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The Supreme Court's Tortured Reasoning Brings New Meaning To 'Sausage-Making'

By: Doug Bandow - June 17, 2013

The Supreme Court is finishing up its latest term, releasing its most controversial decisions last. Americans venerate the Constitution. Politicians praise the nation's founding document. But judges determine its meaning by interpreting its words.

Unfortunately, the result of the judicial process vindicates Otto von Bismarck, the famous German "Iron Chancellor," who said no one should see his sausages or his laws being made. Just read the many court opinions filled with tortured reasoning and bizarre arguments.

Because of such misinterpretation the Constitution has become largely irrelevant to Washington. Everyone accepts the structural provisions—there are two houses of Congress, a Supreme Court, periodic elections, etc. Those provisions are too explicit to easily ignore. Moreover, everyone admits that the Bill of Rights sets some limits on government. After all, many of these restrictions are favored by the Left, which dominates American jurisprudence.

However, the rest of the Constitution is treated like an antique wall decoration. As originally written and amended, the document created a national government with limited and enumerated powers. In contrast to state governments, the "federal" government did not have general "police power." Washington's authority was no more than what the Constitution decreed.

Today, however, the federal government does whatever it wants, irrespective of the nation's fundamental law. Only a handful of legislators—most notably retired Rep. Ron Paul (R-Texas)—recognized that they received their authority to act from the Constitution and that their power was limited. Even fewer presidential appointees worry about what the Constitution actually says. When critics of the Obama administration's plan to nationalize American health care suggested the law might not pass constitutional muster, leading proponents were incredulous, literally stupefied by the claim that anything was beyond Uncle Sam's reach.

Ultimately, in a bizarre opinion authored by Bush appointee Chief Justice John Roberts, the high court decided that nothing really was beyond Congress' power. Legislators just had to satisfy the contortions of judicial reasoning by calling a mandate a tax. Actually, lawmakers didn't even have to do that: the Court majority did it for them.

Unfortunately, there may be no way to avoid judicial rule-making. Long ago in Marbury vs. Madison the Supreme Court claimed to have the final say on the meaning of the Constitution. It "is emphatically the province and duty of the judicial department to say what the law is," declared Chief Justice John Marshall.

However, Louis Fisher of the Library of Congress insisted: "Being 'ultimate interpreter,' however, is not the same as being exclusive interpreter." For instance, Presidents are expected to enforce the law, even if they believe it is unwise. But what if they believe a measure is unconstitutional?

That issue came to the fore when the Obama administration refused to defend the Defense of Marriage Act before the Supreme Court, whose decision is pending. Instead, the House of Representatives fielded an attorney to defend DOMA, which had been duly enacted by Congress.

President George W. Bush signed a law giving Americans born in Jerusalem the right to list Israel as their birthplace, but refused to implement it because of its international implications. He argued that it was unconstitutional. That policy continued under President Obama even though his first secretary of state, Hillary Clinton, voted for the measure in the Senate!

In fact, President Bush turned presidential signing statements into an art form, issuing more than all of his predecessors combined. He routinely approved laws while insisting that provisions within were unconstitutional and would not be enforced. He opined that the McCain-Feingold Act was unconstitutional, yet signed it into law.

Congress, too, occasionally addresses the issue. Legislators take an oath "to support and defend the Constitution." Democratic members tend to ignore constitutional issues because they usually assume they are empowered to do anything they desire. However, after retaking control of the House in 2011 the GOP required all legislation to cite its constitutional authority. In practice the rule hasn't been very successful: even Republicans rely on the Commerce Clause (long distorted beyond recognition) and the General Welfare Clause (which actually was meant to limit legislative authority).

Arguments over who gets to interpret the Constitution go back to America's early days. The Federalists passed the Alien and Sedition Acts. President Thomas Jefferson, who followed John Adams in the White House, viewed the measures as unconstitutional, "a nullity … that it was as much [his] duty to arrest its execution in every stage." He pardoned those convicted and had their fines refunded.

Andrew Jackson believed a national bank to be unconstitutional and vetoed its reauthorization, even though it had survived a court challenge. He opined: "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial approval."

Anti-slavery politicians like Abraham Lincoln ignored the Supreme Court's infamous Dred Scott decision. Lincoln declared succinctly: "Like politics, with which it was inextricably joined, the Constitution was everybody's business." Since then legislators have raised the issue in more prosaic matters, such as applying the minimum wage to state and local governments and creating short-cut "legislative vetoes" for executive regulations and actions.

It seems natural that anyone taking an oath to support the Constitution should not act in ways he or she believes to violate the law. Abner Mikva, who served both as a congressman and federal appellate court judge, argued that a failure by Congress to consider constitutionality "is both an abdication of its role as a constitutional guardian and an abnegation of its duty of responsible lawmaker."

The potential conflict does not end at the federal level. A similar issue emerged in California when the governor and attorney general refused to defend state Proposition 8, which banned gay marriage. With the latest congressional push for tightened gun regulation, state and even local officials have threatened to ignore federal laws and regulations they deem unconstitutional.

