

PANEL VII: ALTERNATIVES TO ORIGINALISM

INTRODUCTION

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I was invited to participate the weekend of the Symposium in another conference at Yale University on environmental law. That conference was conducted to permit Mr. Greg Easterbrook, Judge Easterbrook's brother, to defend his new book on environmental law.¹ But I decided that because the number of impressive Easterbrooks at each conference was equal, I would choose the conference I would attend by my own predilections.

This is a very interesting topic. When I became constitutionally conscious in the late 1970s, originalism was thought to be a completely settled issue. In other words, it was treated as an issue of intellectual rest, about which there was not much left to be said. Now all of that has changed, and I suspect it will change even more in the future. It is not only changing in the debates in the law schools, but also in Congress. Congressman McIntosh has expressed some of his views on this subject.² Another Congressional voice on originalism is Senator Spencer Abraham, a freshman legislator from Michigan, who has the distinction that everyone on his staff shares two characteristics: they have both high LSAT scores and membership in the Federalist Society.

Perhaps the most unusual member of the Judiciary Committee in the House of Representatives, Sonny Bono, is also an originalist. Now, I have had long discussions with Sonny, and I would say that he really is underappreciated. He may not know a great deal about the details of constitutional law, but he knows what he likes, and he knows it when he sees it. Sonny told me how he first became interested in politics and constitutional law. After eleven gold records, he decided that his career was on a glide path downwards, and moved to Palm Springs, California. In Palm Springs, Sonny tried to open up a fish restaurant called Bono's. He obtained all of the approvals for the necessary permits. When

* Reporter, *The Wall Street Journal*.

1. See GREGG EASTERBROOK, *A MOMENT ON THE EARTH* (1995).

2. See David M. McIntosh, *Introduction: A View for the Legislative Branch*, 19 HARV. J.L. & PUB. POL'Y 317 (1996).

he opened his restaurant, his permit for a sign identifying his establishment had still not been approved. So he opened the restaurant without a sign, and for the first few days, because all of his friends knew where it was, the restaurant had customers.

Sonny started running out of customers, because no one could spot his restaurant. So he wandered down to City Hall, to the Planning Department. He demanded to see the City Planning Commissioner, who came out and said, "What is the problem?"

Sonny said, "Well, I have a problem. I cannot get my sign permit approved." And the fellow said, "Well, give me a week. I will take care of it."

Sonny came back a week later and asked, "My sign application. What has happened to it?"

"Oh, it is complicated," the Commissioner responded. "You will have to come back in another week."

Steaming, because his restaurant was continuing to lose business, Sonny came back a week later and said, "What about the sign application?"

"Well," the planning commissioner answered, "we are going to have to review it very carefully, because it is an unusual size, unusual nomenclature and certainly an unusual design."

Sonny proceeded to whip out his Constitution and discuss the original meaning of the Takings Clause.³ His view was that his restaurant was being rendered valueless because customers could not find it, and effectively he was being disenfranchised in his property rights.

Finally, Sonny, having no satisfaction at all, a week later came back for his final confrontation with the planning commissioner. He went in to see the planning commissioner and said, "I have a great solution to our problem. I have a perfect way that we can resolve our difficulties between us."

The planning commissioner looked at him and said, "You do not understand. You cannot come up with a solution. That is my job. I am the planning commissioner. I will come up with a solution."

Sonny said, "No, no, no. I have the perfect solution to our problem. All you have to do is hear me out."

3. See U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

The planning commissioner said, "I am not interested. I am here to come up with a solution. I will take my own good time in coming up with one. And you, frankly, are not part of it."

Sonny said, "No, you do not understand. I have the perfect solution. I am going to run for mayor. I am going to win, and then I am going to fire you." Sonny ran for mayor of Palm Springs, won, and proceeded to fire the planning commissioner. But Sonny is a benevolent man and, in the interest of the new conservative compassion, he decided to take care of the old planning commissioner, and he made him his gardener.

Sonny discovered that although he certainly had jurisdiction over the laws of Palm Springs, there were many unfunded mandates and many requirements not only from the state and local governments, but also from the Congress. So he proceeded to rise in the best tradition of the Peter Principle and ran for Congress. Having won that election, he now sits on the Judiciary Committee, providing it with a unique perspective. Sonny, however, is an originalist in the most basic sense of the word, and he would, I suspect, be interested here in this panel on alternatives to originalism. We have a fine and distinguished panel, including Judge Easterbrook, who, at least when I first became aware of constitutional law, I viewed as an original originalist.

