The Proper Role for the Supreme Court: Activist or Restraint

by Dave Saffell

Introduction

One of the enduring subjects for debate about American government is: What is the proper role for the Supreme Court to play? Should the Court be an *active policymaker*, playing a role similar to that of Congress and the president, or should it exercise *restraint* by narrowly interpreting the Constitution and statutes while showing deference to the other branches of government? Activist judges view the Constitution as a "living document" that is adaptable to current social circumstances. They believe that judges should consider evolving standards of acceptable behavior when making decisions. On the other hand, restraint-minded judges believe that activists improperly interject their own values into their opinions. They view judges as neutral referees whose proper role is to interpret the rules and not to make policy decisions. Recently, some restraint judges have identified themselves as "originalists." They believe that the Constitution should be interpreted literally. That is, that it means exactly what the framers intended it to mean.

Whether they define themselves as activist or restraint, *all* judges have personal opinions that they bring with them to the bench based on a variety of past experiences. As Justice Benjamin Cardozo put it, "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." In regard to the theme of this book, this means that judges may look at cases in terms of their inclination to preserve public order over individual freedom or they may seek to protect freedom from what they believe to be assaults from policies aimed at preserving order.

At the most extreme, activist judges would tailor decisions to support their personal political agendas. And they would support a dominant role for the Supreme Court in its relationships with Congress, the president, and the states. Under extreme restraint, judges would always defer to the other branches of government and they would interpret the words in the Constitution and laws very narrowly. Of course, actual judicial behavior is likely to fall somewhere between these extremes.

Especially in the area of individual liberties (for example, interpretation of the First Amendment), the Supreme Court has played a strong policymaking role much of the time since the late 1930s. As political scientist Richard L. Pacelle, Jr., notes, "If the

Supreme Court were not a policymaker, it would not matter who a president selected to the bench as long as the nominee was eminently qualified."

When making judicial nominations, nearly all presidents say they are seeking judges who will interpret the law, not make policy. And when asked by members of the Senate Judiciary Committee about their judicial philosophy, virtually all nominees describe themselves as persons who can be expected to interpret the law, not make it. Even after serving on the Court and making activist decisions, justices continue to speak of themselves in terms of restraint. For example, in 1999 Justice Clarence Thomas said, "I just follow the law, so it doesn't make any difference what my opinions are."

Beginning with President Washington, judicial appointments have been a very political process. Presidents and Congress members have understood that once on the Court nominees are likely to play a central role as policymakers in deciding controversial cases and they are likely to remain on the Court far after the presidents who nominated them have left office. Thus political scientist David M. O'Brien speaks of the "myth of merit" in which eminently qualified persons have been passed over by presidents seeking judges who share their political philosophy. As a result, the Court at various times in the past has had justices who are political hacks and cronies.

Having discussed the terms "activist" and "restraint" and how they relate to the classic dilemma of determining the proper role for the Supreme Court, this chapter will examine evidence that suggests that the Court often has been an active policymaker. It will refer to some recent opinions of the Court that show how both liberal and conservative judges can be activists. Then there will be a discussion of a "debate within a debate" over the issue of original intent versus an evolving interpretation of the meaning of the words of the Constitution. This chapter will conclude by arguing that the dilemma should be resolved in favor of activism.

Questions for Consideration

1. Should courts make policy?
2. Is it inevitable that they will make policy?
3. Was *Bush v. Gore* (2003) decided properly?
4. Is it correct to speak of "liberal activism" *and* "conservative activism"?
5. How can we know the intent of the writers of the Constitution?
6. Why is it that originalist judges most often decide cases to support politically

conservative positions?

7. Are those who argue that the court should defer to the original intent of the frames really just trying to turn back the clock on issues of civil rights and civil liberties?
8. Should the Supreme Court assume the kind of activist role outlined by Richard Pacelle?
9. Are you convinced that the courts are sufficiently equipped to play a policymaking role? How well has Congress played this role lately?
10. Why was Congress unable to respond to the growing civil rights movement until 1964?
11. How different are Congress and the Supreme Court when it comes to being reliable policymakers?

