Governor James Exposes the Activist Judges

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One of the gray eminences of the New York Times, Anthony Lewis, has come out foursquare for a favorite conservative concept: ""original intent." But while conservatives use it to affirm fidelity to the original intent of the U.S. Constitution and to decry judicial activism, Lewis uses original intent for a different purpose.

Lewis invokes original intent to exempt Al Gore from prosecution for his violation of the plain language of Section 607 of the Federal Criminal Code, which prohibits ""any person to solicit or receive any contribution . . . in any [federal government] building." Lewis claims that the original intent of the law was to stop politicians from shaking down civil servants for contributions, and therefore Gore's White House fundraising phone calls to fat cats were OK.

Let's apply the original intent argument to the hot issue raised in Alabama by Governor Fob James's 34-page letter to Federal District Judge Ira DeMent. What, exactly, does the First Amendment mean when it states that ""Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"?

The plain meaning is clear, and all historical evidence confirms, that the First Amendment was designed to prevent the new national government from establishing a national church or interfering with the free exercise of religion, It's equally clear that the First Amendment placed no restriction on the states, several of which had established churches at the time the First Amendment was adopted.

Judge DeMent ruled earlier this year in Chandler v. James that an Alabama statute permitting ""student-initiated voluntary prayer" is unconstitutional under the First Amendment. He did this on the basis of the liberal dogma, in vogue for the last 50 years, that ""the Supreme Court has held" that the Fourteenth Amendment applies the First Amendment against the states.

However, the Fourteenth Amendment, adopted in 1868, doesn't say that at all. It says: ""nor shall any state deprive any person of life, liberty, or property, without due process of law."

Governor James's letter convincingly demonstrates that not only the plain language but the original intent of the Fourteenth Amendment had nothing whatever to do with applying the First Amendment to the states, and that the so-called ""incorporation doctrine" is a Supreme Court fabrication. No evidence has been uncovered in Congressional debates or state ratifications of the Fourteenth Amendment to sustain the incorporation notion.

In 1875 the so-called Blaine Amendment attempted to put a restriction on the states parallel to the First Amendment's religion clause, but it failed. During extensive Congressional debates, no one suggested that the Fourteenth Amendment (ratified only seven years earlier) had already done this.

Governor James's letter traces the Supreme Court decisions showing how the activist liberal justices, first slyly and then brazenly, without any legal or historical precedent, invented the incorporation doctrine and used it to hold that the Fourteenth Amendment's due process clause ""embraced" the First Amendment's Establishment Clause. This invention was then used to rule that voluntary prayer in public schools is an ""establishment" of religion.

Justice William Douglas, late in his 36-year Supreme Court career, admitted that the due process clause is the ""wildcard to be put to such use as the judges choose." Douglas's metaphor was very apt; his association with Las Vegas gamblers was a scandal that brought calls for his impeachment (unfortunately, unsuccessful).

Governor James buttressed his letter with the text of a 1982 speech by Justice William J. Brennan which sets forth the mindset of the liberal activist judges who have convinced themselves that they are divinely ordained to rule over lesser Americans. He argued that it is time ""to wonder whether the older values are fully adequate."

Brennan argued for ""the evolution of constitutional doctrine" and for law itself ""to rethink its role." In previous eras, he said, ""the function of law was to formalize and preserve (accumulated) wisdom," but ""over the past 40 years Law has come alive as a living process responsive to changing human needs."

He said that these changes have ""outmoded many of the traditional mechanical limits on judicial action." He bragged that ""evolution of constitutional law has been, in fact, a moving consensus."

Brennan admitted that ""case after case had held" against the incorporation doctrine, but ""during the last 25 years however the dam has been broken." Rationalizing this, he said, ""the genius of the Constitution resides not in any static meaning that it has in a world that is dead and gone, but in its adaptability of its great principles to cope with current problems and current needs."

Brennan expressed disdain for ""laymen [who] tend to assume that law is fixed and certain. . . . My theme tonight is that we must know better. . . . Our constitutional guarantees and the Bill of Rights are tissue paper bastions if they fail to transcend the printed page."

The arrogant activist judges have convinced themselves that our Constitution is mere ""tissue paper" which they must ""transcend" in order to guide the ""evolution" of the law away from the ""laymen" who think that the law should be what it says.

Governor James should be commended for proving that the First and Fourteenth Amendments should be no bar to prayer in the classroom or a Ten Commandments plaque in the courtroom.