The Right's Misconstrued Constitution

Exclusive: The U.S. Supreme Court will rule on the right of a corporation owned by abortion opponents to assert its freedom of religion on health insurance, trumping a woman's choice of birth control, another chance for the Right to expand corporate rights, says Robert Parry.

By Robert Parry

The five right-wingers on the U.S. Supreme Court may soon recognize the "religious freedom" of corporations so that these artificial constructs can then dictate to female human citizens restrictions on the kinds of contraceptives that they can get through their work-place health insurance plans.

That may sound crazy but some court watchers believe that the Right-Wing Five will follow the logic of their "corporations-are-people" theories to this next nutty conclusion. After all, if corporations have First Amendment rights of "free speech" when they are financing political propaganda to influence the outcome of U.S. elections, there is a consistency albeit a bizarre one to extending to corporations the First Amendment's "religious freedom."

Already unlimited corporate money in campaigns has drowned out regular human citizens in terms of who (or what) has the bigger say in the outcome of elections, so why shouldn't the religious choices of corporations override the personal and moral judgments of people who work for the corporations?

We'll get a better sense of whether the Five Justices John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito will make their next leap of logic when the case gets to oral arguments. But whatever the Five do, you can count on them wrapping their reasoning in their claims to be devotees of an "originalist" view of the U.S. Constitution or as "strict constructionists."

The reality, though, is that the Five's *modus operandi* is to reach an ideological conclusion about what they want to do based on their political opinions or partisan needs and then find some legal-sounding language to wrap around the ruling.

See, for instance, their reasoning for gutting the Voting Rights Act, despite the Constitution's Fifteenth Amendment explicitly authorizing Congress to take action it deems necessary to ensure the voting rights of racial minorities. Somehow the Five intuited an overpowering right of the states not to have their discriminatory behavior so constrained, all the better for Republicans and right-wingers to win elections.

An earlier grouping of the Five found similar excuses for shutting down the counting of votes in Florida in December 2000 to install George W. Bush as President even though Al Gore got more votes nationally and would have carried Florida, too, if all ballots legal under Florida law were counted.

Scalia first issued an injunction to stop the vote-counting because he feared that a tally showing Bush behind might damage Bush's "legitimacy" once Scalia and four other Republican justices got around to throwing out Gore's votes and putting Bush ahead; then Scalia's group devised an upside-down interpretation of the "equal rights" clause of the Fourteenth Amendment to ensure that the votes of blacks and other minorities were more likely to be tossed than those of whites and the well-to-do.

It was clear that these Republican partisans started off with their conclusion – that Bush should be President and thus have the power to appoint more right-wing justices – and then cobbled together some mismatched arguments for a ruling so ugly that they declared that it could never be cited as a precedent in future cases.[For details, see *Neck Deep*.]

Targeting Obamacare

Though in upholding the Affordable Care Act in 2012, Chief Justice Roberts split off from Alito and his three amigos (Thomas, Alito and Kennedy), Roberts joined in their rejection of the Constitution's Commerce Clause as the principal support for the law.

In doing so, the Five ignored the clear intent of the Framers to give the federal government's elected representatives broad powers to do whatever they judged necessary to "provide for … the general Welfare of the United States" and – through the Commerce Clause – the power to regulate interstate commerce, which clearly applied to the health insurance industry.

But to make the right-wing case, Scalia again resorted to legal sophistry and rhetorical trickery. For instance, Scalia's dissent against the Supreme Court's narrow endorsement of the Affordable Care Act (based on the government's taxing authority) pretended that Alexander Hamilton, an arch-Federalist who favored a powerful role for the federal government, would have sided with the law's opponents regarding their concern about using the Commerce Clause to mandate that people obtain health insurance.

Scalia wrote: "If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton's words, 'the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor

sacred nor profane.’” Scalia footnoted Hamilton’s Federalist Paper No. 33.

