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Original Interpretation

President Trump has nominated Judge Neil Gorsuch to the United States Supreme Court, some say to fill the shoes of the late Justice Antonin Scalia. Much of the debate over the nominee will be driven by the term "original intent." Should a Justice of the United States Supreme Court try to imitate what the Founders of this country were thinking when they wrote the Constitution of the United States, or should the document evolve to fit modern times?

Once upon a time, I was trying a case in federal court involving the Bill of Rights. In a moment of overexuberance, I referred to the original Ten Commandments, instead of the first Ten Amendments to the United States Constitution. The Judge smiled and quietly admonished me at the Bench, "Cliff, the Ten Bill of Rights and the Ten Commandments may have a lot in common, but here we are only dealing with the Bill of Rights." I felt as though everybody in the Eastern United States could see me blush with embarrassment.

Original intent is a slippery concept regardless of whether we look at the Constitution or the Bible. It is no secret that the Founders of this country had broad disagreements as to the reach of the Constitution. The Hamiltonian faction saw the States as withering away with time so that the federal government could occupy the national agenda, especially with respect to commerce. Jefferson and Madison, who worked with Hamilton to write the Constitution, saw the States as paramount in the federal scheme. After that, it was off to the races!

Likewise, the Bible talks about "an eye for an eye." Most sources say that was never meant literally, and that in the Judeo-Christian ethic, monetary compensation was always awarded in return for physical injury.

Proof with respect to the vigor of the debate over original intent is that the Constitution of the United States could not be adopted by all of the States without adding a Bill of Rights. In a very real sense, the Bill of Rights, which became part of the Constitution, were an interpretation. They were a placement of flesh on the bones of the skeletal governmental system created by the Founders. When the Fourth Amendment to the United States Constitution was passed, addressing warrants and probable cause for searches and seizures, there was no electricity other than what Benjamin Franklin found in lightening. There was no transportation other than that provided by horses and sailing vessels. Nobody could possibly have imagined the ways that government might search and seize. Today, not one legitimate legal scholar would doubt for a second that the Fourth Amendment applies to searches and seizures well beyond those contemplated by those who wrote the Fourth Amendment to the United States Constitution.

The Second Amendment addressing weapons links the right to bear arms with a militia. We do not have militias today. The United States Supreme Court has interpreted, therefore, the Second Amendment to apply to personal gun ownership notwithstanding that the Founders themselves debated the reach of the Second Amendment. The law is what the Supreme Court of the United States says it is, and the Second Amendment was "interpreted" to reach beyond the use of flintlock guns by a well-ordered militia.

Other provisions in the United States Constitution and the Amendments incorporated into that arcane document are so general that the document would be uninterpretable and unenforceable absent scholarly legal study. What does the due process clause or equal protection clause in the Fifth and Fourteenth Amendments mean? Due process means the legal process that a person is entitled to. What is that legal process? Enter the nefarious interpreters that we call judges and justices. The same is true of the commerce clause and a myriad of other phrases that are a shorthand for complex principles. There are those who believe that the first Ten Amendments to the United States Constitution apply to the States as a result of the Civil War Amendments. Judge Robert Bork, among others, questioned that well accepted view. It does not say anywhere in the Constitution that the first Ten Amendments apply to the States, when the Constitution was amended after the Civil War.

Enter hot button issues like abortion and gay rights. Certainly the Founders of this country did not intend anything they wrote to apply to those lifestyles. Nevermind that according to Ron Chernow's monumental work on Alexander Hamilton, the quirkish Founder wrote seemingly salacious letters to a male friend. Until the Civil War, the authors of the Constitution and the Bill of Rights did not intend what has become a holy document to apply to people of the non-white race. It was a shock to many of his contemporaries that George Washington welcomed into the Continental Army Hebrews, Mohammedans, free slaves, and even atheists! Sodomites, as gay people were called at the time, certainly were not contemplated as those with any rights under the United States Constitution or the Bill of Rights. Should the Constitution now be interpreted to include the gay, lesbian and transgender community? Original intent would certainly say "no," but those who argue for a "yes" answer point out to the general nature of the Founders' work and the fact that even the least imaginative thinkers have stretched the Constitution to fit unforeseen circumstances.

There is also so-called "conservative activism." In one now infamous line of cases, so-called conservatives on the Bench have equated the right to free speech under the First Amendment with the expenditure of money. They therefore have struck down laws regulating the corrosive effect of finances in our electoral system. There are those who loudly advocate for the view that there is no such thing as free speech unless one can give unrestricted amounts of money to candidates and causes of their choice. Does the Constitution say that? Of course not. It is a matter of interpretation by activists of a conservative stripe.

In the debate that will take place concerning Justice Gorsuch, a little healthy self-introspection would be in order. Everyone interprets the Constitution and its Amendments. Further, there are occasions when it is impossible to understand what the numerous drafters of the document really meant. Therefore, interpretation, judicial and social philosophy will unquestionably determine the ultimate decision.

Judge Gorsuch was correct when, in accepting the nomination, he pointed out that what is most important about a candidate is their overall philosophy about the rule of law and a respect for our tripartite form of government. One question that probably will not be asked of Judge Gorsuch at all, but which is vitally important, concerns the reach of the Supremacy Clause. The Constitution says that it is "Supreme." This has led to a doctrine, announced nowhere in the Constitution, of preemption. The doctrine of preemption means that when the federal government has directly or impliedly occupied an area of the law, state law must be ignored. This is a tool utilized by both liberals and conservatives to shut down state legislation which is perceived as interfering with the domination of the federal government. Sometimes state law affords citizens stronger protections than the federal government and sometimes weaker. In a practical sense, the preemption doctrine, its

reach and future, will affect daily lives more than most of the other high publicity issues that will be debated in connection with the Judge Gorsuch nomination to the Supreme Court of the United States.

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