

Strict Construction versus Intelligent Design

By Michael Coblenz

Tag: Both Strict Construction and Intelligent Design are quasi theories created by Conservatives out of whole cloth to counter a reality they don't like.

I spent most of my free time between Thanksgiving and Christmas researching Constitutional history. I was working on a paper on Strict Construction for a progressive legal organization – the American Constitution Society – timed to coincide with Judge Samuel Alito's confirmation hearings. While I was doing that research the Intelligent Design case in Dover, Pennsylvania was making news. I was analyzing a conservative legal theory about the creation of the Constitution that had only the slightest relationship to the actual historical events, and was hearing about a conservative scientific theory about the creation of life on earth that had only the slightest relationship to the actual historical events.

The juxtaposition made one thing clear: Strict Construction is to Constitutional Law as Intelligent Design is to Biological Science. In other words, both are essentially nonsense created out of whole cloth by conservatives who don't like the way the world works.

Strict Construction (SC) is the theory that judges should interpret the Constitution based on the intent of the men who wrote it. This presupposes that those men had a unanimous or even consensus intent, but the history of the Constitutional Convention in Philadelphia in 1787, and of the years immediately after Ratification, shows that they disagreed, often bitterly, over many things. Within two years of Ratification, for example, James Madison and Alexander Hamilton were fighting over whether the Constitution gives Congress the power to charter a national bank. If the Framers had a unified understanding of the authority of Congress to regulate commerce

there would have been no disagreement. In other words, had there been a consensus original understanding, there wouldn't have been anything for Hamilton and Madison to argue about. In subsequent years there were many other disagreements over the meaning of the Constitution by the men who wrote and ratified it, and presumably knew what it meant. If the framers disagreed, how are we, two hundred years down the line, supposed to agree?

Intelligent Design (ID) is the idea that life is so complex that it could not have occurred by chance, and therefore there must have been a guiding hand of some form. But the real world is full of silly, unintelligent designs, from the male nipple to the human coccyx. Such random aberrations seem to indicate chance mutation and not design.

The curious overlap between my research and the news revealed a number of other interesting parallels between strict construction and intelligent design.

Not Theories, But Opposition

Both Strict Construction and Intelligent Design were created in opposition to ideas that Conservatives didn't like.

Strict Construction was created shortly after the *Roe v. Wade*, 410 U.S. 113 (1973) decision, but Roe was only the last of a long line of Supreme Court rulings that angered conservatives. They complained about "legislating from the bench" for many years, in particular during the fifties, sixties, and seventies, when the Warren and Burger Courts made a number of rulings they despised. These decisions included the expansion of the rights of "criminals"

through more rigorous rules on searches and the questioning of suspects, outlawing prayer in public schools, the (temporary) ban on capital punishment, and forced busing of students to integrate schools. The culmination of this era of “judicial activism” was the *Roe v. Wade* decision allowing abortion.

Conservatives derided these rulings as examples of a “Living Constitution” or a document that changed with the times. In an attempt to create philosophical arguments to oppose these decisions, Conservative lawyers (like Ed Meese, future Attorney General under Ronald Reagan) and scholars (like Robert Bork) developed the idea that the Constitution should mean today basically what it meant when it was adopted. And when Judges interpret a law, they should strictly construe the text based on the intent of the men who wrote it. The main problem with this idea is that it is virtually impossible to determine what the framers intended when they wrote the Constitution because different framers wanted different things. This allows modern lawyers to find convenient quotes from founders in support of such opposing ideas as expansive government regulation, and untrammelled states rights.

Intelligent Design was created in an attempt to disprove biological evolution because Fundamentalist Christians understood that proof of evolution would disprove the Biblical version of God. If life evolved, then the Biblical version of creation cannot be literally true, and if evolution created mankind then there might not be a need for God. Fundamentalists tried to teach creationism in school, but when the ‘activist’ Supreme Court (with Rehnquist as Chief Justice), in *Edwards v. Aguillard*, 482 U.S. 578 (1987) said they couldn’t, they shifted their attention to disproving evolution. They came across a biochemist named Michael Behe who was

writing about the extreme complexity of living organisms and questioning the ability of evolution to produce such complexity. Other scientists, notably biophysicist Dean Kenyon and molecular biologist Michael Denton, were looking at the inability of evolution to explain the initial origins of life. All three said that life itself might be far too complex to be fully explained by evolution. This idea became known as “irreducible complexity,” but this sounds like an egg-head academic theory which doesn’t appeal to Conservatives. Along came Charles Thaxton, a Ph.D. Chemist, with the Discovery Institute in Seattle, who was also writing about the creation of life problem. He too thought the initial creation of life was too complex to be explained by evolution and might have been the product of an intelligent plan, so he called it intelligent creation. But this sounded too much like creationism, so he looked for alternate wording, and eventually came up with Intelligent Design.

Unlike most scientific theories, which develop from the desire to prove a hypothesis, Intelligent Design was developed with the sole purpose of finding holes in evolution. And it was named for purely political purposes.

Rejected by Scholars, Including Adherents

Neither Strict Construction nor Intelligent Design is accepted by mainstream scholars, and even many supposed adherents question the validity of these so called theories. While Conservative lawyers write about Strict Construction, no historian specializing in Constitutional history believes that there is any way to determine an original understanding of the Framers. But the most stinging rebuke comes from Supreme Court Justice Antonin Scalia, whom President Bush mentions as an example of the type of judge who strictly construes the Constitution. Scalia has

said “I am not a strict constructionist, and no one should be.” He has called strict construction “a degraded form of Textualism (his preferred legal theory) that brings the whole philosophy into disrepute.”

While Conservative critics of evolution write about Intelligent Design, no reputable life scientist supports the idea. But beyond that, even the main organization promoting the idea says that it shouldn't be taught in schools. The Discovery Institute, the Seattle Washington think tank that created Intelligent Design has publicly stated that it is not a fully formed theory – it is at best in embryonic form – and it should not be taught in school.

Rejection and Ignorance of History

As I've mentioned repeatedly, Strict Construction is based on a fundamental misunderstanding of what went on during the framing of the Constitution and during the fights over the meaning of the Constitution that occurred in the first years of the nation. The Constitutional issues that we argue over today – the scope of national regulation of commerce, Presidential war powers, meaning and extent of free speech, among others – were the subject of inconclusive debate during the Constitutional Convention, and created bitter partisan debates in the immediate aftermath of ratification.

Intelligent Design largely ignores the past one hundred and fifty years of biological sciences. It ignores genetics, which has shown at the most basic level how species are related. It misstates the findings of paleontology by focusing on such fanciful non-entities like the so called missing

link. And worst of all, it disregards the innumerable advances in modern medicine that are based on an understanding of how diseases evolve and exist within their environment.

Its Politics, not Theory

Finally both ID and SC are endorsed by politicians to further their own agendas. Conservatives have latched on to Strict Construction as a convenient argument against judicial decisions they oppose. Conservative Christians, who fear science, adopted Intelligent Design for no other reason than to erode the teaching of evolution. And not surprisingly, President Bush has endorsed both.