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Theocracy Alert

Originalists and "proactive judicial activism"

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May 27, 2005—The Senate's "bipartisan compromise" on Bush's judicial nominations (and renominations) is history. In its wake, the label "activist judge" became transparently contradictory given the record of judicial activity by the nominees now headed for an up-or-down vote in the Republican dominated Senate. A new label for transgressing jurists was needed.

Conservative columnist David Limbaugh came up with that new label—"proactive judicial activism"—for jurists who don't adhere to the "correct" ideology. (From Mr. Limbaugh's website one can sign up for the *Voice of the Martyrs* monthly newsletter, as well as purchase his book *Persecution: How Liberals Are Waging War Against Christianity.*)

In keeping with his politics and religious views, Limbaugh favors "originalist" judges." The term is not new. H. Jefferson Powell defined it in his 1987 article "Rules for Originalists" in the *Virginia Law Review:* "Those who advocate giving normative force to the 'original intent' of the Constitution's framers . . . adherence to the Constitution's original *meaning* without locating that meaningin the founders' actual intention."

Some of today's most well known originalists are Antonin Scalia, Clarence Thomas, and failed Supreme Court nominee Robert Bork, who authored a functional definition of "originalist" in his book *The Tempting of America.* Mr. Bork stated "all that counts" for a judge interpreting the Constitution "is how the words used in the Constitution would have been understood at the time [of enactment]." By "the Constitution" originalists mean the document written by the Founding Fathers. Subsequent amendments to the Constitution are not on a par with the original text.

Applying Bork's originalist criterion to the Declaration of Independence, one would have to conclude that "all men are created equal" means exactly what it says: men, not women. And since slaves were not really considered "human" much less citizens in the eighteenth century, African-Americans and other "minorities" unrecognized then simply don't exist today either, legally speaking. That may be why originalists have such a problem with civil rights.

William H. Pryor, one of the previously filibustered nominees for the U.S. Court of Appeals for the 11th Circuit, is a leading proponent of the originalists' "federalism" movement *to limit the authority of Congress to enact laws protecting individual and other civil rights.* He is particularly hostile to recognizing—much less protecting—gay Americans' equality or civil rights. Mr. Pryor's judicial attitude was made clear in the amicus brief he filed with the Supreme Court during the *Lawrence v. Texas* case. He argued government has a legitimate interest in singling out same-sex relationships for punishment and compared those relationships to "prostitution, adultery, necrophilia, bestiality, possession of child pornography . . . incest and pedophilia." What gay or lesbian American could believe in the fairness of Judge Pryor?

Other Bush judicial nominees follow the same pattern. Justice Priscilla Owen's record makes it clear that she has consistently ruled against consumers' and individuals' rights. Justice Janice Rogers Brown has a record of hostility to workers' rights and victims of discrimination. And federal district court Judge Terrence Boyle, nominated and renominated to the appellate bench by Presidents George H. W. Bush and George

W. Bush, has also repeatedly shown his hostility to civil rights litigants, especially when the case involved the Americans with Disabilities Act. His record shows that in more than 20 years as a federal judge, Mr. Boyle has *never* ruled in favor of a plaintiff in an ADA case. What consumer, worker or disabled American could believe in the fairness of these originalist jurists?

Not surprisingly, the originalist worldview has much in common with the fundamentalist worldview of Jerry Falwell: “The Bible is the inerrant . . . word of the living God. It is absolutely infallible, without error in all matters pertaining to faith and practice, as well as in areas such as geography, science, history, etc.” Advances in social, scientific and legal knowledge have no bearing or relevance. If the Bible says epilepsy is caused by demons, it is. And since there is no “right to privacy” or “separation of church and state” enumerated in the Constitution, neither exists . . . or should.

Mr. Limbaugh ended his political sermon lamenting “that Senate Republicans have once again caved by entering into a ‘bipartisan’ compromise with Democrats to avert the constitutional option.” Like the leaders of the evangelical Christian Right who believe they alone are right and they alone know what “God” wants and how everyone should be and live, Limbaugh and his ilk believe only one party has good ideas and they alone should rule, absolutely. No discussions, no compromises, no “bipartisan” efforts. He made that clear when deriding Howard Dean’s statement of fact: “48 percent of us didn’t vote for President Bush, but we still have some say in shaping the agenda of the country.”

Right-wing Republicans manifest the political edict of the leaders of the evangelical Christian Right: our way must be the only way, for everyone. Perhaps that’s why Louis Sheldon of the Traditional Values Coalition and James Dobson of Focus on the Family blew a gasket when the Senate compromise on the filibustered judicial nominees was announced. Sheldon and Dobson expressed their dictatorial outrage while stomping their feet and making their usual threats:

> Of the seven Republicans who signed the compromise agreement, Sheldon said: “They didn’t have the backbone and the fortitude to stand up for the fact that we are the majority.”
>
> James Dobson, who had been lobbying GOP senators to hold firm, expressed his “disappointment, outrage and sense of abandonment.” Come election day, he said, “voters will remember both Democrats and Republicans who betrayed their trust.” (LA Times, May 24, 2005)

Interesting phrase: “betrayed their trust.” For decades Americans have placed their trust in the courts—especially the federal courts—to uphold their civil rights and enforce liberty, justice and equality for all. The *Brown v. Board of Education* case comes immediately to mind. That trust in the courts has been betrayed not by the senators who brokered the bipartisan compromise, but by George W. Bush who nominated and renominated only one kind of jurist, originalists: “The Court should include justices with different approaches to constitutional interpretation. A Court without dissenters is a Court that will not adequately inform us of the costs of choosing the path taken.”

Betrayal is also the *modus operandi* of the leaders of the Christian Right. They have betrayed the philosophy and message Yeshua of Nazareth in favor of their own political agenda and its vitriolic bile. Religion should be a source of comfort and inspiration, not the cesspool of bigotry and hate called for by “Christian leaders” such as Randall Terry:

> "I want you to just let a wave of intolerance wash over you. I want you to let a wave of hatred wash over you. Yes, hate is good . . . Our goal is a Christian nation. We have a Biblical duty, we are called by God, to conquer this country. We don’t want equal time. We don’t want pluralism."