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Supreme Court Policymaking

Linda Greenhouse, who covers the Supreme Court for the *New York Times*, says that the Supreme Court makes policy "because it has to." She argues that because Congress writes bills in general terms, the Supreme Court must necessarily fill in gaps when dealing with issues about how laws should be implemented. For various reasons, including the need to compromise, a desire to avoid taking political heat in controversial areas of policymaking, a lack of interest in specifics, and an inability to anticipate some future consequences of laws, Congress may approve legislation that is broad on policy, but weak on detail. Sometimes Congress seems to invite the Court to supply details. In turn, the Court's opinions may contain pleas to Congress to be more specific. Rather than seeking power to make policy, the Court may do so reluctantly. Greenhouse supports her basic position by contending that the Supreme Court has the credibility and the responsibility to clarify laws.

It can be argued that *all* judges must by necessity use their discretion to interpret laws and thus make policy. However, policymaking by the Supreme Court is the most pronounced because the justices hear so few cases and a high percentage of those cases

raise issues of national importance. In addition, Supreme Court justices are free from concern about reelection that may inhibit state judges and, of course, there is no higher court to overrule them.

When the Supreme Court is especially active it can virtually rewrite legislation under the guise of interpretation. In other opinions the Court has set specific guidelines for state and federal officials to follow. These include providing remedies, such as busing, to desegregate schools and setting specific rules for the administration of prisons, such as how hot the water should be.

Pacelle notes that, "judicial policymaking is inevitable, but activism is a matter of choice." The Supreme Court chooses activism when its decisions either expand or limit laws passed by Congress. Restraint judges would pass on the opportunity to change the work of Congress through interpretation of laws. At the most extreme, the Court can exercise its power of judicial review to declare acts of Congress unconstitutional. Regarding this power, Chief Justice Charles Evans Hughes commented, "We are under a constitution, but the Constitution is what the Supreme Court says it is."

Judicial review, which has been used infrequently to overturn acts of Congress, is the most direct means of judicial intervention into the political process. The Supreme Court has used its power of judicial review much more often to overturn laws passed by state and local governments. On a few occasions, it has invalidated actions taken by presidents, such as when it ruled in 1952 against President Truman's order for the federal government to seize major steel mills.

The Supreme Court's ability to make policy and yet appear to be above politics often requires careful writing of opinions and it may cause the Court to back away from deciding some controversial matters if it fears it might loose public support. For example, the Court never directly dealt with the legality of the Vietnam War.

From the late 1930s until the late 1960s, the Supreme Court was a central policymaker in the area of individual liberties. This included support of equal rights for African Americans and rights for criminal defendants. At the same time, the Court tended to defer to Congress in the economic policy. In his classic opinion in *United States v. Carolene Products* (1938), Justice Harlan Fiske Stone advocated that while individual rights cases would be carefully scrutinized, the Court should show restraint in economic matters. This so-called "preferred position doctrine" was strongly adhered to by the

Court under Chief Justice Earl Warren (1953-1968). Later we will look at some specific Warren Court opinions.

Of course, not everyone believes that policymaking by filling in gaps left by Congress in bills is an appropriate role for the Supreme Court. Former presidential candidate Steve Forbes argues that Congress may purposely write broad guidelines to allow discretion by state and local officials. And if Congress wishes it can always fill in the gaps itself. Still, Forbes acknowledges that Congress may lack the courage to deal with specifics, thus encouraging the courts to step into the policymaking process.

More fundamentally, those who take a constrained view of judicial power argue that courts are ill-equipped to play a policymaking role. Unlike legislatures, courts have to wait for issues to come to them and their opinions usually are not based on the kinds of compromises common in the legislative process. Because they don't face election, judges are much less constrained by majority opinion than are legislators. When faced with noncompliance with their rulings, judges must rely on action from the other two branches of government to enforce compliance. Finally, courts are not well equipped to evaluate the impact of their decisions over time. These arguments will be considered in more detail later in this chapter.

