Holland Professional Club

SUPREME PLAYERS ON THE SUPREME COURT

The Minimalist, the Orginalist, the Activist: Breyer, Roberts, and Scalia

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I Three Approaches to Constitutional Interpretation: Activist, Minimalist, Originalist.

We Americans take pride and cherish our freedoms. While we often grumble about our political and legal systems, few of us would trade our system for those in any other country. Our government, legal system and freedoms are rooted in our Constitution. We owe a large debt to our Founding Fathers and what they created – our Constitution. But how solid of a base is that Constitution? The meaning of the Constitution is often disputed and those disputes are often resolved at our Supreme Court. As Cass Sunstein, Law Professor at the University of Chicago has said, "the rights of Americans depend on what the Court says, and the Court doesn't always say what it said before."

Much discussion in the press about Supreme Court decisions focuses on "liberals" versus "conservatives", but this description is too simplistic. Political ideology does matter, but different judges follow different approaches to constitutional law and these approaches go well beyond political ideology. Three approaches have long dominated constitutional debates and they are Activism, Minimalism, and Originalism. I would like to spend a few minutes on each before focusing on how three current justices fit into these traditional approaches.

Activism is favored by many liberals. Activists want to make the Constitution the best it can be. They follow the document's text, but they are very willing to understand it in a way that reflects their own deepest beliefs about freedom of speech, the power of the President, abortion and other fundamental issues. Activism was the hallmark of the Warren Court. Earl Warren had never been a judge before becoming Chief Justice and he brought to his court the mindset of a politician – a person who had been a successful multi-term governor of California. The Warren Court banned racial segregation, prohibited compulsory school prayer and provided broad protection for political dissent. When liberal Activists are committed to a right they often want the Supreme Court to say that right is part of the Constitution. The classic example of that is the discovery in the early 1970's of a constitutional right for abortion. Jeffrey Rosen, one of the most respected legal commentators of today, recently described the Roe vs. Wade decision as being "high handed and one of the few times in our history when the Court leaped ahead of a national consensus."

The second major branch of Constitutional interpretation is Minimalism. Minimalists are hesitant to embrace general theories of interpretation; they want to proceed one step at a time. They refuse to promote a broad agenda. They are nervous about the exercise of judicial power and they resist calls for the Supreme Court to establish new rights lacking a clear foundation in traditions. Felix Frankfurter was a leading Minimalist and more recently Sandra Day O'Connor. Minimalists may be conservative or liberal.

The third major branch of Constitutional interpretation is Originalism. Originalists believe the Constitution must be interpreted according to its "original understanding". It must be interpreted to mean exactly what it meant at the time it was ratified. If the Constitution did not originally ban the federal government from discriminating on the basis of race, then the federal government can so discriminate.

Originalism is not without its critics. Jack Rakove, a Professor of History at Stanford, wrote a book ten years ago titled "Original Meanings" which was a critique from an historian's perspective of the legal philosophy of Originalism. Rakove wrote: "It is not immediately apparent how the historian goes about divining the true intentions or understandings of the roughly 2000 actors who served in the various conventions that framed and ratified the Constitution, much less the larger electorate that they claimed to represent…the notion that the Constitution had some fixed and well known meaning at the moment of its adoption dissolves into a mirage". One of the most well known advocates of Originalism is the former Yale Law School Professor, Robert Bork.

I would now like to shift to the current Court and focus on three pivotal members and how each falls into one of the three traditional approaches to Constitutional interpretation.

II The Activist: Stephen Breyer

With Republicans having won 7 of the last 10 Presidential elections, they have had the ability to select 7 of the current 9 Supreme Court Justices. This has led to a steady move to the right for Supreme Court decisions since the end of the Warren Court in 1969. The Court has been more balanced than expected, because two of the Republican appointees – John Paul Stevens and David Souter- have been huge disappointments for conservatives. Sandra Day O'Connor played a pivotal role on the Court throughout the 1990's and until her retirement in 2005. Her vote was often decisive in determining whether a viewpoint favorable to liberals or conservatives won the day. With her replacement by Samuel Alito, conservative positions on the Court are in a strong ascendancy. During the Court's 2006/7 session, four justices often voted together and found themselves on the losing end of many 5-4 votes. These four – John Paul Stevens, David Souter, Ruth Ginsburg, and Stephen Breyer – form the current liberal wing of the Court. None of them are cut from the same Activist mold as Earl Warren or William Douglas, but Stephen Breyer comes closest. Stephen Breyer grew up in San Francisco, attended Stanford and then Harvard Law School. Prior to becoming a Supreme Court Justice in 1994, he had been on the Harvard Law faculty since 1967.