However, in Federalist Paper No. 33, Hamilton was not writing about the Commerce Clause. He was referring to clauses in the Constitution that grant Congress the power to make laws that are “necessary and proper” for executing its powers and that establish federal law as “the supreme law of the land.”

Hamilton also wasn’t condemning those powers, as Scalia and his friends would have you believe. Hamilton was defending the two clauses by poking fun at the opponents of the Constitution as alarmists who had stirred up opposition to the new governing document by issuing wild-eyed warnings about federal tyranny.

In the cited section of No. 33, Hamilton is saying the two clauses had been unfairly targeted by “virulent invective and petulant declamation.”

It is in that context that Hamilton complains that the two clauses “have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane.”

In other words, Scalia’s dissent did not only apply Hamilton’s comments to the wrong section of the Constitution but reversed their meaning. Hamilton was mocking those who were claiming that these clauses would be “the hideous monster.”

Originalist Thinking

Scalia and the Right also misrepresent the actual “originalist” thinking of the Framers. The drafters of the Constitution decided on a system of checks and balances (primarily devised by James Madison) that required deliberate action but gave the nation’s elected representatives nearly unlimited authority to do what they deemed necessary for the good of the country.

But American right-wingers are no more honest about the Constitution than they are about most other things. Indeed, an objective reading of the Founding era’s history reveals the Framers of the Constitution to have possessed a much more robust view of federal government activism on behalf of American citizens and the country than the modern Right wants you to know.

The Framers of the Constitution, after all, were the Federalists, led by the likes of George Washington, Alexander Hamilton, James Madison (in his earlier incarnation as one of Washington’s protÃ©gÃ©s) and Gouverneur Morris (who was a key drafter of the famous Preamble). This group, which dominated the Constitutional Convention in 1787, were pragmatic nationalists, devising a

system that gave the central government all the necessary powers to make the young, sprawling country succeed.

That's why the Constitution grants sweeping powers to the federal government to "provide for the general Welfare" and to enact whatever legislation is deemed "necessary and proper" to achieve that and other goals. The language about the "general Welfare" appears both in the Preamble and in Article I, Section 8, the so-called "enumerated powers." It is an open-ended concept giving wide discretion to the country's elected representatives.

And that's not just a retrospective view from the 21st Century. Both at the Philadelphia convention in 1787 and in the ratification fight of 1788, the Framers were opposed by the Anti-Federalists who also perceived the Constitution to be a major concentration of power in the central government. The states went from being "sovereign" and "independent" under the Articles of Confederation to "subordinately useful," in Madison's notable phrase.

'General Welfare' Clause

As historian Jada Thacker has noted, in the "general Welfare" clause and the "elastic" language of "necessary and proper," the Constitution put into the hands of Congress and other federal agencies the authority to meet whatever might confront the nation in the future.

"When viewed in light of the ambiguous authorization of the Article's first clause (which includes the 'general Welfare' language), the importance of the "necessary and proper" clause truly is astonishing. Taken together, these clauses restated in the vernacular flatly announce that 'Congress can make any law it feels is necessary to provide for whatever it considers the general welfare of the country.'"

That was precisely how the Constitution was interpreted by dissidents at the Convention. As New Yorker Robert Yates wrote after walking out in Philadelphia:

"This government is to possess absolute and uncontrollable power, legislative, executive and judicial, with respect to every object to which it extends. The government then, so far as it extends, is a complete one. It has the authority to make laws which will affect the lives, the liberty, and the property of every man in the United States; nor can the constitution or the laws of any state, in any way prevent or impede the full and complete execution of every power given."

When the Constitution was sent to state conventions for ratification, the Anti-Federalists continued to make their case against the transfer of power from the states to the federal government. In Virginia, leading Anti-Federalists Patrick Henry and George Mason tried to rally opposition by warning plantation owners

that eventually the North would come to dominate the federal government and end slavery.

“They’ll free your niggers,” warned Patrick Henry.

