

LWVMP Phoenix Community Team at The Terraces
May 2017 Report from Rivko Knox

“If an Originalist, a Textulist and a Pragmatist All Walked Into a Bar, What Would Happen to the Constitution?” Bob McWhirter, author, immigration and constitutional law specialist, and currently a defense attorney, started by talking about the right to vote, which is not mentioned in the original Constitution and didn't appear, though in a roundabout way even then, until the 15th amendment and later of course was expanded under the 19th amendment. That is why there are no national voting requirements or standards. And then, he asked, what about the right to privacy? This didn't appear until the Supreme Court's decision in *Griswald v Connecticut* that defined a 'penumbra' (Latin for 'almost' and 'shadow') of rights flowing from the original Constitution and Declaration of Independence and led to the right to contraception.

Rights, McWhirter said, come from various sources such as the constitution itself, amendments to such, statutes, customs and case law. For example, the Magna Carta ensured the right to travel and due process, which carried over into the US Constitution.

And what, McWhirter asked, was going on with all these people speaking out about 'freedom' and their 'rights' being taken by the government? What does "take back America mean?" For some this means that the we don't need government giving us rights so we take them back to be free of government. However, he said: all rights require some form of government to protect and ensure their use..

Regarding the 10th amendment, he asked "My right, your right, whose right are we talking about?" There are definitely some enumerated rights in the Constitution but we continue to argue, throughout US history, about their application and extension. Somebody, said McWhirter, has to balance rights and interpret laws; and in the US it has been the judiciary. But what about the term 'activist judges?' He said that term almost always applies to the losing side in a court battle!!!

Going back into history, which McWhirter is well known to do, using a very entertaining PPT with pictures and quotes from the Bible, Greece, Rome, Medieval history and sometimes motion pictures, he pointed out that the Declaration of Independence speaks to the indictment of King George's attack on judicial independence. And after the Constitution, the

first instance of judicial review was in the case of Marbury vs. Madison, in which the Supreme court invalidated a legislative action, thus establishing judicial review, which, he said, is 'intended by the structure of our government.'

Regarding judicial review, he pointed out that historically (and with all due respect to the current president), common law, the constitution and natural law all trumped acts of Parliament.

The Constitution, he reminded those listening, is not an owners manual; it is just a framework for a government and must be interpreted. However, 'how different people READ the constitution is similar to arguments over how different people READ the Old and especially the New Testament. Is one right and the other wrong? And who decides?'"

Textualism he said, encompasses originalism and strict construction. It basically says that the law is not what the lawgivers intended; it is just what the statute says!! Any changes thus require Constitutional Amendments.

Thus the Constitution is NOT a living document; it is dead, dead, dead as Supreme Court Justice Antonin Scalia said; it is not an organism.

Until the Warren Court, he pointed out, many of the rights in the Bill of Rights did not really apply. The words themselves don't protect rights which is why courts are needed. In 1927 a very important book, in terms of constitutional interpretation was written, titled 'The Living Constitution.'" It focused on what is called 'loose construction,' pragmatism (society changes/evolves, which results in evolving interpretations of the Constitution); and the fact that the Framers' intended the Constitution to be read in a flexible manner. However, there are also problems with a 'living constitution,' i.e., what is it moored to? is a living constitution relativism?

One of the problems with Originalism, is how does a judge define what a word or law means? How do we decide what the Framers meant? For example, what does 'cruel and unusual' or 'excessive bail' mean? McWhiter pointed out that in the time of the Framers, there were no prisons. People were either punished, fined or let go!! When we ask what the Framers meant do we mean the Framers of the 1789 Constitution or the 1870 Constitution? Did the Framers want it to be a 'living constitution?' No one knows regardless of what scholars write or say. Keep

in mind, said McWhiter, that every time the Constitution is amended, it changes the meaning of the document. The goal he said is balance because almost no one believes in totally unfettered capitalism, i.e., no Federal Aviation Administration or Food and Drug Administration.

McWhirter said he considers himself to be a progressive originalist because he believes that there must be government/a structure to ensure rights, which goes back to what was written in the Declaration of Independence, i.e., "...that a government instituted among men..."

April meeting speaker: "Impact of New Policies on Immigration in Arizona," a presentation by Ray Ybarra, distinguished immigration attorney, human rights activist, author and film maker.