Justice Scalia's 'Originalist' Hypocrisy

From the Archive: The death of U.S. Supreme Court Justice Scalia has prompted fawning eulogies about his legal brilliance and his heart-felt faith in constitutional "originalism," but the reality is that he twisted the Framers' thoughts into whatever was politically convenient, as Robert Parry noted in 2011.

By Robert Parry (Originally published on Jan. 5, 2011)

U.S. Supreme Court Justice Antonin Scalia unintentionally revealed the hypocrisy of the Right's rhetoric about "originalist" interpretations of the U.S. Constitution with his comments about how the Fourteenth Amendment's guarantee of "equal protection under the law" doesn't mean equal rights for women.

"In 1868, when the 39th Congress was debating and ultimately proposing the Fourteenth Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation," Scalia said in an interview with the legal magazine *California Lawyer*.

"So does that mean that we've gone off in error by applying the Fourteenth Amendment to both? Yes, yes. Sorry, to tell you that."

However, if the "original intent" of the amendment's drafters was so determinative that the Fourteenth Amendment supposedly was only meant to apply to black men at the end of slavery it might be safe to assume that the drafters weren't thinking about protecting a white man like George W. Bush from possibly losing an election in Florida in 2000.

Yet, the Fourteenth Amendment was precisely what Scalia and four other partisan Republicans on the Supreme Court cited to justify shutting down the Florida recount and handing the White House to Bush, despite the fact that he lost the national popular vote and apparently would have come out on the short end of the Florida recount if all legally cast ballots were counted.

To justify their ruling, the five Republican justices cited the Fourteenth Amendment's "equal protection" clause in claiming that Florida's electoral precincts had failed to apply common standards for counting votes. Then, rather than giving the state time to rectify the situation, the justices set a deadline of two hours, effectively assuring Bush's "victory."

In other words, Scalia and other right-wing justices operate with a situational ethic when it comes to "originalism" and "strict construction." If their

partisan and ideological interests require the abandoning of those precepts, the principles are dumped overboard.

That is what most of us would call hypocrisy or dishonesty. But Scalia, like many on the Right, operates with a curious sense of false righteousness, at least when his “principles” match up with his ideology and partisan interests.

In the interview, Scalia packaged his assessment of “originalist” intent on the Fourteenth Amendment as a tough-minded recognition of the facts. Scalia claimed that the amendment’s provisions should only relate to the “original” intent of extending legal rights to black men.

He framed his argument as an invitation to state legislatures to grant women, gays and other groups equal rights. But that also suggests that the states would be free to deny these Americans their rights, if the legislatures saw fit.

“If indeed the current society has come to different views [regarding equal rights for women and gays], that’s fine,” Scalia said. “You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex.

“The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don’t need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.”

Defending White Plutocrats

Nevertheless, when the power to appoint future Supreme Court justices was at stake in Election 2000 Scalia signed off on a fully unanticipated application of the “equal protection” language.

In the Bush v. Gore case, Scalia joined in a ruling that blocked the Florida Supreme Court from interpreting statutes passed by the state legislature regarding standards for legally cast votes. Scalia and four other Republican justices stopped Florida’s canvassing boards from assessing whether rejected ballots had indeed reflected the clear intent of the voters.

In effect, Scalia and the four other partisan Republicans Justices William Rehnquist, Clarence Thomas, Anthony Kennedy and Sandra Day O’Connor were citing the Fourteenth Amendment to overturn a state law regarding how elections should be conducted.

They did so with the expressed intent of protecting the “rights” of George W.

Bush and without any concern that the Congress in 1868 never expressed any intent for the amendment to be used as a device to overturn the will of the voters and put a white plutocrat in the White House.

But as the saying goes, necessity is the mother of invention. And Scalia and his cohorts were willing to invent or ignore “originalism” as needed to achieve their partisan ends. They were acting as what they like to condemn, “activist judges.”

By the way, the relevant part of the Fourteenth Amendment doesn’t make any reference to race or to gender, only to “citizens” and “any person.”

It states: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Four decades ago before Scalia’s arrival on the scene the U.S. Supreme Court ruled that those provisions do apply to women. More recently, some federal judges have ruled that the language also would prohibit discriminatory laws against gays.

Bush v. Gore

As painful as it might be to some, it’s worth reviewing — in the context of Scalia’s statement — how the Bush v. Gore ruling came to pass.

The behind-the-scenes court drama began on Dec. 8, 2000. Bush was clinging to an official lead of only a few hundred votes out of six million cast in Florida when the Bush forces were dealt a crushing blow. A divided Florida Supreme Court ordered a statewide review of ballots that had been kicked out by antiquated counting machines.

The recount began on the morning of Dec. 9. Immediately, the canvassers began finding scores of legitimate votes that the machines had rejected.

