Ron Paul’s False Founding Narrative

Exclusive: Rep. Ron Paul and other right-wingers have lured many average Americans into their camp by creating a false narrative about America’s Founding, claiming that the drafters of the Constitution wanted a weak central government. But that’s not the real history, Robert Parry writes.

By Robert Parry

Ron Paul, the libertarian congressman from Texas who has topped 20 percent in the first two Republican contests, is fond of claiming that the U.S. Constitution was written “to protect your liberty and to restrain the federal government,” thus making modern laws – from Social Security, to civil rights statutes, to health-care reform – unconstitutional. But that isn’t really true.

While the framers of the Constitution in 1787 undeniably cared about liberty at least for white men they were also practical individuals who wanted a vibrant central government that would enable the new nation to protect itself both militarily and economically, especially against European rivals.

The broad powers that the Constitution granted Congress were designed to let this central government address national problems that existed then as well as others that would arise in the future. For instance, the Constitution gave control over interstate commerce to Congress in order to counter economic advantages enjoyed by foreign competitors.

Far from Paul’s assertions that the Founders wanted a weak central government, the Founders at least those at the Constitutional Convention in Philadelphia understood that a great danger came from having a national authority that was too weak, what they had experienced under the Articles of Confederation, which governed the nation from 1777 to 1787.

The Articles of Confederation embraced the concept of state “sovereignty” and called the United States not a government or even a nation, but “a firm league of friendship” among the states. The Confederation’s Article II declared: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated.” And very few powers were delegated to the federal government.

The result had been severe problems for the young country, ranging from the failure of states to make voluntary contributions in support of the Continental Army to opening regional divisions that foreign rivals could exploit.

So, in 1787, the framers of the Constitution – led by Gen. George Washington,

James Madison and others in the Virginia delegation – scrapped the Articles and put forward a very different plan, eliminating state sovereignty and creating a strong central government with broad powers, including control over "interstate commerce."

The Commerce Clause wasn't some afterthought, either. It was part of the original proposal outlined on the Constitutional Convention's first day of substantive business on May 29, 1787. The Virginia delegation had one of its members, Edmund Randolph, include it in his opening presentation.

Virginia's plan laid out the framework that would later become the U.S. Constitution, transferring sovereignty from the 13 original states to "we the people of the United States" as represented by a new national Republic.

Economic Strategies

Beyond giving the central government authority over the common defense, foreign policy and currency – as well as its own taxing power – the Founders also recognized the need to coordinate American commerce so it could compete effectively with Europe and other nations around the world.

James Madison's convention notes on Randolph's presentation recount him saying that "there were many advantages, which the U. S. might acquire, which were not attainable under the confederation such as a productive impost [or tax] counteraction of the commercial regulations of other nations pushing of commerce ad libitum &c &c."

In other words, the Founders at their most "originalist" moment understood the value of the federal government taking action to negate the commercial advantages of other countries and taking steps for "pushing of [American] commerce." The "ad libitum &c &c" notation suggests that Randolph provided other examples off the top of his head.

Historian Bill Chapman summarized Randolph's point in his teaching materials as saying "we needed a government that could co-ordinate commerce in order to compete effectively with other nations." So, from that first day of substantive debate at the Constitutional Convention, the Founders recognized that a legitimate role of Congress was to ensure that the nation could match up against other countries economically.

Though the likes of Ron Paul have worked hard in recent decades at constructing an alternative narrative claiming that the Founders envisioned a weak national government and were big supporters of states' rights that storyline is simply not supported by the history. Key framers of the Constitution even objected to adding a Bill of Rights to the original document, accepting the first 10

amendments only later as part of negotiations over ratification.

Yet, on Tuesday, celebrating his second-place finish in the New Hampshire primary, Paul told his cheering supporters that "the Constitution was written for a very precise manner. It was not designed to restrain the individual – not to restrain you – it was to protect your liberties and to restrain the federal government."

