Channeling The Authors Of The U.S. Constitution

By Chris Braswell

May 17, 2014

Discussing the intent of the authors of the U.S. Constitution has become all of the rage since the turn of the millenium, and one of the foremost supporters of the constitutionalist movement in Arizona, the Goldwater Institute, hosted attorney and author Timothy Sandefur of the Cato Institute earlier this week.

The event was one of a handful of public events put on by the Goldwater Institute each year. The Goldwater Institute describes its function as an, "Arizona-based conservative public-policy, advocacy and research organization."

Besides his work at the Cato Institute, Sandefur is also the principal attorney at the Pacific Legal Foundation, heading up the Foundation's Economic Liberty Project, which, according to the group, "protects entrepreneurs against intrusive government regulation." He has written articles for numerous magazines and newspapers as well as having appeared news outlets, primarily Fox News.

His presentation focused on many of the tenets of constitutionalism, specifically the notion of prior restraint and why it both refutes and argues against progressivism.

Rights and Privileges
Sandefur related a story to the group, about 17th century political philosopher John Milton, whose Doctrine and Discipline of Divorce was controversial, and resulted in an investigation by the British Parliament as to why the author had not sought government permission to publish the tract.

The story was part of his explanation of the legal concept of "prior restraint" which derives from English common law and in the contemporary American context, the term is used in connection with dialog about free speech.

In the 17th century, there was a sea change with the application of prior restraint, as Whig intellectuals put forth the idea of "rights as rights" rather than "rights as privileges." Such a philosophy of law was part of the foundation for the American Revolution, Sandefur said.

Prior restraint denotes a “permission society,” as opposed to a “free society, where, essentially, the government had to ask you to do things,” Sandefur said. A constitutionalist or libertarian rhetorical position typically holds that such a “free society” frames the intentions of the “founding fathers” of the United States of America and the authors of the U.S. Constitution and the Declaration of Independence.

“Freedom means not having to ask permission,” Sandefur said. “If you have to ask permission, you are not free. If you do not have to ask permission, you are free, but you have responsibilities.”

The country's founding fathers took the precedent against prior restraint yet further, with the concept of religious freedom, such as in George Mason's Virginia Declaration of Rights, and in Thomas Jefferson's Virginia Statute of Religious Freedom which is a precursor for the First Amendment's establishment clause and free exercise clause in the United States Bill of Rights. These documents put forth the concept of “liberty” rather than “toleration” for religious practices.

The idea of a society of permissions being replaced by a prescription for freedom can also be observed in the establishment of early for-profit business corporations in the United States, which at the time, in the early 19th century, were called “self-organized societies,” Sandefur said. In 1819, the United States Supreme Court recognized the first private for-profit corporations that were not a branch of the government.

Sandefur said Milton's experience with the prior restraint investigation compelled him to write Areopagitica, which argues against the rule of prior restraint, in favor of rights to freedom of speech and expression, and established principles that form the basis for modern justifications for freedom of the press.

The Birth of the Progressive Era

The “Progressive era” which began in the late 19th and early 20th century undid much of the libertarian implementations of the founding fathers, Sandefur said. Supreme Court cases he cited as examples were Muller v. Oregon (1908), Adkins v. Children’s Hospital (1932), Buck v. Bell (1927), and Abrams v. United States (1919) which is an important source of today's free speech jurisprudence.

Rather out of step with its contemporary Progressive era, the Supreme Court's Adkins v. Children‘s Hospital precedent, is reviled still today by the judicial and legislative elite, Sandefur said. The decision set a precedent that federal minimum wage legislation for women was an unconstitutional infringement of liberty of contract as protected by the due process clause of the Fifth Amendment of the Bill of Rights. Such an interpretation purports that such a minimum threshold destabilizes the job marketplace to the detriment of the labor force and its power of negotiating contracts, and that it also creates a non-egalitarian environment among the labor force and the economy at large, he said.

Such a progressive philosophy holds that rights and privileges are given by a government for the government's own purposes, as Justice Louis Brandeis put it, ”rights of property and the liberty

of the individual must be remolded, from time to time, to meet the changing needs of society," Sandefur noted.

The Progressive era, which Sandefur said is in many real ways still at hand, can be thought of as having substituted democracy for liberty, although the word democracy never appears in the Constitution nor in the Declaration of Independence, he pointed out.

So, there is a dynamic of opposing legal philosophies that seems to be in play, where progressive legalism holds that "government exists to make society nice to live in," compared to where the founding fathers found consensus that the government's role is primarily to protect individual rights, he said.