Stephen Breyer has developed an approach for Constitutional interpretation that he describes in his 2005 book: "Active Liberty: Interpreting our Democratic Constitution." Many on the left hope his manifesto will lead to a progressive revival in American jurisprudence. Breyer disagrees strongly with the Originalist approaches of Justices Scalia and Thomas. Breyer offers a coherent alternative to Originalism. Breyer argues that the framers never intended for future generations of jurists to resolve contemporary issues by guessing how the framers themselves would have resolved them. Instead justices should focus on how to promote what Breyer calls, "Active Liberty". Breyer has said that "I think people believe that on the one hand you have Originalism and on the other hand simply

judges who go around deciding each case as they think is appropriate. That is not the way it is". Breyer has also said "It was a serious objective of the framers that people participate in the political process. If people don't participate, the country can't work". Given his respect for the democratic process, Breyer is very deferential to the legislative decisions. One of his ex-clerks has said of Breyer "He trusts Congress a lot more than the left did in the Sixties or the right does today". While Breyer has shown the highest percentage of votes to uphold acts of Congress, he does want the Court to be aggressive in some areas, above all in order to protect democratic governance. An area where this can be seen is campaign finance reform. Breyer suggests that if we focus on the Constitution's basic objective "participatory self-government" then we will be receptive to restrictions on campaign contributions. He thinks Scalia has been mistaken to focus on freedom as a barrier to campaign finance restrictions.

Breyer is the first judge to mount a head on critique of Origianlism. He reminds us that the Constitution does not enshrine any particular theory of interpretation. He critiques Originalism not only because the historical record is often fuzzy, but because Originalism "may itself produce seriously harmful consequences. For starters Originalism would permit the national government to discriminate both on the basis of race and sex".

In his New Republic review of Breyer's book "Active Liberty" Cass Sunstein has this to say: "With its pragmatism and emphasis on the centrality of democratic goals, Breyer's approach provides an eminently reasonable foundation for Constitutional law. It is an approach that deserves a place of honor in national debates about the role of the Supreme Court in American life."

Conservatives strongly attacked Breyer and his book. One wrote with strong disdain "Breyer takes ideas seriously. He refers to Isiah Berlin and competing concepts of liberty. He references learned tomes by late High Court jurists. Occasionally he even cites the Constitution."

My personal view is that I have strong respect for Breyer. Unlike earlier Activist judges, such as Warren and Douglas, who frequently appeared to be creating political judgments from the bench, Breyer is a thoughtful Activist on certain critical issues, but a pragmatic minimalist on many others.

III The Minimalist: John Roberts

On July 1 of this year the New York Times described the first full term of the Roberts Court: "It was the Supreme Court that conservatives had long yearned for and that liberals feared. Fully a third of the Court's decisions were decided 5-4 with most of these decided along ideological lines." The Court is looking more and more like two ideological camps: the conservatives with Roberts, Scalia, Thomas and Alito and the liberals with Breyer, Souter, Stevens and Ginsberg. Anthony Kennedy has replaced Sandra Day O'Connor as the key swing voter. Kennedy joined with the conservatives about twice a frequently as he did with the liberals. How Kennedy votes is clearly very important.

The conservative camp has two Originalists – Scalia and Thomas and two Minimalists – Roberts and Alito.

A recent Harvard Law School grad described his view to me of John Roberts. He said "The Law profession is very hierarchical. Based on what law school somebody went to, how they did there, their role in the Law Review, who they

clerked for, what firm they worked for, etc., it would be possible to rank order every lawyer in the country. When John Roberts was in private practice in the 1990s, he would have ranked #1."

John Roberts's father was an executive for Bethlehem Steel. He grew up in Indiana near Gary. He graduated from Harvard and Harvard Law School where he was Managing Editor of the Law Review. He was a law clerk for William Rehnquist. Prior to becoming Chief Justice in 2005, he was a judge on the U.S. Court of Appeals for the District of Columbia.