Despite a supposed reverence for states’ rights and a disdain for federal interference, Bush’s lawyers raced to the U.S. Appeals Court in Atlanta to stop the count. Though dominated by Republican conservatives, the appeals court held to established precedents and refused to intervene to stop the recount.

A frantic Bush then turned to the U.S. Supreme Court in Washington. There, in the late afternoon, the high court took the unprecedented step of issuing an injunction to stop the counting of votes cast by American citizens.

In the injunction, Justice Scalia made clear that the purpose of the court's action was to prevent Bush from falling behind in the tally and thus raising questions about his legitimacy should the Supreme Court later declare him the winner.

That outcome would "cast a cloud" over the "legitimacy" of an eventual Bush presidency, explained Scalia. "Count first, and rule upon the legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires," Scalia wrote.

Trusting the Law

Nevertheless, on Dec. 11, 2000, Gore and his lawyers voiced confidence that the rule of law would prevail that the U.S. Supreme Court would rise above any partisan concerns and would insist that the votes be counted and the will of the voters be respected.

Gore was particularly confident that Justice O'Connor would reject partisanship and apply the law fairly. However, on that same day, reporter Mollie Dickenson wrote for Consortiumnews.com that O'Connor, a supposed "swing vote" was "firmly on board for George W. Bush's victory."

Dickenson wrote that "according to a knowledgeable source, O'Connor was visibly upset – indeed furious – when the networks called Florida for Vice President Al Gore on Election Night. 'This is terrible,' she said, giving the impression that she desperately wanted Bush to win.

"Some have heard that one reason why O'Connor was so upset was that the O'Connors want to retire home to Arizona, but will not do so if Gore wins. In that case, O'Connor will remain on the court to deny Gore the opportunity to replace her." (As it turned out, O'Connor did retire with Bush in office, enabling him to appoint right-wing Justice Samuel Alito, who became part of Scalia's faction on the court.)

Yet, the Gore team apparently went before the court not knowing that whatever they argued, the five Republican partisans were determined to make Bush the next president.

The evidence is now clear that the five Republican partisans decided on the outcome first and worked out the rationale second. Indeed, their legal logic flipped from the start of their deliberations to the end, but their pro-Bush verdict remained steadfast.

USA Today disclosed this inside story in an article about the strains that the Bush v. Gore ruling created within the court. Though the article was sympathetic

to the pro-Bush justices, it disclosed an important fact: that the five were planning to rule for Bush after oral arguments on Dec. 11. The court even sent out for Chinese food for the clerks, so work could be completed that night. [*USA Today*, Jan. 22, 2001]

At that point, the legal rationale for stopping the Florida recount was to have been that the Florida Supreme Court had made "new law" when it referenced the state constitution in an initial recount decision rather than simply interpreting state statutes.

Even though this basis for giving Bush the White House was highly technical, the rationale at least conformed with conservative principles, which are supposedly hostile to judicial "activism." But the Florida Supreme Court threw a wrench into the plan.

On the evening of Dec. 11, the state court submitted a revised ruling that deleted the passing reference to the state constitution. The revised ruling based its reasoning entirely on state statutes, which permitted recounts in close elections.

This modified state ruling opened a split among the five conservatives. Justices O'Connor and Kennedy no longer felt they could agree with the "new law" rationale for blocking the recount, though Justices Rehnquist, Scalia and Thomas were prepared to stick with the old thinking even though its foundation had been removed.

Finding a Reason

The plans for finishing up the formal opinion on the evening of Dec. 11 were scrapped as O'Connor and Kennedy veered off in a very different direction.

Through the day on Dec. 12, they worked on an opinion arguing that the Florida Supreme Court had failed to set consistent standards for the recount and that the disparate county-by-county standards constituted a violation of the "equal protection" rules of the Fourteenth Amendment.

The logic of this argument was quite thin and Kennedy reportedly had trouble committing it to writing. To anyone who had followed the Florida election, it was obvious that varied standards already had been applied throughout the state.

Wealthier precincts benefited from optical voting machines that were simple to use and eliminated nearly all errors, while poorer precincts with many African-Americans and retired Jews were stuck with outmoded punch-card systems with far higher error rates. Some counties had conducted manual recounts, too, and those totals already were part of the tallies giving Bush a tiny lead.

The statewide recount ordered by the Florida Supreme Court was designed to reduce those disparities and thus bring the results closer to equality. Applying the "equal protection" provision, as planned by O'Connor and Kennedy, turned the Fourteenth Amendment on its head, guaranteeing less equality than would have occurred by letting the recount go forward.