But that simply is a distortion of what the framers were up to. And for right-wingers who cite the Tenth Amendment as supposed support for their position, they should read the amendment's weak language on states' rights compared to what it replaced, Article II of the Articles of Confederation, which established the supremacy of the states.

After the Constitution wiped away the sovereignty of the states and established the supremacy of the federal government, the Tenth Amendment amounted to a minor concession to the anti-federalists, giving the states only ill-defined leftover powers.

Endorsing Obamacare

The Right's revisionist version of the nation's Founding isn't even accepted by serious conservative legal scholars, including one of the most right-wing members of the U.S. judiciary, senior Judge Laurence Silberman who was appointed to the influential U.S. Court of Appeals in Washington by President Ronald Reagan.

On Nov. 8, 2011, Silberman issued a ruling supporting the constitutionality of the Affordable Care Act, often called "Obamacare." In it, Silberman explained how the law and even its most controversial feature, the individual mandate requiring the purchase of health insurance coverage fit within the language of the Commerce Clause and within prior legal precedents.

"We look first to the text of the Constitution," Silberman wrote in his opinion. "Article I, § 8, cl. 3, states: 'The Congress shall have Power . . . To *regulate Commerce* with foreign Nations, *and among the several States,* and with the Indian Tribes.' (Emphasis added by Silberman).

"At the time the Constitution was fashioned, to 'regulate' meant, as it does now, '[t]o adjust by rule or method,' as well as '[t]o *direct.*' To 'direct,' in turn, included '[t]o prescribe certain measure[s]; to mark out a certain course,' and '[t]o order; to command.'

"In other words, to 'regulate' can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation

to an interstate market. Nor was the term ‘commerce’ limited to only *existing* commerce. There is therefore no textual support for appellants’ argument” that mandating the purchase of health insurance is unconstitutional.

Silberman’s opinion also examined decades of Supreme Court precedents that affirmed the power of Congress to establish regulations over various national markets.

“Today, the only recognized limitations are that (1) Congress may not regulate non-*economic* behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible,” Silberman wrote.

Neither limitation applied to the health-care law, Silberman noted, because medical insurance was clearly an economic activity and surely had sizable interstate implications.

As for the claim that people had a constitutional right not to participate in the purchase of health insurance, Silberman was not persuaded. For instance, he cited a Supreme Court precedent that a farmer who wished to raise wheat for his own consumption could still face federal restrictions because his production (and that of other likeminded farmers) could affect the overall supply of wheat and thus undermine federal policy regarding the wheat market.

Addressing National Problems

Silberman also recognized Congress’s power to address difficult national problems, like the tens of millions of Americans who lack health insurance but whose eventual use of medical services would inevitably shift billions of dollars in costs onto Americans who must pay higher insurance rates as a result, what courts have described as “substantial effects.”

“The shift to the ‘substantial effects’ doctrine in the early twentieth century recognized the reality that national economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce,” Silberman wrote.

“Its very premise is that the magnitude of any one individual’s actions is irrelevant; the only thing that matters is whether the national problem Congress has identified is one that substantially affects interstate commerce.

“It is irrelevant that an indeterminate number of healthy, uninsured persons will never consume health care, and will therefore never affect the interstate market. Broad regulation is an inherent feature of Congress’s constitutional authority in this area; to regulate complex, nationwide economic problems is to

necessarily deal in generalities.

“Congress reasonably determined that as a *class*, the uninsured create market failures; thus, the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence.”

Silberman wrote that “Congress, which would, in our minds, clearly have the power to impose insurance purchase conditions on persons who appeared at a hospital for medical services as rather useless as that would be is merely imposing the mandate in reasonable anticipation of virtually inevitable future transactions in interstate commerce.”

He noted that since those challenging the health-care law “cannot find real support for their proposed rule in either the text of the Constitution or Supreme Court precedent, they emphasize both the novelty of the [individual] mandate and the lack of a limiting principle,” i.e. some example of when the government could not require citizens to purchase a specific product.