John Roberts is a different kind of conservative than Scalia or Thomas. His nomination for Chief Justice received editorial support from the Wall St. Journal: "The hearings were useful in illuminating the real dividing line in our current judicial politics. It is between those who view the court as another policy arm of government, as an engine of social change, and those who share Judge Roberts's view of judges as "umpires", not philosopher-kings". Yet the editors went on to say: "None of this is to say we are ourselves certain what kind of Chief Justice Judge Roberts is likely to be. It is entirely possible that Judge Roberts's philosophy of judicial restraint will lead him to sustain Roe…" The left of center New Republic's legal commentator Jeffrey Rosen has written favorably of Roberts: "In the 1990's he was widely respected as a legal craftsman who did not come to cases with preconceived grand theories but instead took positions based on the arguments and legal materials of the case. Personally as well as professionally modest, Roberts prefers baseball analogies to showy displays of his formidable intellect".

Roberts emphasizes temperament more than ideology. Roberts is attempting to emulate John Marshall, Chief Justice early in the 19th century and one of his most respected predecessors. Roberts recently said this of Marshall: "He gave everyone the benefit of the doubt, he approached everyone as a friend, the assumption was that this is someone I'm going to like unless proven otherwise." Roberts is especially frustrated with the media focus on the number of 5-4 decisions. After years of the media focusing on the politicization of judicial decisions, Roberts is working to increase the number of unanimous decisions. Roberts has said: "It's much harder to reach unanimity with nine people than with three on the Appellate Court. You sit around with three people and ask 'Where's the common ground?' and it's easy. With nine it is much harder."

Roberts has said that his most formative experience was arguing before the Supreme Court as a lawyer: "I do find that you can be more successful in arguing a case, if you go with something that you think has the possibility of getting seven votes rather than five. To go in thinking 'Here's my pitch and I'm honing it to get five votes. That is a risky strategy." John Roberts argued more cases before the Supreme Court than any lawyer in history and won 70% of them.

Roberts was part of the majority on a number of cases during the 2006/7 year that moved the Supreme Court in a more conservative direction. Some examples: upholding the Partial Birth Abortion Ban, limiting pay discrimination suits, making it easier for prosecutors to remove jurors who express ambivalence about the death penalty etc. Nevertheless he is gaining admiration across the spectrum for attempting to lower the temperature at the Court and building greater unanimity without pushing an overarching Constitutional perspective.

IV The Originalist: Antonin Scalia

Antonin Scalia had been my favorite jurist for many years. I respected his intellectually sharp and humorous conservative viewpoint. The fact that he is a Catholic didn't hurt him either. While I continue to respect his views, I have grown to appreciate a number of other justices. Plus with five Catholics on the Court now, his Catholicism stands out less.

Scalia grew up in New York City and attended Georgetown and Harvard Law where he graduated magna cum laude. He was a law professor at the University of Chicago before joining the U.S. Court of Appeals for the District of Columbia. He was approved by the U.S. Senate 98-0 in 1986 and became a Supreme Court Justice.

While Originalism is growing in importance as a theory of how to interpret the Constitution, it is still a pariah in the law schools. Scalia describes himself as one of a "small, hearty minority". This group is so small, he has said "you could fire a cannon loaded with grapeshot in the faculty room of any major law school and not hit an Originalist." Many believe he would enjoy firing a cannon at such a target.

Most of what Supreme Court Justices do is to interpret the meaning of Federal laws and regulations. But around 20% of the time they are confronted with issues of Constitutional interpretation. Scalia believes that judges should adhere to the precise words of the Constitution, and he believes that the meaning was locked in when it was written. Scalia is firmly against the Activist approach such as voiced by Justice William Brennan who said in 1985 "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of great principles to cope with current problems." Scalia believes this is judicial arrogance which often leads to the discovery of new rights. An example he likes to use is the possibility of declaring the death penalty unconstitutional. He has said: "I have served with three Justices who have maintained that the death penalty is unconstitutional, even though it is explicitly contemplated in the Constitution. The Due Process Clause of the Fifth and Fourteenth Amendments says that no person shall be deprived of life without due process of law. No matter. Under the Living Constitution the death penalty may become unconstitutional, and it is up to each Justice to decide when that occurs." Scalia does not want judges to have that much leeway and he rejects the notion of a Living Constitution.

