meets my PERSONAL philosophical framework?" That question, when asked by judges, is what I consider judicial activism. One shouldn't be accused of activism just because of devotion to considering the Founders' intent! How can that be classified as activism? **It is in no way helpful to cast aside the wisdom of our Founders as relics of yesteryear. They are NOT!**

An argument has been made that, as regards the constitutionality of Obamacare for example, the history of the Commerce Clause rulings makes further argument "moot" – therefore a waste of time. Murchison also addressed this:

It's a bit late in the day, you may think, to reopen that immense and vital question, but sometimes the rule [i.e. the Constitution's provisions] is better late than never.

OK – It's a Good Thing – But Maybe It's Still Best Left to the States or Individuals

We must remember the proper question for judges to be asking: "Does a particular law, policy, or rule fit into the limited "enumerated powers" specified in the Constitution?" They should NOT be asking whether the particular law or policy "is a good thing." There are lots of "Martha Stewart type 'good things'" that should NOT be part of the federal government's role. Nor should judges be taking the "easy way out" by simply seeking out a "just or reasonable" course of action.

Some say: "For conservatives, that's a convenient theory to hold, but to what end? Is holding to a constitutional theory of "originalism" a sufficient end in itself?" That's what

some are hearing me say – and their understanding falls dramatically short of the true meaning. My “government affairs advisor,” son Jason, provided me with insight into one of the good reasons for enumerated powers in conjunction with that “old fashioned” idea of “states rights.” He recently wrote that the right reason for this is:

“..... the ‘competition of ideas’ and what [some] call the ‘laboratories of democracy.’ When regulation and control are determined at the state level, new ideas can be tried in one state without impacting everyone in the country this will put pressure on the state with the bad policy to correct/improve the policy, even if it is politically painful. Likewise, if a state is on to a great idea/program, other states can and will see their success and hopefully emulate it.

With federal control, there is absolutely no competition of ideas. Everyone either sinks or succeeds together I guess it is just my old fashioned belief that competition drives innovation and new/better ideas. Centralized, federal regulation will smother true competition.”

Some “good things” are best left to the states. I couldn’t have said it better myself!

In the Final Analysis, If It Doesn’t Work We Can Change It

If a significant flaw exists in our Constitution, there are processes set up through which it can be changed. Thankfully, this process is not, nor was it intended to be, easy! It is, in fact, intentionally difficult and painful.

The Great Experiment – The Founders’ Brilliance on Display!

Much of the Founders’ brilliance was understanding human nature and then betting on the ability of people to rule themselves, given freedom and the right government structure. And basic human nature stays fairly constant. We observe conservatives still believing in the Founders’ interpretation of human nature and in the ability of modern day citizens to rule themselves. I join them in that! I recently read John Stossel’s comments on achieving “spontaneous order” based on a free enterprise model. While there is never a perfect outcome, I believe that “spontaneous order” does spring from freedom and the right government structure – that structure envisioned by our Founders. **Liberals seem compelled to believe** that order can be achieved only through a system of central decision making, heavy regulation, and constantly deciding between economic and societal winners and losers. **These two dramatically different world views cannot be more vividly displayed!**

I don’t believe we should disregard anything decided by our Founders until we thoroughly investigate their intent and motivations. I hope to study much about that in the near future so that I can frame questions and gather answers using greater wisdom. Helpful in doing this research will be the Federalist Papers, and other early documents, the purpose of which were to lay out the Founders’ research, considerations, reasoning, and intellectual integrity of this form of government – The Great Experiment.