In a body of Constitutionalism or Libertarianism "you have rights but don't hurt people," while the philosophy of Progressivism would be "you have rights but do what we say," Sandefur said. Progressivism connotes such legalistic parameters as a society in which a government gives privileges and permissions through prior restraint, the concept of a "living Constitution," and the concept of "judicial restraint" wherein judges hesitate to strike down laws unless they are obviously unconstitutional.

Judicial Restraint

Supreme Court case examples regarding the concept of judicial restraint given by Sandefur on Thursday included Killough v. City of New London (2005), which upheld the use of eminent domain by the city and a private developer to take real property away from a private property holder; Plessy v. Ferguson (1896), which upheld state laws requiring racial segregation in public facilities under the separate-but-equal doctrine; and Buck v. Bell (1927) in which the court ruled that a Virginia law permitting compulsory sterilization of the unfit, for the protection and health of the state, did not violate the Due Process Clause of the 14th Amendment.

The theory of judicial restraint is exemplified by the practice of "rational basis review," which is the lowest of three levels of applied scrutiny in courts when considering questions of constitutionality, under which only the most flagrant laws that are not rationally related to a legitimate government interest are overturned.

"The rational basis test presumes against freedom," Sandefur said.

Arguably, having a society of permissions rather than one of individual freedom carries with it the danger that is sometimes referred to as the tyranny of the majority or of special interests. Therewith, Sandefur angled criticism at Associate United States Supreme Court Justice Antonin Scalia. "Justice Scalia does not believe in individual freedom, but has said majority rules always," and using that logic, "Justice Scalia has said if the public votes for abortion then it's OK."

"As we move further into a permissions society, we move further away from the blessings of liberty," Sandefur said.

For example, the idea that "money is speech," which modern Supreme Court case law has

upheld, can be thought of as anachronistic or counterintuitive from various perspectives, however, in an arguably ongoing Progressive era, property rights and rights to free speech can get upside down enough that the suggestion that money is speech does not shock the conscience.

“Money is not speech, money is property, but of course the government has neutered our property rights so much that we now talk about money as speech,” Sandefur said.

As opposed to a progressive approach, such a “libertarian” view comprises a common law reliance on litigation if something goes wrong, Sandefur said, while also putting upon the free man or free woman to not harm others as a fundamental rule. A system of prior restraint in which one must receive all permissions from the government, however, “presumes against freedom, which means that it restricts innovation,” he said. “And it gives power to people to restrict their own competition.”

It also presents a knowledge problem, in that “bureaucrats don't know what you should do with your property,” he said.

In the Marketplace

Progressivism also poses the problem of permission or privilege regulators who are not operating in good faith, he said, citing as an example licensing rules at the state level. He noted that occupational licensing is a protocol that is often used against would-be competitors by established operators to prevent competition, although such rules are supposed to be used to prove competency and involve only content related to the particular trade.

He also gave an example of the early progressive-era Supreme Court precedent set by the case of Dent v. West Virginia (1889), in which the court upheld a state law requiring an array of specific medical credentials, and did not recognize Dent's degree from an institution in Ohio. Dent's group accepted and taught the conventional medical science of the time, although it campaigned against excess drugging and bleeding, which we now understand today to have been a right-minded medical philosophy.

“The legal profession is in the same position today that the medicinal profession would be in if it determined that health is not it's mission,” Sandefur said.

Granted, there does sometimes seem, at times, to be buffoonery afoot in the marketplace of ideas when it comes to interpretation of the Declaration of Independence, the Constitution, and the Bill of Rights. But at the same time, there is a certain semantic recursiveness which represents a nuanced complexity involved in philosophical discourse and applications such as law and legalism.

Sandefur exemplified this subjectivity to his lunchtime audience by posing the rhetorical question of “how do you prove a right to liberty?”

“Rights” can be defined in a conversation, but at the same time, there is a certain perception of self evidence that is required to simply understand or experience “rights as rights.” That is, “all rights are rights to privacy,” Sandefur said.

Many in the United States today have lost the fundamental vocabulary of natural rights and freedom, he said — of terms for example such as Due Process of Law, Public Use, and Privileges and Immunities of United States Citizens.

He said the key to resolution of the problem is through education; “really, there is no substitute for it, for teaching these principles.”

He noted the ancient caveats made by the Greek philosopher Aristotle in his Nichomachean Ethics, which illumined the challenge in communities where the laws are not good and parents must attempt, on their own, to create the right educational environment for young people, without the help from lawmakers.

And in broader terms, the Classical work by Aristotle discussed the failure of such ethical theory if its aim is not achieved in any applied sense.