

# **WE ARE ALL JEFFERSONIANS - STRICT CONSTRUCTION vs. IMPLIED CONSTRUCTION**

**By Evan Gutman CPA, JD (2013)**

This essay provides a basic lesson in constitutional law for the multitude of Judges lacking knowledge in the law, who obtained their positions by generating substantial legal fees for law firms they worked for. The fees they generated allowed them to establish the necessary friendships for obtaining a Judicial position. However, regrettably these friendships did nothing to assist them in developing legal knowledge. Thus, on a quantified basis, this essay is directed to about 60% of the nation's Judges.

Strict Construction of legislative enactments generally means that the law will be applied by a rigid adherence to definitions of words contained in the law. It relies on the premise that the law should not be expanded by implication of the words expressly stated. In contrast, Implied Construction generally means laws are interpreted in a manner that not only takes into account the expressly stated words in the law, but also considers legislative intent and purpose. Thus, Implied Construction provides more flexibility to interpret the written law because Judges can go beyond the stated words in the law.

Since this nation's inception, officials of all three branches of government have argued about whether laws should be interpreted Strictly or by Implication. I conclude that the position adopted by any Judge depends upon the exigency of the moment. Put simply, Judges use Strict Construction when it supports the conclusion they want and they use Implied Construction when that supports the conclusion they want. Thus, all Judges are ultimately Jeffersonians (don't worry trial court Judges, I'll explain to you what that means shortly).

The Strict versus Implied Construction debate began shortly after the U.S. Constitution was adopted. The issue was whether the U.S. Constitution granted the Federal government power to form a Bank. Alexander Hamilton was the Secretary of the Treasury. He was the major proponent for forming a Federal Bank, but he had a problem. His problem was that the express words of the Constitution did not provide power for the Federal government to form a Bank. Thus, he needed to get over the nuisance of the definitions of the express words in the Constitution. He did so by arguing in favor of the existence of Federal power by Implication of the express words stated in the Constitution.

Hamilton's opponent on the bank issue was Thomas Jefferson. Jefferson opposed the Bank on the ground that the Constitution only granted the Federal government "Particular Powers" and that those powers could not be expanded by

Implication of the expressly stated words. Jefferson at this time was a staunch Strict Constructionist. According to him, the Constitution meant precisely what it said and nothing more. The crux of Jefferson's strategy was to demonstrate that Hamilton was seeking to expand Federal powers by going beyond the powers expressly granted in the Constitution. Hamilton in contrast adopted the position that the words meant more than they stated. This dispute all occurred in the early 1790s. Now, here's the catch.

In 1800, Jefferson was elected President. Three years later in 1803, Napoleon of France offers to sell the entire French Louisiana Territory to the United States for a paltry \$15 million. The region to be sold was so large that it encompassed numerous present day U.S. States. Jefferson now has a problem. If he wants to effectuate the purchase, he has to grab the deal quickly or Napoleon may withdraw the offer. However, in order to grab the deal quickly, Jefferson has to accept it before Congress even has time to agree to it. That creates a major dilemma for Jefferson because he knows that according to the U.S. Constitution he lacks authority to approve the deal without congressional approval. But, the deal is just too good to pass up.

So Jefferson takes a gamble. He accepts the proposed deal knowing full well that he lacks the legal power to do so. Subsequently, Congress ratifies the deal and the U.S. gets the entire territory. But, Jefferson is politically attacked for his abject hypocrisy. He was the one who argued for Strict Construction of the Constitution against Hamilton. Yet, when he was the one faced with a decision, he opted for Implied Construction to suit the exigency of the moment. With that decision, Strict Construction of laws in general, and the Constitution in particular, as a matter of practicality ended. This occurred because the most fervent supporter of Strict Construction, chose Implied Construction when it suited him.

Since Jefferson's decision, there have been numerous U.S. Supreme Court Justices and Appellate Justices who purport to be Strict Constructionists. But, the bottom line is that there really hasn't been one. They all interpret laws based upon what suits their immediate need. There is enough case precedent material sitting out there to support any decision a Judge makes. So, they emphasize the expressly stated words in a law when that fits the decision they want. And they emphasize legislative purpose, intent or development of the law when that suits their immediate need.