The latter might seem presumptuous yet, noted author Seth Lipsky: "It turns out that the Constitution itself requires all persons holding an office of trust under the United States, from Supreme Court justices down to the lowliest officer of a county, to swear to support the same parchment—the U.S. Constitution."

Jefferson apparently believed that all constitutional opinions were equal. He contended that each branch was "truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution." However, that is a prescription for conflict, not check and balance. When constitutional opinions differ it makes sense to have a final authority. There are times when the political process must yield an answer.

The final say logically goes to the judiciary, since the legislative and executive branches pass and approve/execute laws, respectively, making them the institutions in most need of constraint. Alexander Hamilton argued in Federalist 78 that limitations on government power "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

In this way, the judiciary was supposed to protect individual liberty. In introducing the Bill of Rights, James Madison told Congress: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." (Tragically, this is no longer the case.)

Still, judicial supremacy doesn't prevent the other branches (or states and localities) from challenging the court's interpretation. Wrote Chief Justice Roger Taney in a dissent years before he authored the Dred Scott opinion, the high court's pronouncement "upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error." Similarly, argued Fisher: "Each decision by a court is subject to scrutiny and rejection by private citizens and public officials." The most obvious response is a constitutional amendment, but the issue also can be brought back before the judiciary, especially after a significant change in Supreme Court's composition. However, people need to comply if their challenges fall short.

Refusal to do so should be limited to issues of unique import where a case can be made that the opinion was in serious, abusive error. To have the branches in eternal war over the Constitution's meaning would create legal instability without protecting liberty.

The biggest problem today is that judges no longer bother to actually interpret the Constitution. As a result, no one in the legislative or executive branches pays much attention to the document. Madison's "few and defined" powers for the national government have become "everything and unlimited," essentially whatever officials want to do.

Some on the Left would drop the Constitution entirely. For instance, Louis Michael Seidman, a professor at Georgetown Law School, last winter urged Americans to abandon their "obsession with the Constitution [which] has saddled us with a dysfunctional political system, kept us from debating the merits of divisive issues, and inflamed our public discourse." We should just trust today's politicians to do the right thing.

However, Seidman declared, we should keep the present political structure because, well, just because "some matters are better left settled." Exactly which those are he does not detail. And we should "continue to follow" the Bill of Rights "out of respect, not obligation," as if that would limit anyone.

If past political compromises are irrelevant, then anything goes. Seidman believes Congress should be able to do whatever it wants. I don't believe it should. How do we settle our dispute? Seidman offered no answer. He pointed to "systems of parliamentary supremacy and no written constitutions," but they place little effective limit on government. That is precisely what most Americans want, and they want it from their nation's constitution. Seidman obviously sees no problem with sinful human beings exercising unreviewable power over their neighbors. Most Americans do.

Of course, the courts have essentially created Seidman's system, despite the fact that once in a very great while a judge uses a constitutional provision to prevent Congress from completely emptying our pockets or entirely controlling our conduct. Indeed, Yale's Bruce Ackerman admits that the judiciary has become a bulwark of the state, not liberty.

During the New Deal, he explained, President Franklin Roosevelt and the Congress did not bother amending the Constitution. Rather, they "left it to the Justices themselves to codify the New Deal revolution in a series of transformational judicial opinions." No need to go through the complex and uncertain process of changing the nation's fundamental law if you can just pack the court and turn it into a continuing constitutional convention, available for use whenever necessary.

Constitutional interpretation should involve actual "interpretation." The Founders may be dead white slave-holding males, as Seidman and others have complained, but they understood the most enduring human problem: how to create and then constrain the use of power. They also faced the challenge of infusing a new political order with legitimacy while providing for its peaceful evolution.

Their solution was to enshrine a political agreement which can be changed only through an agreed-upon amendment process. It's that original political compromise which courts should enforce today. What were the common expectations of the lawmakers who drafted the relevant provision, the citizens who debated it, and the legislators who approved it?

Not all answers are clear, but that doesn't mean no answers are clear, or that there are no answers. The Constitution authorizes a strong but limited national government with only enumerated powers. Interpretations which conflict with this system are in fact amendments rather than interpretations. If people want the former, they should use Article V and formally rewrite the Constitution.

If courts have no obligation to enforce past political compromises, then why bother pretending that we live under a rule of law? Everyone should just do whatever he or she wants in the hopes

that judicial expositors of a "living Constitution" will follow suit. Legislative and executive branch officials can act however they like, subject only to judges, who can decide however they like. The nation's constitutional jurisprudence then would be defined as "whatever." It would be government zeitgeist. If it feels good, do it.

There may be no choice but to make judges the final arbiters of the Constitution. But they should not be the only people who interpret the nation's basic law. And given the bad job that jurists often do, the rest of us also must "defend and support" the Constitution. It may no longer be much of a bulwark for liberty. But today it is about all we have.