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The Supreme Court: 'Originalism's' Theory and the Federalist Papers' Reality

By Ben W. Heineman Jr.

January 11, 2011



"Constitutional originalism is all the rage...." So begins Jeffrey Rosen's Week in Review article ([New York Times, January 9, 2011](#)) about political thought in the Tea Party era.

Actually, "originalism" has, of course, been hotly debated for more than two decades. It is just one of many theories which judges, lawyers and academics have used in an effort to find principled limits on the Supreme Court's paradoxical power to invoke the Constitution in invalidating legislative, regulatory or executive rules promulgated by other, more democratically accountable governmental institutions. (For a description of the issues in the context of *Citizens United* see ["Supreme Paradox", The Atlantic, January 24, 2010.](#))

The motive behind such efforts is that Court decisions, regardless of their arcane legal reasoning, can have consequential and controversial impacts on our national life: the practice of religions; the reach of economic regulation; our degree of privacy; the power of the States to regulate immigrants ... and on and on.

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Such theories limiting Supreme Court discretion have been sought by "liberals" when a "conservative" court struck down Progressive and New Deal era social and economic legislation using, for example, the Due Process or Contracts Clauses. Similarly, "conservatives" seek such limiting theories when a "liberal" court uses the Bill of Rights to expand individual liberties (e.g. protecting the privacy right to reproductive choice) in the face of Federal or State restrictions. There is the direct if inconsistent flip side when, at other

times, both liberals and conservatives, now in the majority rather than the minority, are not concerned about limitations on judicial action but on finding authority in the Constitution to strike down legislative or regulatory restrictions on social, political or economic liberty of persons or organizations.

But, whatever their name and however contradictory their purpose (to expand or to limit the reach of enumerated and un-enumerated constitutional rights), such theories invariably fail to explain—or constrain—the results in constitutional cases over time which, inevitably, stem from shifting judicial coalitions and basic constitutional value choices which the Justices usually justify after the fact in their weighty (and often lengthy) decisions.

To preserve the "legitimacy" of the court, a vast industry exists to analyze the decisions and seek principled theories for justifying judicial activism (voiding laws) or judicial restraint (deferring to more democratically accountable institutions). But most sophisticated observers of the Court understand that results in hard and controversial cases are not derived from logical systems but from basic value choices which flow from, among other things, a complex amalgam of law, facts, precedent, history, personal character, ideology, contemporary political culture, and practical implications of the decision. Some Justices may have theories to which they generally adhere (from Black to Frankfurter to Scalia) but these theories stem from complex personal and legal careers and value systems. Moreover, the Justices at the center of the Court, who decide the close cases, often are not intellectually holistic or even consistent in their efforts to "do justice."

Let me return to "originalism" as an example. Although all students of constitutional adjudication would acknowledge that historical understanding is important, "originalism" in its most didactic form, like other holistic constitutional theories, has obvious limits. As it has evolved over more than 20 years, it has taken two forms (although Rosen doesn't

make this distinction clear in his article).

One form—"original intent"—looks to the plain meaning of the constitutional words ("cruel and unusual" punishment") and, if that meaning does not decide a case 200 years later, that "originalist" formulation then tries to divine what the drafters and ratifiers of the Constitutional provisions intended. But there is no one historical method of determining the intent of multiple actors (with a variety of motives) in a highly political process. A brilliant exposition of the political fights about the constitution's origins—and the difficulty of ascertaining precise intent on specific provisions—is Bernard Bailyn's essay, "The Federalist Papers, " in his book [*To Begin the World Anew: The Genius and Ambiguities of the American Founders*](#) (Knopf 2003).

Bailyn, one of the great historians of America in the past half century, notes that the Federalist Papers were penned amidst a bitter fight over ratification of the Constitution; were hurriedly produced by Hamilton (51 papers), Madison (29) and John Jay (5) who did not coordinate their efforts; were styled as pamphlets to sway opinion, not as records of the secret debates at the Constitutional Convention in Philadelphia (Jay wasn't even there); contained ideas which had not been developed at the Convention in order to defend the basic constitutional structure of "uniting national power and personal liberty" which forceful anti-federalist papers had attacked; and, understandably were not given great deference by the Supreme Court as an expression of founder's intent until recent decades (both Madison and Chief Justice Marshall warned against reliance on the Papers as an authoritative source of intent).

To avoid the problems of ascertaining the "intent" of the framers, a second school of originalism focuses not on "intent" but on "original meaning", which widens the lens of historical inquiry to ascertain how a "reasonable person" would have understood the Constitutional provisions in the historical period during which such provisions were proposed, ratified and first implemented. But, without wandering off into the thickets of scholarly disputation, it should be obvious that constructing the "reasonable man" of 1789 (as if there were not, even then, a wide variety of views held by thoughtful people) and ascribing to that fictional person the key to constitutional interpretation is, on its face, problematic.

