Written by **Joe Wolverton, II, J.D.** on August 4, 2010

Elena Kagan and Chief Justice Roberts: Same Difference?

A recent story published by the respected online political magazine, Politico, proposes to set forth similarities between the philosophies of constitutional interpretation espoused by Chief Justice John Roberts and Supreme Court nominee Elena Kagan.

The analysis is particular timely in advance of the imminent vote in the Senate to confirm President Obama's nomination of Elena Kagan to fill the spot on the Supreme Court bench left vacant by the retirement of Justice John Paul Stevens.

The *Politico* piece offers the thesis that despite their apparent political differences (Roberts is described as "conservative" while Kagan is labeled a "liberal") there is greater confluence than divergence in the views held by these two "legal powerhouses from the left and the right" of the proper role of recurring to the intent of the Framers in untangling the threads of constitutional complexities.

To support their thesis, the authors of the article present testimony on the subject given by Chief Justice Roberts during confirmation hearings held in 2005 and the congressional inquiries into Kagan's suitability that recently adjourned.

During the process of fulfilling their constitutional role of providing "advice and consent" to the President, Senators delved into the John Roberts' theory of whether the constitutional questions he would hear on the Supreme Court should be interpreted "in light of modern circumstances" or should his opinions be guided by "the original meaning of the Constitution's words."

The article reports that Roberts informed his congressional inquisitors that he "endorsed a form of living constitutionalism." The upshot of which is that when presented with thorny constitutional questions, Chief Justice Roberts believes it is more helpful (and legally sound) to take judicial notice of the current political and social climate than to rely on the "original meaning of constitutional provisions."

For her part, Elena Kagan testified to her plan to faithfully follow the polestar of political circumstances, but later tempered that position by proclaiming that "we are all originalists."

The debate between the two camps ("orignialists" and "living constitutionalists") centers on a two-part question: first, whether or not the Supreme Court should be the ultimate arbiter of the constitutionality of acts of the legislative branch; and second, whether during the evaluation of the relevant constitutional clauses, should the Supreme Court consider the attendant conditions in which the law

before them was enacted or should the justices "endeavor to resurrect the original meaning constitutional provisions and statutes as the only reliable guide for judgment?"

Each side has its persuasive advocates. The late Senator Edward Kennedy reacted strongly to the steadfast defense of originalism displayed by Judge Robert Bork during his confirmation hearing in 1987. In responding to Bork's pronouncement, Kennedy indirectly warned America that:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is — and is often the only — protector of the individual rights that are the heart of our democracy.

It is noteworthy to mention the distance Chief Justice Roberts, during his confirmation process, sought to put between himself and the brand of originalism embraced by Robert Bork.

More recently, at a speech delivered at the Museum of the Rockies in Bozeman, Montana, current Supreme Court Justice Antonin Scalia, an unabashed enemy of the notion of a "living constitution," declared that the concept was a principle that has produced several fundamental rewrites of the Constitution by unelected judges who are unqualified to make decisions on moral issues. "Nothing that I learned in my courses at Harvard law school, none of the experience I acquired practicing law qualifies me to decide whether there ought to be, and hence is, a fundamental right to abortion or assisted suicide," Scalia said.

This debate will continue and will not end with the nomination of Elena Kagan to the Supreme Court, and it would not have ended had a staunch originalist like Robert Bork taken a spot on the bench of the nation's highest tribunal. There are questions of authority at stake and men will naturally stand as fearless sentinels on the border between themselves and any perceived threat.

What must be remembered, however, is that our founding charter is not some musty codex from antiquity for which the opinion of its authors are lost to history. This is a document with thousands of pages of elegant exegesis collected in libraries and repositories around the world, and in the age of electronically disseminated information, it is accessible online by most any interested investigator. There is no need to pull a hermeneutical hamstring in the calisthenics of interpreting the Constitution.

To wit, the words of Alexander Hamilton as published on June 14, 1788 in the *Independent Journal* (known later as *Federalist* No. 78):

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.
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> If, then, the courts of justice are to be considered as the bulwarks of a limited

> Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Anyone interested in further illumination on the matter may avail themselves of the advice and consent of our Founding Fathers by making a simple recourse to the above-quoted *Federalist Papers*, early Supreme Court decisions, and the personal writings of those who were present at the creation of the Constitution that gave life not only to our grand Republic, but to the governmental institutions whose actions, for good or ill, very often determine the future thereof.

Photo of Chief Justice John Roberts: AP Images