Though the Constitution eked through to ratification, the Anti-Federalists did not give up their fight against the governing document. Their strategy changed, however, into seeking to reinterpret it. Rallying behind the charismatic figure of fellow slaveholder Thomas Jefferson, who had been in France during the drafting and ratification of the Constitution, the Anti-Federalists sought to constrain federal powers by insisting that the plain language of the document didn’t mean what it said.

This reinterpretation of the Constitution spearheaded by Southerners fearful of the eventual loss of their massive investment in slavery explains the extraordinary bitterness of the battle between the Jeffersonians and the Federalists in the 1790s.

Ultimately, due to Federalist missteps inherent in the complexity of setting up a new government mistakes skillfully exploited by Jeffersonian propagandists Jefferson prevailed in developing extra-constitutional theories like the right of states to “nullify” federal laws or even secede. Jefferson defined his reassertion of states’ rights as “strict constructionism” but it was clearly not what the original Framers had intended in 1787.

However, as President, even Jefferson adopted the “pragmatic nationalism” of the Federalists when he justified buying the Louisiana Territories from France and imposing a trade embargo against European states.

Madison, who shifted his allegiance from the Federalists to the Jeffersonians (and thus saved his political career among his fellow Virginian slaveholders), also embraced more expansive federal powers after nearly losing the War of 1812. To help fund the government and build a professional military, Madison set up the Second Bank of the United States before leaving office in 1817. (Treasury Secretary Hamilton had created the First Bank of the United States under President Washington.)

Though defeated politically by the early 19th Century, the Federalists – or at least their view of the Constitution – prevailed as the central government took on more and more responsibility for building the young and expanding nation. Ironically, too, the warning from Patrick Henry and George Mason about the fate of slavery also turned out to be prescient. Eventually, the North did move to eradicate slavery at the end of the Civil War.

Then, in the face of the Great Depression in the 1930s, President Franklin

Roosevelt again tapped into the "pragmatic nationalism" of the Federalists, enacting wide-ranging social legislation to provide for the "general Welfare." The Federalists' Constitution written so future generations could deal with unanticipated challenges threatening the nation's well-being continued to prevail through the 1960s and into the 1970s.

Continued Resistance

However, the Right never abandoned its crimped and revisionist interpretation of the Constitution, that it didn't empower the federal government to do what the words of the Constitution said. Especially, in the South, white supremacists continued to insist on the extra-constitutional theories of "nullification" and on state "sovereignty," though it was eliminated when the Articles of Confederation were scrapped in 1787.

Though not based on a literal reading of the Constitution's words, the Right's revisionist interpretation gained traction because of the increased power of right-wing propaganda and because the American Left generally disdained the Constitution for other reasons, its defense of property rights and its compromises with Southern slaveholders.

So, instead of the Right's interpretation being viewed as make-believe, many Americans came to see the Right as defending the Founding document and liberals and the Left as violating its principles. Justice Scalia, in particular, has pushed this notion that he represents the "originalist" interpretation of the Constitution though he clearly doesn't. He really is just a right-wing ideologue who passes himself off as a legal theorist.

But that is the way the Right has rolled when it comes to the Constitution and the Federalist Papers, whose primary author and creator was Alexander Hamilton. The right-wing ideologues cherry-pick a few quotes from the Federalist Papers and twist whatever words might be useful in the Constitution – and then count on the mainstream news media to shy away from any serious debate over the "complexity" of the constitutional history.

With such legal "scholarship" prevailing, it shouldn't come as a total surprise that today's Supreme Court Five might end up ruling that a corporation's "freedom of religion" trumps the religious and moral beliefs of actual citizens. Whatever it takes to undermine Obamacare!

Investigative reporter Robert Parry broke many of the Iran-Contra stories for The Associated Press and Newsweek in the 1980s. You can buy his new book, *America's Stolen Narrative,* either in print here or as an e-book (from Amazon and barnesandnoble.com). For a limited time, you also can order Robert Parry's

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