Scalia has been criticized for not being true to his Originalist philosophy in some of his decisions. Scalia believes that Originalism must accommodate the doctrine of stare decisis (respect for precedent) and it cannot remake the world anew. Stare decisis was heard much in the congressional hearings of Alito and Roberts. Liberals were pushing them very hard to voice support of that doctrine and hopefully protect Roe v Wade. The criticism of Scalia that he respects stare decisis is done from the perspective that Scalia either does not have a coherent philosophy or that he is selective in how he uses it. Scalia has responded in his 1996 book "Matter of Interpretation": "The demand that Originalists alone be true to their lights and forswear stare decisis is a demand that they alone render their methodology so disruptive of the established things that it will be useful only as an academic exercise."

Nevertheless Scalia rejects using stare decisis on some big issues. Scalia's method is to determine whether a long standing American tradition has supported the practice under challenge. It is Scalia's position that since abortion was outlawed in the U.S. for over a century, one cannot claim that an American tradition upholds the right.

The 1992 Planned Parenthood v Casey case was one of the last major Supreme Court cases dealing with Abortion. Conservatives had huge hopes that Roe v Wade would be overturned. The liberal Justice William Brennan had been replaced by the Bush appointed David Souter. Souter shocked the conservatives by joining the majority which upheld Roe v Wade. He wrote in the majority opinion: "To overrule, under fire, in the absence of the most compelling reason to reexamine a watershed decision, would undermine the Court's legitimacy." Stare decisis held for Souter, but not for Scalia. He wrote a blistering dissent: "Not only did Roe not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it by elevating it to a national level, where it is infinitely more difficult to resolve."

Scalia is most often criticized for the consequences of Originalism with the historic decision to outlaw school segregation in the 1954 case Brown v the Board of Education. In that case the Court reversed a position it took in 1896 Plessy v Ferguson which supported the doctrine of separate, but equal.

The 14th Amendment to the Constitution was adopted after the Civil War and states: "No State shall deprive any person life, liberty, or property without due process of law." There is strong evidence that the drafters of the 14th Amendment did not intend to outlaw segregated schools because Congress also in 1868 rejected a bill that banned segregated schools in Washington D.C. For the next 90 years schools remained segregated in many parts of the country. Brown v Board of Education struck school segregation down in 1954 and eventually proved to be a catalyst for political action leading major increases in civil rights over the next 20 years. It is not possible to make a plausible case for this decision which is consistent with Originalism. Scalia says that he would have voted with the majority in Brown. He acknowledges that even a faulty theory can produce good results. The way the Court got to Brown was to embrace the "Living Constitution" by allowing the Court to decide how values enshrined in the Constitution ought to be applied to current critical issues.

V Wrap-Up

The Constitution is a brief and generally very specific document that establishes how our government functions and gives certain rights to the citizens. Most of its sentences are not open to interpretation. The clarity of the following sentences are typical:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states. (Article 1, section 2)
>
> "The House of Representatives shall have the sole power of impeachment." (Article 1, section 2)

> "The President shall be Commander in Chief of the Army and the Navy." (Article II, section 2)
>
> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (First Amendment)

There are statements, particularly in the Amendments, which are less straightforward:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." (Ninth Amendment (1789))

An obvious question is what are these other undefined rights retained by the people.

> "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without the due process of law." (Fourteenth Amendment (1868))

There has been much debate over what the above mentioned "privileges and immunities" as well as "due process" entail. Thus the U.S. Constitution is largely straightforward, but sections of it are open to interpretation and debate.

I would like to conclude by stating some of my views or beliefs about constitutional interpretation:

(1) I support Scalia's approach of Originalism with wording or meaning as being a central element of how to interpret the Constitution. Most of the wording is open to little debate and should be definitive. In the portions that are ambiguous, efforts should be made to understand what the words meant at the time they were written. This will not always be clear-cut, but it is preferable to ignoring the potentially relevant portions of the Constitution.