Indeed, if one were to follow the "logic" of the O'Connor-Kennedy position, the only "fair" conclusion would have been to throw out Florida's presidential election in total. After all, the U.S. Supreme Court was effectively judging Florida's disparate standards to be unconstitutional. But that would have left Gore with a majority of the remaining electoral votes.

Or, more rationally, the U.S. Supreme Court could have given Florida more time to conduct the fuller recount that the O'Connor-Kennedy position envisioned, bringing in not only so-called "under-votes" in which a choice was hard to detect but "over-votes" in which citizens both punched the hole for their choice and wrote his name in.

However, Gore stood to benefit from either approach and that went against the pre-determined outcome to put Bush in the White House, whatever the legal excuse had to be.

Even more telling than the stretched logic of the O'Connor-Kennedy faction was the readiness of Rehnquist, Scalia and Thomas to sign on to a ruling that was almost completely at odds with their initial legal rationale for blocking the recount – and in violation of their supposedly "strict constructionist" beliefs.

On the night of Dec. 11, that trio was ready to bar the recount because the Florida Supreme Court had created "new law." On Dec. 12, the same three justices were voting to block the recount because the Florida Supreme Court had not created "new law" by establishing precise statewide recount standards.

The five conservatives had devised their own Catch-22. If the Florida Supreme Court set clearer standards, that would be struck down as creating "new law." If the state court didn't set clearer standards, that would be struck down as violating the "equal protection" principle. Heads Bush wins; tails Gore loses.

There was one other clever twist to the conservative majority's maneuvering. When the ruling was issued at around 10 p.m. on Dec. 12, the Republican majority's rationale asserted that the Fourteenth Amendment required a recount with equal standards applied statewide, but then gave Florida only two hours to complete the process before a deadline of midnight.

Because this two-hour window was absurdly unrealistic, the result of the ruling was to give Bush the White House based on a 537-vote lead in the "official"

Florida results, as overseen by the state administration of his brother, Gov. Jeb Bush.

Denying Politics

After the court's ruling and Gore's gracious-but-pained concession speech the next day, Justice Thomas told a group of high school students that partisan considerations played "zero" part in the court's decisions. Later, asked whether Thomas's assessment was accurate, Rehnquist answered, "Absolutely."

In later comments about the court's role in the case, Rehnquist seemed unfazed by the inconsistency of the court's logic. His overriding rationale seemed to be that he viewed Bush's election as good for the country whether most voters thought so or not.

In a speech on Jan. 7, 2001, Rehnquist said sometimes the U.S. Supreme Court needed to intervene in politics to extricate the nation from a crisis. His remarks were made in the context of the Hayes-Tilden race in 1876, when another popular vote loser, Rutherford B. Hayes, was awarded the presidency after justices participated in a special election commission.

"The political processes of the country had worked, admittedly in a rather unusual way, to avoid a serious crisis," Rehnquist said. Scholars interpreted Rehnquist's remarks as shedding light on his thinking during the Bush v. Gore case as well.

"He's making a rather clear statement of what he thought the primary job of our governmental process was," said Michael Les Benedict, a history professor at Ohio State University. "That was to make sure the conflict is resolved peacefully, with no violence." [Washington Post, Jan. 19, 2001]

But where were the threats of violence and acts of disruption in the 2000 election? Gore had reined in his supporters, urging them to avoid confrontations and to trust in the "rule of law." The only violence had come from the Bush side, when the Bush campaign flew protesters from Washington to Miami to put pressure on local election boards.

On Nov. 22, 2000, as the Miami-Dade canvassing board was preparing to examine ballots, a well-dressed mob of Republican operatives charged the office, roughed up some Democrats and pounded on the walls. The canvassing board promptly reversed itself and decided to forego the recount.

The next night, the Bush-Cheney campaign feted the rioters at a hotel party in Fort Lauderdale. Starring at the event was crooner Wayne Newton singing "Danke Schoen," but the highlight for the operatives was a thank-you call from George

W. Bush and his running mate, Dick Cheney, both of whom joked about the Miami-Dade incident, the Wall Street Journal reported.

The Journal noted that "behind the rowdy rallies in South Florida this past weekend was a well-organized effort by Republican operatives to entice supporters to South Florida," with House Majority Whip Tom DeLay's Capitol Hill office taking charge of the recruitment. [WSJ, Nov. 27, 2000. For more details, see Consortiumnews.com's "Bush's Conspiracy to Riot."]

Republican Defiance

In other less violent ways, Bush-Cheney operatives signaled that they would not accept an unfavorable vote total in Florida. In the chance that Gore pulled ahead, the Republican-controlled state legislature was preparing to void the results. In Washington, the Republican congressional leadership also was threatening to force a constitutional crisis if Gore prevailed in Florida.