But beyond that issue, the fundamental question, of course, is whether the founders of the Constitution intended that generations yet unborn should be bound by the understandings of the late-18th-century time (assuming that such understandings could be discerned with reasonable certainty) unless altered by the constitutional amendment process or whether the meaning of the great Constitutional provisions, as interpreted not just by the Supreme Court but also by the Congress and the President, should also

evolve over time through other less cumbersome processes as well. In any event, numerous Supreme Court cases have, in fact, interpreted key Constitutional provisions according to social, economic, and political developments, and the current court has to deal with that robust decisional history which can often be at odds with original understandings, as even the "originalists" acknowledge.

Rosen's article cites conservatives who say that "originalism" in whatever form has not—and perhaps cannot—be applied consistently to contemporary constitutional problems. One of the most respected conservative scholars, Professor Michael McConnell of Stanford Law School, is quoted to this effect: "Recently, originalism has taken some serious hits on the court, not because of its opponents, but because of its proponents, who manifested a distinct lack of interest in following the original understanding when it became inconvenient."

And, in [*The Dynamic Constitution: An Introduction to American Constitutional Law*](#) (Cambridge University Press) , Harvard Law Professor Richard Fallon notes that, although conservatives emotionally profess concern about the Supreme Court's "counter-majoritarian" decisions and use "originalist" doctrines to restrain "counter-majoritarian" impulses, "charges of 'counter-majoritarianism ' can be leveled at conservatives as well. Fallon then goes on to cite decisions where seemingly "conservative" Justices were activist is using the Constitution to strike down "numerous pieces of federal regulation" such as prohibitions on violence against women, affirmative action, restrictions on commercial advertising. Had the book been written today, Fallon would have also cited the Court's recent decision in *Citizens United*, invalidating provisions of the McCain-Feingold election laws, and looked forward with interest to the Court's decision, several years hence, on the constitutionality of national health reform.

The now long-standing debate about "originalism" is thus just part of an argument without end about how to justify the realistic essence of Supreme Court constitutional decisions when it substitutes its judgment for the judgment of other organs of government—or when it chooses not to do so.

The Court has been both restrained and active in our history—sometimes for "good" and sometimes for "ill."

I wish we could have a more honest about how the Court actually works—which those who wish to "preserve" the Court's legitimacy shy away from—whether it is controlled by a liberal majority or a conservative one. When construing the great provisions of the constitution in new and vexing cases—protecting free speech, prohibiting establishment of religion, securing due process, requiring equal protection, banning cruel and

unusual punishment—and when deciding either to strike down legislative, regulatory, executive or State-originated rules or to sustain them, the Court is filling in uncertain and capacious constitutional content with its choices about constitutional "values."

The choices in these new, difficult cases—whether to strike down or uphold—are not required by immutable principles, unambiguous history, or crystalline holdings from prior cases, however much the Court might like to present the decision as if it were so. They are, instead, as I have noted above, the result of a complex set of factors—both legal and personal—which shape constitutional "values."

Although constitutional language, history and precedent provide limits on the Court's discretion—and the Constitution itself limits the types of cases and controversies which may properly come before the Court—the questions in most controversial contemporary cases are the ones which reflect fundamental tensions in our constitutional system: the separation of powers at the federal level (Congressional, Presidential and Judicial), the appropriate distribution of sole or shared power between the Federal government and the States, and the instances when constitutional guarantees of individual liberty (either enumerated or un-enumerated) protect minorities from an overbearing majority. The nature of these tensions—and how they could generally be reconciled in our dynamic constitutional system—was the great subject of the Federalist Papers, not how those tensions would be resolved in particular cases or the precise intent of the 55 members of the then completed Constitutional Convention.

These profound questions of American government—these fundamental values in tension within our constitutional scheme—are thus the fundamental riddles of judicial review. And no "doctrine" of Supreme Court decision-making—"originalism" or "neutral principles" or "judicial restraint" or "natural law" or "protecting democratic processes" or "protection of rights of minorities unable to protect themselves" or "common law approach"—is going *a priori* to solve those question which present themselves in the complex factual reality of all hard cases.

Resolving those profound tensions which have no simplistic or rigid answer requires not doctrinal purity, but wisdom and judgment about when the Court should serve as a balance wheel in our society because, for example, other governmental institutions have exceeded their bounds in injuring constitutional values (denials of free speech) or lack present capacity or will to deal with pressing issues that have constitutional dimensions (segregation in Southern states). It has been both restrained and active in our history—sometimes for "good" and sometimes for "ill."

The very nature of the Court's counter-majoritarianism means we, as a nation, will argue

fiercely and endlessly about those good or that ill impacts. It is fine to debate holistic doctrines like "originalism," which seek to justify decisions and the Court's role; however limited they may prove to be in dictating results in an evolving, complex society. But we will also, invariably and properly, debate whether the results of the Court's decisions voiding laws and regulations were wise because other institutions had ridden roughshod over constitutional values or had failed, over time, to demonstrate the ability or will to protect those values enshrined in the Constitution.

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