Justice Felix Frankfurter (1939-1962) is a classic example of restraint. Frankfurter believed that because he was appointed to his post he should not substitute his judgment for that of elected officials. For example, in the groundbreaking case of *Baker v. Carr* (1962) Frankfurter warned that courts should not enter a "political thicket" by telling state legislators how to apportion legislative districts. In contrast, his long-time activist adversary on the Court, William O. Douglas, often seemed anxious to overturn legislative bodies and to create new rights.

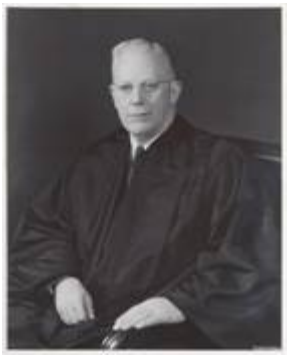
Activist Opinions by the Supreme Court

Since the time of John Marshall as Chief Justice (1801-1835), the Supreme Court has played a policymaking role through the interpretation of the Constitution and the use of judicial review. Perhaps the Court's most political decision ever was *Dred Scott v. Sandford* (1857), which held that Congress did not have the power to prohibit slavery in

territories. It was the first use of judicial review, the power to declare of Congress unconstitutional, since Chief Justice Marshall's opinion in *Marbury v. Madison* (1803). The *Dred Scott* opinion hastened the coming of the Civil War and weakened the Court for many years.

By the 1870s the Supreme Court had become much more politically conservative than Congress or state legislatures. Over the next fifty years it consistently ruled against attempts to regulate business and to protect workers. From 1905 to 1936 a politically conservative Supreme Court struck down 35 federal laws and declared more than 350 state and local laws unconstitutional. In the 1920s and 30s political liberals urged restraint, contending that an activist Court was thwarting the will of the majority.

As noted earlier, Supreme Court opinions changed significantly by the late 1930s as some justices switched their votes in key civil liberties cases and President Roosevelt was able to add new justices who supported his New Deal program. The Court began to play an activist role in supporting civil liberties, but it showed restraint in economic matters by not challenging laws regulating business. With Congress and the president unable or unwilling to act, the Court in B*rown v. Board of Education* (1954) held that segregated educational facilities were inherently unequal. Shortly after *Brown* , the Court issued a series of opinions overruling schemes designed to evade meaningful integration. By the early 1970s the Court supported a number of integration remedies, including busing, to correct past discrimination.



As expected, political conservatives strongly criticized the "activist" Supreme Court, with some calling for the impeachment of Chief Justice Warren. Although President Nixon named Warren Earl Burger as the new Chief Justice in 1969, the Court continued through the 1970s to issue opinions upholding plans to integrate various public facilities and none of the major Warren Court decisions supporting criminal rights was overturned. The landmark abortion decision in 1973, *Roe v. Wade* , continues to be at the center of attacks on the Court for creating new rights.

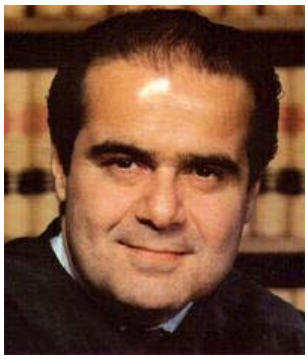
Since the election of Ronald Reagan in 1980, Republican presidents have made "*strict constructionism*" their major stated consideration when making judicial nominations and they have called on judges to show restraint in their opinions. Nevertheless, the Burger

Court ((1969-1986) struck down more state and local laws than under any previous Chief Justice. Since 1986 the Supreme Court under Chief Justice William Rehnquist has shown restraint in its willingness to uphold state laws, but it has overturned more federal laws than the Warren and Burger Courts combined. The Rehnquist Court has limited the rights of criminal defendants, restricted the use of affirmative action, and made it more difficult to get an abortion. But it has only narrowed rights, not taken away rights that were judicially created in the 1950s, 60s, and 70s.