Silberman acknowledged that “the Supreme Court occasionally has treated a particular legislative device’s lack of historical pedigree as evidence that the device may exceed Congress’s constitutional bounds,” but added that “we are obliged and this might well be our most important consideration to presume that acts of Congress are constitutional” absent “a clear showing to the contrary.”

Silberman also addressed the core political objection to the health-reform law, its supposed intrusion on individual liberty. He wrote: “That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before but that seems to us a political judgment rather than a recognition of constitutional limitations.”

He added: “It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family.

“The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local or seemingly passive their individual origins.”

Politicized Rulings

So, even a very conservative legal scholar examining the Constitution and precedents could not find a convincing argument to overturn “Obamacare” and that is because the Founders intentionally empowered Congress to address national economic problems. It was, as the Virginian delegation understood, one of the key reasons for the Constitutional Convention.

That does not mean, of course, that the partisan Republicans who currently control the U.S. Supreme Court might not overturn health-care reform anyway, to deal a blow to Obama right before Election 2012.

Some of the Republican justices have shown before that they would twist the law for partisan ends, such as in December 2000 when they invoked the 14th Amendment to stop the counting of votes in Florida and thus hand the White House to their political favorite, George W. Bush.

It didn’t matter that these Republican justices were turning their backs on their prior support for states’ rights and their insistence on only following the “originalist” intent of those who wrote the Constitution and the amendments. What was at stake in Election 2000 was more important to them who would get to fill vacancies on the federal courts.

Thus, Republican justices William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O’Connor suddenly saw in the “equal protection clause” of the 14th Amendment an “originalist” intent by its post-Civil War authors to shield a white plutocrat like George W. Bush from variations in ballot standards in Florida.

That was especially odd for Scalia, who has argued forcefully that the 14th Amendment despite its language that no state shall “deny to any person within its jurisdiction the equal protection of the laws” does not protect the rights of women or gays because it was originally written to guarantee only the rights of black males.

However, when the power of the presidency was at stake and the possibility loomed that a Democratic president might make appointments that would leave the court’s right-wing faction in the minority Scalia had a remarkable change of heart. [For details, see Consortiumnews.com’s “Justice Scalia’s ‘Originalist’ Hypocrisy.”]

It is one of the dirty secrets of the U.S. system that ultimately the Constitution means whatever a majority of the current justices on the Supreme Court says it means. Ideally, the court would be filled with honorable people who would put the law ahead of partisan interests, but that does not appear to be the current makeup of the court’s majority.

So, it would not be surprising if the court's right-wing majority would overturn Judge Silberman's opinion even though it is based on a fair reading of the Constitution and the powers that the Founders granted to Congress. A chance to damage Obama's reelection hopes might prove too tempting.

After all, the larger goal of the American Right is not to uphold the ideals of the Founders, who wanted a vibrant central government, but to reverse government policies dating back to President Franklin Roosevelt's New Deal. The plan is to return the United States to a pre-Depression "gilded age" of a society divided into a few haves and many have-nots.

The Right is engaged in an ideological war with the intent of making the rich richer and marginalizing the rest of us. Creating a false narrative about the American Founding is just a convenient way to get some ill-informed Tea Party types to vote against their own interests.

[For more on related topics, see Robert Parry's *Lost History, Secrecy & Privilege* and *Neck Deep*, now available in a three-book set for the discount price of only $29. For details, click here.]

Robert Parry broke many of the Iran-Contra stories in the 1980s for the Associated Press and Newsweek. His latest book, *Neck Deep: The Disastrous Presidency of George W. Bush,* was written with two of his sons, Sam and Nat, and can be ordered at neckdeepbook.com. His two previous books, *Secrecy & Privilege: The Rise of the Bush Dynasty from Watergate to Iraq* and *Lost History: Contras, Cocaine, the Press & 'Project Truth'* are also available there.