If one takes Rehnquist's "good-for-the-country" rationale seriously, that means the U.S. Supreme Court was ready to award the presidency to the side most willing to use violence and other anti-democratic means to overturn the will of the voters.

Rehnquist's approach suggested that since Gore and his supporters were less likely to resort to violence while Bush and his backers were ready to provoke a crisis if they didn't get their way that the high court should give the presidency to the side most committed to disruption.

A far more democratic and rational approach would have been for the Supreme Court to accept the O'Connor-Kennedy logic and simply extend the deadline for Florida to turn in its results. The court could have ordered the fullest and fairest possible recount with the winner being whichever candidate ended up with the most votes.

However, if that had occurred, the almost certain winner would have been Gore. When a group of news organizations conducted an unofficial recount of Florida's disputed ballots in 2001, Gore came out narrowly on top regardless of what standards were applied to the famous chads dimpled, hanging or punched-through.

Gore's victory would have been assured by the so-called "over-votes" in which a voter both punched through a candidate's name and wrote it in. Under Florida law, such "over-votes" are legal and they broke heavily in Gore's favor. [See Consortiumnews.com's "So Bush Did Steal the White House."]

In other words, the wrong candidate had been awarded the presidency. However, this startling fact was an unpleasant reality that the mainstream U.S. news

media decided to obscure.

The tally wasn't completed until after the terrorist attacks on 9/11 and the prevailing view among senior news executives became that it would be harmful to the nation's need for unity if the press reported that Gore was the rightful winner of Election 2000.

So, the major newspapers and TV networks hid their own scoop when the results were published on Nov. 12, 2001. Instead of stating clearly that Florida's legally cast votes favored Gore, the mainstream media bent over backwards to concoct hypothetical situations in which Bush might still have won the presidency, such as if the recount were limited to only a few counties or if the legal "over-votes" were excluded.

The discovery of Gore's rightful victory was buried deep in the stories or relegated to charts that accompanied the articles.

Misleading the Readers

Any casual reader would have come away from reading The New York Times or The Washington Post with the conclusion that Bush really had won Florida and thus was the legitimate president after all. The Post's headline read, "Florida Recounts Would Have Favored Bush." The Times ran the headline: "Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote."

Some columnists, such as the Post's media analyst Howard Kurtz, even launched preemptive strikes against anyone who would read the fine print and spot the hidden "lede" of Gore's victory. Kurtz labeled such people "conspiracy theorists." [Washington Post, Nov. 12, 2001]

After reading these slanted "Bush Won" stories, I wrote an article for Consortiumnews.com noting that the obvious "lede" should have been that the recount revealed that Gore had won. I suggested that the news judgments of senior editors might have been influenced by a desire to appear patriotic only two months after 9/11. [See Consortiumnews.com's "Gore's Victory."]

My article had been up for only a couple of hours when I received an irate phone call from New York Times media writer Felicity Barringer, who accused me of impugning the journalistic integrity of then-Times executive editor Howell Raines. I got the impression that Barringer had been on the look-out for some deviant story that didn't accept the pro-Bush conventional wisdom.

Today, the dominant conventional wisdom appears to be that while the Bush v. Gore decision was a case of politicized justice, it's not something that Americans should get too upset about. There is even a school of thought that

asserts that it was encouraging that U.S. citizens did not take to the streets to protest this overturning of their democratic judgment.

In a Sept. 13, 2010, interview with NBC's Brian Williams, Justice Stephen Breyer, one of the dissenters in the Bush v. Gore ruling, said he still believed the majority was wrong, but added that he found the aftermath remarkable in a positive way.

"That remarkable thing, is even though more than half the public strongly disagreed with it [Bush v. Gore], thought it was really wrong, they followed it," Breyer said. "And the alternative, using guns, having revolutions, is a worse alternative.

"And it's taken quite a long time, many, many years, decades and decades for Americans to come to that understanding. And that fact, that America will follow court decisions made by fallible human beings, even when those decisions are very unpopular, has not always been true."

In other words, Breyer believes it is preferable for Americans to accept an anti-democratic judgment made by five partisans in black robes than to rise up in outrage against a powerful institution that has usurped the role of the voters and overturned the consent of the governed.

Yet, is that acquiescence really preferable to the courageous actions by people all over the world who have staged protests and risked their lives in defense of democracy when autocratic rulers have refused to accept the results of an election?

A decade after the fateful court ruling with the results of Bush's presidency now painfully apparent and his appointed justices helping to open the floodgates of special-interest money to further distort the democratic process Bush v. Gore must be viewed as a moment when the United States started down a very dark road.

It also is a reminder that for Justice Scalia and his cohorts, a stated devotion to "originalism" and "strict construction" is more a propaganda exercise designed to fool the gullible than a bedrock principle that must be followed even when it doesn't work in favor of a politically desired outcome.