The decision in *Bush v. Gore* (2003) is held up by political liberals as an example of how conservative judges can actively promote their personal goals. In a 5-4 vote, the five most conservative justices on the Supreme Court, all appointed by Republican presidents, overturned a decision by the Florida Supreme Court (whose seven members all were appointed by Democratic governors) to continue a manual recount of contested Florida ballots in the presidential election. Had the Court exercised restraint, the Florida ruling would have stood and the count would have gone forward. By intervening as it did, the Supreme Court assured that George W. Bush would be elected president. Bush's election also made it more likely that conservatives would be nominated for federal judgeships.

Original Intent

In the past twenty years judicial restraint has become strongly associated with the concept of *original intent*. That is, the position that judges should seek to determine the intentions, or preferences, of the writers of the Constitution and of legislators who wrote laws. When this is done, it is believed that it will assure stability in the law, rather than having the meaning of words change as new justices come to the Supreme Court. Justices can do this by referring to the literal meaning of the words, or if the Constitution is not clear, they can refer to common practice at the time the document was written without interjecting their personal beliefs into the process.



According to Justice Antonin Scalia, judges should adhere to the precise words of constitutions or laws, whose meanings remain the same as when they were written. The Constitution, says Scalia, is about rigidifying things." Prior to Scalia, Hugo Black (1939-1971) was the Supreme Court justice most closely associated with taking a literal view of the Constitution. For example, Black took literally the words

of the First Amendment that "Congress shall make no law … limiting freedom of speech…" Black memorably opposed busing as a tool to integrate schools because he could not find the word "bus" in the Constitution. The term "originalism" began with a speech made by Robert Bork in 1970 and it was further developed in his writings that followed.

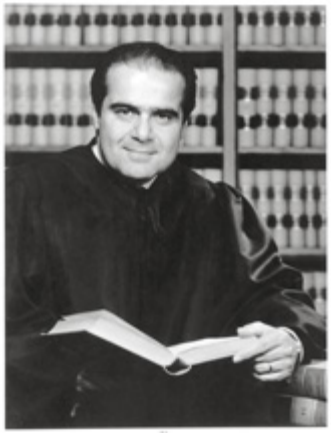
A broader debate over original intent was initiated in the 1980s by Edwin Meese III, President Reagan's Attorney General. Meese argued that the framers had chosen their words carefully and the language they used meant exactly what they said. For support, Meese cited Chief Justice John Marshall who noted that, "The Constitution said what it meant and meant what it said." Therefore, Meese contended, neither "political expediency nor judicial desire" is sufficient to change the meaning of the framers' language. Meese emphasized that the Constitution is a limitation on judicial power, as well on legislative and executive power. "A drift back to radical egalitarianism and expansive civil libertarianism of the Warren Court ," said Meese, "would once again be a threat to the notion of limited but energetic government." Acting on this position throughout his term, Reagan said he would only nominate "strict constructionist" judges to federal courts.

Among current members of the Supreme Court, Justices Antonin Scalia and Clarence Thomas are the strongest proponents of a jurisprudence of original intent. To Scalia, the idea of a "living Constitution" gives judges too much power to use their personal beliefs to create new "rights." For example, he believes that if there is a right to privacy it should be created by a legislature. "A living-Constitution judge," says Scalia, is a "happy fellow who comes home at night to his wife and says, 'The Constitution means exactly what I think it ought to mean.'"

Two recent decisions by the Supreme Court highlight Scalia's support for originalism and his disdain for the Court's majority who, he believes, ignored the intent of the framers in those cases. Scalia does not want to interpret the Constitution in light of present-day social developments and he and other originalists are skeptical of any constitutional rights if they are not in the Constitution.

In *Lawrence v. Texas* (2003) a six-person majority struck down a ban on homosexual sex (sodomy) as an unconstitutional violation of privacy. Justice Anthony Kennedy wrote that, "The state cannot demean their (homosexuals) existence or control their destiny by making their private sex life a crime." As in abortion cases where he rejects the idea that the Fourteenth Amendment implies a right to privacy and autonomy, Scalia, along with

Thomas and Rehnquist, voted to uphold the Texas law against challenges that it violated a right to privacy. Supporting not only originalism, but also his reading of the moral position of a majority of Americans, Scalia in his dissent said, "The court has largely signed on to the so-called homosexual agenda…" and it "has taken sides in a culture war."



