CONSTITUTIONAL OPINIONS

Does the Constitution Mean Anything?

By Doug Bandow on 12.17.10 @ 6:08AM

Obamacare unconstitutional? The denizens of Washington and their many friends who favor expansive and expensive government are worried. At least one judge has actually read the Constitution. Moreover, Tea Party activists are calling themselves constitutional conservatives and insisting that the Constitution is relevant to the operation of the federal government. It is a frightening concept to those constantly seeking to expand Leviathan.

It has been years since the Constitution has had any meaningful impact on what is done in Washington. True, no one challenges the structural provisions -- there are a hundred senators, presidential elections are held every four years, etc. And there are lots of court battles over application of the Bill of Rights, largely because it protects some liberties favored by the Left.

But most congressmen pay little, if any, attention to their authority under the Constitution before they pass legislation. And there probably are more unicorns in the wild than executive branch employees who consult the Constitution before imposing regulations.

Yet read the Constitution and you discover a document that carefully creates a national government with limited and enumerated powers. In contrast to state governments, federal authority is constrained. Washington does not have general jurisdiction, or the so-called police power, authorizing it to intervene in any matter not explicitly barred by law or constitution.

None of the 27 amendments expanded federal power in this regard. The 13th, 14th, and 15th Amendments, passed in the immediate aftermath of the Civil War, did transform federal-state relations: the United States went from being a plural aggregation to a single unit. National power expanded insofar as it protected individual liberty in the states. The constitutional changes did not expand Washington's authority to infringe the liberty of the same individuals.

However, judicial "interpretation" changed over the years. Although the Founders provided a method to amend the nation's governing document, activists preferred to take a judicial short-cut. Judges liked the idea of making law and began treating the constitutional text as advisory. This turned the Supreme Court into a sort of continuing constitutional convention, with new amendments routinely enacted with just five votes.

Jurist-legislators covered themselves in high-minded rhetoric. Said the high priest of feel-good jurisprudence, Justice William Brennan: "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principles to specific, contemporary

questions."

Yet the real arrogance is the claim that unelected judges are entitled to overturn settled legal understandings and complex political compromises because they prefer a different outcome. The proper interpretive objective is not to discern the secret intent of a handful of drafters at the Constitutional Convention or a later Congress, but to respect the common expectations of the legislators and citizens who drafted and passed the provision at issue. If the people's intentions are not controlling, then what is the purpose of the Constitution? The document should simply authorize the executive and legislative branches to do whatever they feel like, subject to judicial review, which will be based on whatever the judges feel like. Why bother with the pretense that *constitutional interpretation* is occurring?

Not every constitutional question has a clear answer, of course, but that doesn't mean honest application of originalist principles allows *any* answer. The nation's founding document envisioned a national government of enumerated powers. A jurisprudence of unlimited national power violates the nation's basic law.

Lincoln Caplan of the *Legal Times* recently justified the "government-can-do-anything" position with an appeal to the phrases "We the people," "a more perfect union," and "the general welfare." All of these are in a preamble written by men who believed that the way to promote the general welfare for the people was through a more perfect union in which the government had only limited power. Revolutionaries who had fought against the excesses of king and parliament were determined not to allow similar abuses in the new nation they created. Silly idealists. They didn't foresee modern liberalism.

Caplan sneers at the "nostalgia for an inadequate version of the country's past." Yet the problem of government abusing power and violating liberty is eternal. That's why the Founders consciously limited the national government by enumerating its authority. Has time passed their handiwork by? Then the people can follow Article V and amend the Constitution. It isn't easy, but that is no argument against following the law.

In contrast, advocates of a "living" Constitution prefer lawmaking by zeitgeist. If it feels good, interpret it, was always the unstated approach of Justice Brennan and those who shared his philosophy. Consider the jurisprudential theories, if they deserve to be called such, offered by the book *The Constitution in 2020*, published last year.

One standard bases judicial interpretation on a "dynamic" sense of history and tradition. Using this argument, the courts should declare a "right" to public education. Another approach is to base constitutional doctrine on "consensuses," that is, when a big majority of people believe something. Judges get to determine the right-sized majority and the exact consensus that results.

Possessing even less meaning is the "time is right" philosophy, which posits that judges should change the Constitution when, yes, the "time is right." Obviously legislators have no sense of right timing and little things like the political process shouldn't get in the way. So leave it to judges. Moreover, a "constitutional moment" may arise with the passage of "landmark legislation." In this case there is no reason to bother amending the Constitution when you merely have to pass a bill.

Finally, rights should result from the activities of "social movements." With this form of judicial make-believe there's no need even to pass a bill if you have organized a "movement." After all,

these "organized communities" are sort of mini-constitutional conventions, even if the rest of us weren't invited to attend.

Focusing on the intended meaning of constitutional provisions faces obvious obstacles, but compare that to allowing judges to amend the nation's fundamental law in the name of the right social movement pushing the right bill at the right time. The mind boggles at the latter as a standard for anything, let alone for protecting people's fundamental liberties.

"Originalists" of varying stripes have tended to criticize judicial "activism," but activism is not the problem. Lack of fidelity to the Constitution is the problem.

The Founders, as well as those involved in the ratification and amendment struggles, wanted to limit the powers of government. To be true to that objective judges have an obligation *to act* to enforce the Constitution. This explains the apparent contradiction cited by *Politico* columnist Michael Kinsley: how can Republican legislators advocate that the courts turn activist and strike down Obamacare?

However, as noted by James Antle in the *Spectator*, "the notion that the Constitution imposed substantive, rather than merely procedural, limitations on that government was for a long time fairly uncontroversial." Even the modern Supreme Court has recognized limits to the Commerce Clause, stating bluntly that the justices were not ready to accord the national government unlimited "police power."

Although expansive, the Commerce Clause has never been used to reach inactivity. Dahlia Lithwick of *Slate* accused opponents of Obamacare of pursuing "a rather radical rewriting of the Constitution," but that is what liberal jurists have been doing for decades.

The Constitution empowers Congress to regulate commerce "among the several states," and no court has ever held that merely living in one of those states is itself a form of commerce "among the several states." If the federal government can force Americans to engage in commerce by buying health insurance, it can insist that they purchase automobiles from bankrupt manufacturers, acquire securities from failing Wall Street concerns, become farmers by growing food in their yards, and exercise three times a week. That is, upholding this power would obliterate the constitutional scheme of limited government. There would be no need for Article 1, Section 8, other than one clause allowing Congress to regulate commerce.

If the American people want a national government of unlimited power, they can have one. But to do so they should amend the Constitution, rather than rely on an ephemeral majority of high court justices. And if they don't want one, it should not be imposed on them by judges acting on personal whim. If the Constitution is still relevant to Washington governance, jurists have an obligation *to act* to invalidate Obamacare.

GIVEN THE TENDENCY of judges to ignore law and constitution, one helpful fix would be to end life tenure for justices. Intended to protect judicial independence, this provision creates a dangerous and disconnected elite that will always be tempted to overstep its role. Better to appoint judges for a term, perhaps ten years. Rotation in office would still insulate jurists from political passions while limiting the concentration and abuse of power by the judiciary. Errant jurists would naturally leave the bench rather than forever wield unconstrained power -- becoming liberal saints along the way.

The Constitution must mean something to have any effect. One approach would be to amend the document by sprinkling the phrase "and we really mean it" after the many provisions gutted by aggressively statist judges. Better would be to insist that judges enforce the document as written, meaning the general political compromise when specific provisions were passed. If constitutional protections are but formless inkblots, then no American is truly safe from his or her government.

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