Realistically, there is a minimal distinction, if even that between Strict Constructionists and Implied Constructionists in today's judicial world. Instead, it can be fairly stated that all Judges are Jeffersonians. They are Strict or Implied Constructionists depending upon which approach is needed to arrive at the conclusion they seek.

This concept was summed up in the historic work "The Tyranny of Words" written by Stuart Chase, published in 1938. Chase writes as follows (emphasis added):

"Chancellor Kent of New York State, a great legal authority, in a charming burst of frankness once wrote: "I saw where justice lay, and the moral issue decided the court half the time. I then sat down to search the authorities. . . . I might once in a while be embarrassed by a technical rule, but I almost always found principles suited to my view of the case." **The learned judge used his his best judgment, came to a decision, and then ransacked the fat books for authority to support him. . . . The decision constitutes the reality of legal machinery; the citations contribute to the magic.**"<sup>247</sup>

The foregoing is for the most part, judicial decision-making in a nutshell no matter who the Judge is. Whether so-called, conservative or liberal, Strict or Implied Constructionist, they decide what they want to do and then find legal authority to support their decision. Some Judges don't even bother with the final step. They just totally ignore the matter of finding legal authority and just do what they want to anyway.

Throughout our nation's history, depending on the Judge, the time period and issue presented, Implied Construction has been used to both enlarge Rights of the citizenry and to diminish such Rights. Similarly, Strict Construction has been used alternatively to do the same. Sometimes it is used to supplement citizen rights and other times, diminishes such in favor of governmental power.

I believe words should at least mean something. Concededly, this is a bit of a far-fetched premise for the Judiciary to accept. To allow unbridled Implied Construction of words in laws, effectively negates the entire concept of law itself. By the same token, I am sensitive to the fact that most legislators are morons. As a result, a totally rigid adherence to Strict Construction would result in the invalidation of so many laws it is unimaginable. Nevertheless, when Courts define words to save statutes in a manner resulting in the word meaning the precise opposite of its commonly accepted definition, Implied Construction has gone to far. There is no doubt that the doctrine of Implied Construction was the specific approach used by the German Judiciary to apply the laws of Nazi Germany.

Regrettably, many of our Courts have embarked on the same misadventure as the German Judiciary in the 1930s. When "Absolute" comes to mean "Conditional,"<sup>248</sup> when "Third Conviction" means "Fourth

Conviction,"<sup>249</sup> when "Child" means "Adult" and "Adult" means "Child,"<sup>250</sup> and "Punishment" means virtually nothing,<sup>251</sup> something is drastically wrong. Words come to mean nothing because they mean what any particular Judge says they mean at the given moment. If that's the case, then you might just as well skip having a legislative branch of government entirely.

Legislators should be held accountable for the meaning of their words. If the express words they write in a statute do not comport with Constitutional Rights of the citizenry, you bounce that freaking piece of Crap Statute right back to the legislative morons who wrote it. To do otherwise, makes the Judiciary an accomplice to legislative incompetence and dishonesty. It is not the Judiciary's job to save poorly written statutes. It is their job to closely scrutinize statutes.

But, before the Judiciary can justifiably assume its intended function of closely scrutinizing legislative enactments, it needs to scrutinize itself more closely. **Judges should lean strongly towards Strict Construction of legislative enactments, but also recognize the U.S. Constitution is subject to Implied Construction. Essentially, an emphasis on Strict Construction with a Warren Court spin so to speak.** The reason for this is that the U.S. Constitution announces general principles to be followed in Spirit. In contrast, the intent of legislative enactments is to regulate conduct with precision. By leaning strongly toward strict construction of legislative enactments, but allowing for implied construction of constitutional principles, the proper balance of judicial interpretation is achieved.

The achievement is attained using the concepts delineated herein, which makes it more simplistic than the Hegelian Dialectic. (Look that one up yourself trial court Judges. Pro Se 's can't do everything for you.).