In *Roper v. Simmons* (2005) the Supreme Court held that executing a person for a murder committed at age 17 or less violates the 8th Amendment of the Constitution (a ban on "cruel and unusual punishment"). Justice Kennedy, speaking for a five-person majority, said that juvenile executions violate "evolving standards of decency that mark the progress of a maturing society." He cited a trend in state legislatures toward ending juvenile executions, as well as international and foreign law opposed to the death penalty for juveniles. In a 1958 opinion Chief Justice Earl Warren said, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man … The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In a 1989 opinion, Kennedy had agreed with Scalia that the Constitution did not forbid juvenile executions.

Scalia's dissent in *Simmons* said that Kennedy's reversal is "not, mind you, that this Court's decision fifteen years ago was *wrong*, but that the Constitution has *changed*." Scalia and conservatives off the Court were particularly upset by the majority's reliance on the opinions of foreigners to determine the meaning of the Constitution.

Despite Scalia's claim that originalism is a politically neutral technique, in most areas of social policy – abortion, gay rights, women's rights, and capital punishment – it leads to conservative results. In virtually every instance, it is political conservatives off the Court who support originalism original intent and political liberals who oppose it.

In his mind, Scalia is not an activist. When he votes to strike down act of Congress, he contends that he relies exclusively on the text and structure of the Constitution. When he dismisses *stare decisis* (upholding precedent established in earlier opinions) it is because an earlier decision lacked a foundation in constitutional text and Scalia is seeking to deactivate the Court's previous activism. Justice Thomas apparently would go even further than Scalia to strike down laws that he believes lack a constitutional basis. These might include Social Security, the Clean Air Act, and much welfare legislation. This,

clearly, would be conservative activism.

Among recent Supreme Court justices, William Brennan (1956-1990) was the strongest activist and the most critical of the search for original intent. Brennan's biographer, Kim I. Eisler, says that "As Brennan made clear in his death penalty opinions, in his mind nothing could be more 'ludicrous' than the idea of original intent." Brennan, Eisler notes, doubted that the framers could have agreed on the meaning of many of their phrases after 200 years of U.S. history. Moreover, no one has a clue what the framers would have thought about the 14th Amendment (ratified in 1868), which was the key factor in Brennan's activism.

In a 1985 speech when he was 79 years old, Brennan responded directly to attacks on his legal reasoning by Edwin Meese and others. "Originalism," said Brennan, "is little more than arrogance clothed as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application to specific, contemporary questions…Typically all that can be gleaned is that the framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in clocks of generality." Brennan accused his critics of ignoring social progress, contending that, "Our Constitution was not intended to preserve a preexisting society but to create a new one."

The debate over originalism became more public during the Senate confirmation hearings for Robert Bork in 1988. Bork's nomination by President Reagan to serve on the Supreme Court was rejected by a vote of 58 to 42.

It can be argued that the intent of the framers can be very difficult to discern because the wording was the result of a series of compromises that, as noted by Justice Brennan, resulted in numerous vague phrases. At any point in time, words often have different meanings and the "plain meaning" of words may change over time. What was common practice in 1789 may be abhorrent in the Twenty-first century. For example, death was the only punishment for felonies and children as young as seven could be executed in the 1790s.

It is even more difficult to determine the meaning of statutes, which, as noted earlier,

often are purposely open-ended to allow broad latitude for interpretation. Various sponsors of a bill may have had different motives for supporting it.

All justices cite precedent to support their positions, but there often are conflicting precedents on both sides of an issue. If all justices followed original intent or if it was always clear which precedents were relevant, then presidents and senators would not have to be concerned about which legally qualified individuals were nominated and confirmed to be federal judges and more opinions would be unanimous. In fact, many legal scholars believe judges are motivated *primarily* by their attitudes and values and use their power to accomplish their policy goals.

