MORE ABOUT SCOTUS – JUDICIAL REVIEW – For Those Uninitiated in "Guv'mint Talk," That's "Supreme Court Of The United States"

Stephen L. Bakke April 30, 2012

Never have we heard more frequent references to the United States Supreme Court than we have in recent years - and for good reason considering the transformational legislation we have seen pass in Congress. Specifically, consider the discussion of the constitutionality of Obamacare which has been all over the media reports. And don't forget other current deliberations like the U.S. vs. Arizona re: immigration legislation passed in Arizona – and the "campaign finance reform" ruling that soooooo got under P-BOb's skin – he "called SCOTUS out" during his State of the Union address in 2011. And who could forget SCOTUS getting involved in the Florida "recount dilemma" during the 2000 presidential election between Bush and Gore?!

I've written about them, and others are continually bantering it about these questions: How appropriate are the recent actions of the Supreme Court?; What is meant by judicial activism?; Is Judicial Review a legitimate activity of SCOTUS?; Which is right, constitutional "originalism" or "living breathing Constitution"? Refer to my report dated February 12, 2011 titled "On Originalism and Judicial Activism." It is on my website in the section "The United States and its Government."

I decided to do more research on the topic "SCOTUS and 'Judicial Review.'" "Here be" the result!

Judicial Review – What Is It?

"Judicial Review" is the doctrine under which legislative and executive actions are subject to review, and potential invalidation, by the judiciary. The concept assumes that certain courts invalidate or annul the actions of the state, in this case the President or the laws passed by the U.S. Congress. For this project, given the current deliberation of SCOTUS about the Obamacare legislation, I am most interested in the responsibilities/obligations of SCOTUS relative to the constitutionality of laws passed by COTUS (Congress of the United States).

It makes sense to take a look at the Constitution to see what it actually says – at the risk of causing even more confusion.

The U.S. Constitution – Article III

The portions of Article III following Sec. 2, Clause 1 aren't relevant to this particular discussion so I have omitted them here. (You don't want to read about cases affecting ambassadors, ministers, consuls, trial of certain crimes, or treason, do you? I didn't think so!)

> **Section. 1.** ***The judicial Power of the United States, shall be vested in one supreme Court****, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*
>
> **Section. 2. Clause 1.** ***The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States****, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*

It doesn't say much directly does it?! It does say the power extends to cases arising under the constitution and the laws of the United States. It does get pretty close to Judicial Review, and gives some indirect implications, but ……

So …… When and How Did Judicial Review Finally Become Official Precedent?

Ever heard of Marbury vs. Madison? I bet you have and I bet you don't know anything about it. I now know only what I need to, and nothing more. I tried to sit down and connect the dots – political, philosophical, etc. – and gave up. So here's a very brief summary. It's all you need to know!

M vs. M is a landmark case which was argued and decided in 1803. It's all about an appointment that was not finalized, but deferred for logical reasons (to me) and which got tangled up in politics, an election, and some new legislation – yada, yada, yada! Anyway, the ruling by the Supreme Court, presided over by the outgoing (and temporarily "acting") Secretary of State and newly appointed Chief Justice John Marshall (who was the one who caused the appointment **not to be** "commissioned" for what seems to be "logical reasons") – it also involved the appointer, outgoing President John Adams, the newly elected President Thomas Jefferson, and the new Secretary of State James Madison … that's enough for this report – look up the details yourself. I'm confused! Advise if I got it terribly, irretrievably wrong!

Anyway, it established a judicial precedent for SCOTUS to rule as to the constitutionality of legislation duly passed by Congress and certain actions by the Executive Branch.

Did Any of Our Founders Submit Thoughts on the Subject?

You can bet your "sweet bippy" they did!

Alexander Hamilton wrote much in Federalist 78 about this topic:

> *The complete independence of the courts of justice is peculiarly essential in a limited Constitution …… [the courts of justice] whose duties it must be to declare all acts contrary to the manifest tenor of the Constitution void …… No legislative act, therefore, contrary to the Constitution, can be valid.*
>
> *The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body …… If there should be an irreconcilable variance …… the Constitution ought to be preferred to the statute ……*

Hamilton is very clear in his commentary – this having been long before the Marbury vs. Madison decision. And, if you think about it, it isn't hard to understand that M vs. M is regarded by some as the "end of liberty." By that is meant **the mere fact of the existence of Judicial Review could make the Constitution vulnerable to broadly creative interpretations of its provisions**. **I believe that was, is, and should continue to be, a serious concern!** As to this point, witness the broad authority courts have given to the legislature under the commerce clause, to such an extent that it is even possible to imagine Obamacare as being perfectly acceptable under the Constitution. The knife of separation of powers can sometimes cut both ways.

In spite of some valid concerns, M vs. M seems to be consistent with our Founders' intent. I am even more certain of this when examining Thomas Jefferson's significant concerns about the potential power of the judiciary if given the power of Judicial Review. In these statements, he is in fact resisting what the general consensus was as to the role of the Supreme Court. He "pulled no punches" when writing the following:

> *The Constitution [will be] a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please.*
>
> *It has long, however, been my opinion, and I have never shrunk from its expression ..... that the germ of dissolution of our federal government is in the constitution of the federal Judiciary ……*
>
> *To consider the judges as the ultimate arbiters of all constitutional questions, is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.*

The opinion which gives to the judges the right to decide what laws are Constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch.

On every question of construction carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates and instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed.

Well, it certainly is the case that Thomas Jefferson clearly saw potential flaws in the concept of Judicial Review. But the question remains: What was the intent of our Founders as a community of very wise individuals?

My Conclusion, Based on (somewhat) Informed Logic

That Jefferson's many concerns were valid has been borne out by the fact that many conservatives criticize the "activist" courts which have permitted broad interpretation of the "Commerce Clause" and the "Necessary and Proper Clause." And P-BOb is seriously "stressed" by the more conservative interpretation of constitutionality in the issue of campaign finance reform. He actually "called them out," very inappropriately, during his 2011 State of the Union Address. They are just "in his way"!

Mallard Fillmore by Bruce Tinsley

Clearly, the Founders set out to create three **co-equal** branches of government. Limited, enumerated powers was a basic element of the Constitution – as was "checks and balance" of one branch as against another.

The Supreme Court couldn't be co-equal, nor could they in any meaningful way, be a "check and balance" without the power of Judicial Review. SCOTUS's legitimacy, enumerated powers, and all of its value as a "co-equal" would disappear without the ability to invalidate, on the basis of the Constitution (the Law of the Land), actions by the other two branches. This is NOT a stretch in logic given the words of the Constitution and those of our Founders. And my interpretation seems to be a natural application of original intent, as opposed to any sort of evolution of duties or purpose. How else can you interpret: "***The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States***"**?!**

I rest my case!