(2) I do support elements of the Living Constitution—the idea that there is some room for allowing the meaning of words to evolve over time. However I would not go so far as to allow new rights to be created which the Constitution is silent about. The Eighth Amendment bans the use of "cruel and unusual punishments." Are we to interpret that as a citizen of the 18th century would or the 21st century? I would give it a 21st century interpretation with one important caveat, but first let me use an analogy. Let's say a property description was written in the 1920's and had as a boundary the shore of a lake. Let's say 80 years later the lake had receded 30 yards. Would the current boundary be where the lake was 80 years ago or where it is now—"the shore of the lake." I believe the text should be followed and it should be where the lake is now. The text did not say the boundary will always be where the lake was in 1923. Thus I would allow a current definition for a phrase like "cruel and unusual." Nevertheless, as I mentioned earlier in this paper, Scalia has pointed out there is another important statement in the Constitution that cannot be ignored. The Fifth Amendment, approved in 1789 at the same time as the Eighth Amendment, states that no person can be deprived of life without the due process of law. This clearly implies that people can be deprived of life with the due process of law. Thus I do not believe you can plausibly argue that a death penalty given with due process of law

can be viewed as unconstitutional because it is "cruel and unusual." The writers of the Constitution clearly did not believe so. Nevertheless there are other punishments, which the Constitution is silent about which were common in the 18th century, which could be banned today by the courts for being "cruel and unusual".

Is the U.S. always locked into the death penalty? Absolutely not! It is up to the democratic process, and not the judicial branch, to make that decision. Twelve States, including Michigan, have banned the death penalty. Every State could ban the death penalty, but it must be done by the voter. It cannot be done by the courts, because the death penalty is not unconstitutional. Another approach would be to pass an Amendment to the Constitution, but that has only been done 17 times since 1790. The framers of our Constitution allowed for change, but did not want to make it easy – another example of their brilliance!

(3)Abortion is the elephant in the Constitutional room. Going back at least 20 years every nomination process for a Supreme Court justice has focused on the issue of Abortion and the 1973 case Roe v Wade. The majority ruling in Roe v Wade found a right to abortion in certain circumstances based upon a Right to Privacy which they felt somehow flowed from the Due Process Clause of the 5th and 14th Amendments. The Right to Privacy is a red flag for Originalists because it is not an explicit right in the Constitution. It is a right that seven judges in 1973 believed was inferred by the Due Process Clause. This decision has been under attack since 1973. It was widely expected to be overturned in the 1992 case Planned Parenthood v Casey, but three Republican nominees—Souter, O'Conner and Kennedy—saved it. A major element in the reluctance of certain justices to overturn Roe v Wade is clearly their respect for stare decisis—the respect for settled law or previous decisions. In the 2007 case Gonzales v Carhart, the Court took a significant step in beginning to unwind Roe v Wade. It supported a federal law which banned the "partial birth" procedure and it did not contain an exception that permitted the procedure to protect the health of the mother. Every Appeals Court had found the law unconstitutional, but the Roberts Court in a 5-4 decision upheld it. It was noteworthy for those who felt Roe v Wade was constitutionally unsound, that Ruth Bader Ginsburg, who wrote the minority opinion, based her dissent on women's equality, not their right to privacy. Even today's liberal justices are backing away from the justification of Roe v Wade.

If at some point in the future, there are five justices who believe that the better path is overturning Roe v Wade than respecting precedent the country will not move to a situation where abortion is viewed as unconstitutional. That is impossible because the Constitution is silent on abortion. It will be left up to the political process in each state to decide what happens. As with the death penalty, there will likely be a patchwork of laws, with some States allowing it and others not. I believe that Roe v Wade was a constitutionally unsound decision made in the spirit of a number of Warren Court decisions even though it occurred four years after Earl Warren had stepped down. Building a law on a right to privacy, when there is no such explicit right in the Constitution, is analogous to building a house on quicksand. For me the more difficult decision issue is whether it should be overturned or whether stare decisis should apply. I would prefer to see the legislative process handle the issue of abortion.

In closing I would like to quote Jeffery Toobin who has recently written an excellent book on the Court called "The Nine". He says:" When it comes to the incendiary political issues that end up in the Supreme Court, what matters is not the quality of the argument, but the identity of the justices. So one factor—and one factor only—will determine the future of the Supreme court: the outcomes of the Presidential elections".