The Case for Judicial Activism

A fundamental argument against judicial activism is that the federal judiciary is inherently undemocratic, with its appointed judges serving what often are life terms in office. Here the original intent of the framers seems clear. Courts were purposely created to be independent bodies, removed from popular control. They were to be independent so that they could check the power of the elected branches. Still, political scientist Robert Dahl classically argued that the Supreme Court's policy views seldom have been out of step with policies supported by lawmaking majorities. Dahl's position continues to be widely accepted by legal scholars.

Since the late 1930s when the Supreme Court has been out of step with Congress it usually has been in support of minorities who are being mistreated by the majority. Free from interest group and voter pressure, the Court's historic *Brown* decision in 1954 came ten years before Congress passed its first major civil rights bill. Presidential leadership in civil rights did not begin until the early 1960s.

As political scientist Lawrence Baum notes, "Neither Congress nor a state legislature could adopt a resolution supporting the right to burn the American flag as a form of political protest, nor could they enact a statute that prohibits student-led prayers at public school's football games." But the Court could and did make such decision. "Even more striking," says Baum "was the Court's expansion of the procedural rights of criminal defendants in the 1960s." Baum comments that no elected legislature

in the country could have made such unpopular policies. Forty years later many of those decisions remain controversial, and some current justices believe they were wrongly decided.

The Supreme Court's ability to act independently of Congress and of the president is far from absolute. The other branches can exercise checks that include control of the Court's jurisdiction (that is what kinds of cases the Court can accept) and non-enforcement of its rulings. In part because of congressional checks, the Supreme Court historically has tended to be more active in striking down state laws than laws passed by Congress. Because judges are concerned with compliance with their opinions and they are aware of changes in society (for example, the movement for women's rights), they can be influenced by public opinion.

When we consider such factors as the influence of money on congressional campaigns, the role of interest groups in the legislative process, the large number of safe House seats (few incumbents are defeated in reelection bids), voter turnout in congressional elections that is consistently under 50 percent, and the equal representation of states in the Senate, a strong argument can be made that Congress is not as democratic as the ideal model suggests. Interest group money also fuels presidential campaigns and typically there are more people who do not turn out to vote than there are people who vote for the winning presidential candidate. As a result, government often seems to respond best to the demands of upper-class Americans and many others question how well they are being represented by the two elected branches of government.

It is well established that judges make policy. Questions at issue include: *should* they make policy and how well-equipped are they to make policy?

Regarding judicial capacity to make policy, critics contend that judges are trained as lawyers and therefore they do not have the specialized knowledge to deal with economic, social, medical, and scientific issues that are involved in making policy. Critics maintain that once judges hand down decisions, they do not have the means to review and correct problems that arise from their decisions. They must wait for future litigants to bring cases to them in order to make policy adjustments. In contrast, it is contended that legislators and the president have access to specialized staff whose technical knowledge helps them make informed policy decisions.

In response to questions about judicial capacity to make policy, Pacelle and others

respond that the Supreme Court is not *that* much different from Congress. They note that justices have access to social facts from *amici* (friend of the court) briefs and they may be as capable, or more so, as Congress members of understanding social facts. After all, the opinions of Congress members often are shaped by pressure from interest groups and by the concern to be reelected. In contrast, judges may be more flexible when it comes to having minds open to new ideas.

Considering arguments for and against judicial activism, Pacelle concludes that the Supreme Court should return to the role it played from the late 1930s through the late 1960s. That is, it should be activist in defending civil liberties, while following restraint in economic matters where Congress and federal bureaucrats are better suited to dealing with those matters. This is a value judgment in which supporters of activism believe it is important for courts to strengthen individual liberties and civil rights. If courts are believed to be too aggressive in this area, Congress has various means to rein them in and the lack of public support can cause judges to refrain from certain kinds of policymaking. Of course this role can only be performed well if a majority of Supreme Court justices are committed to supporting of individual liberties. The record of the current Court suggests that if originalists were to dominate the Court it would *not* be active in the defense of individual rights. In fact, it would be likely to be active in removing some existing rights.

Suggested Reading

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