The Breakfast Club
Constitutional Minute for 12 October 2021

Interpreting the Constitution

Last week I told you about an "Action Plan" I cover at the end of my Constitution Seminar. We are well on the way to accomplishing Step 1[i] with the Breakfast Club. As we work together towards better constitutional literacy we will become more formidable and effective advocates for a return to constitutional government in the U.S.

Step 2 in the plan reads: "Take a stand for jurisprudence of original intent, strict construction, and judicial restraint (and know what these terms mean)."

Jurisprudence? Original intent? Strict Construction? Judicial restraint? Some new terms to some of you. You'll find several different modern definitions of jurisprudence floating about (literally: "knowledge of the law), but I prefer "the understanding or philosophy of law." As it applies to the US Constitution the term relates to how you see the Constitution: as a timeless document, written in 1787, whose drafters expected its terms and expressions to be understood as they understood them, or do you see the Constitution as a "living breathing" document whose meaning changes with our culture?

This argument, how to interpret the Constitution, began soon after the document was ratified in 1788 and continues to this day. It is fair to say the argument is even heating up. Progressives prefer the later form of jurisprudence since to them, everything is always changing, improving, "progressing," Once change occurs, reverting to an earlier time or earlier culture is simply not acceptable. Their champion in terms of Constitutional interpretation is President Woodrow Wilson, who coined the term "Living Constitution." To Wilson, the Constitution's meaning simply had to constantly change with the times; the "science" of government is always evolving and improving, don't you see, and the Constitution must keep up.

The Founders took a different view. James Madison, in an 1824 letter to Henry Lee, wrote:

> *"I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that is not the guide in expounding it, there may be no security for a consistent and stable… exercise of its powers."*

To Madison, the 1400+ men who made up the 13 ratifying conventions firmly set the understanding of the document as they accepted it on behalf of "the people." A year earlier, Jefferson had written something similar:

> *"On every question of construction, let us 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."*[ii]

Even "Big Government" Alexander Hamilton said we should reject any change to the Constitution's interpretation except those made through the process of amendment. The founders were consistent: here is your Constitution, either interpret it as we did, or amend it.

But why go to the trouble of amending the Constitution when you can get the Courts to implement your policy preferences for you, particularly when you know they lack majority support in Congress. Why not just use the courts to "squeeze" something new out of the text? FDR called the Constitution "*the most marvelously elastic compilation of rules of government ever written*."[iii]

Famously, the Supreme Court blatantly took this "Living Constitution" approach in 1958[iv] when they ruled that: "The [8th] Amendment [in this case, concerning whether losing one's citizenship as punishment for a crime amounts to cruel and unusual punishment] must draw its meaning from *the evolving standards of decency that mark the progress of a maturing society*." (Emphasis added) "Evolving standards of decency?" Who gets to decide what those amount to?

The Court's statement in Trop harmonizes nicely with the view of Governor of New York (and future Supreme Court Justice) Charles Evans Hughes who said: "*We are under a Constitution, but the Constitution is what the judges say it is*…" There you have it, all neat and proper: the Supreme Court owns the meaning of the Constitution and they'll let you know when it changes. In other words: as society "progresses" the Court will take it upon itself to "keep the Constitution current."

But the first three words of the Constitution are not "We the Court." If you'd prefer "We the People" be in charge of "keeping the Constitution current," you will need to take ownership of the amendment process, Through your state legislature you can demand an Article V Convention at which amendments can be introduced, discussed, voted on, and sent to the states for ratification, all while keeping Congress on the sidelines. Perhaps I'll discuss this process in a future Minute.

"So, Mr. Candidate" we should ask, "how do you think the Constitution should be interpreted, by discerning the Framers' original intent or meaning or as a 'living' Constitution? We who are considering voting for you would like to know."

"Judicial restraint," occurs when Justices use originalism to discern the true law in a matter and refrain from creating new law. It's opposite: "judicial activism" occurs when Justices "make it up," as Justice Anthony Kennedy did in *Obergefell v. Hodges* (making homosexual marriage "constitutional"}. Kennedy's dose of judicial activism produced the unprecedented remark from Chief Justice Roberts in dissent that Kennedy's majority opinion "*has nothing to do with the Constitution*." Wow!

Conservatives must fight and fight hard if we want to *conserve* the original Constitution; but we need to know what it is we are trying to conserve before we head out into battle.

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[i] Step 1:"Build a local group of citizens who understand Constitutional principles of government and who agree to not elect anyone to public office who does not respect those principles."
[ii] letter to William Johnson, June 12, 1823,
[iii] In a radio address as Governor of New York in 1930
[iv] Trop v. Dulles, 356 U.S. 86 (1958)