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Restoring the Constrained Judicial Vision

GianCarlo Canaparo

KEY TAKEAWAYS

The Constitution guarantees that the majority rules and that the minority has rights.

For decades, the Supreme Court permitted experts to rule, diminishing both the majority's ability to rule and protections for minority rights.

Anchoring jurisprudence in the Constitution's text—a method called "originalism"—restores the balance that deference to experts has upset.

Thank you for inviting me to talk to you about the Supreme Court and the Constitution at this present moment. I thought the best place to begin discussing that topic is at the very beginning. And so, back to 1788 we go.

In that year, the states ratified the Constitution. It was a remarkable achievement for several reasons. It was remarkable, first, because we, an upstart bunch of farmers, had just beaten the world's superpower in a contest of arms. It was remarkable too because we had only just created another form of government under the Articles of Confederation. Lastly, it was remarkable because of what this new document was.

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A Written Constitution: The People as Sovereign

The Constitution was the first charter of government in human history that was born of political philosophy and not political reality. It was also written. This doesn't sound particularly remarkable to a modern audience, but at the time, it was. Britain had—and still has—an unwritten constitution. The British constitution was a set of principles and ideas revealed in historical events and documents that were interpreted and given relevance to contemporary issues by Parliament. Parliament was, effectively, supreme over that constitution.

A written constitution like our own, by contrast, had several groundbreaking implications. For one, it was expressed in written words that had concrete meanings. This meant that those words controlled until they were changed. Article V, which provides the procedures for changing the Constitution, confirms this.[1] After all, why have a mechanism to change it if it is not fixed? And second, it could be changed only by those with power superior to the document itself. That is, the sovereign: the people.

For more than a hundred years, the groundbreaking idea that the people were ultimate sovereigns and governed themselves according to their written terms prevailed here and in other nations, following our example.

The Wilsonian Vision: Rule by Experts

But a new vision for government emerged in the early 20th century. Woodrow Wilson was its most famous proponent, and he believed that the people could not be trusted to govern themselves well. Popular sovereignty, he said, was a suspect form of government that should be constrained. He believed instead that good government could be delivered only through rule by experts—experts who, he believed, would be apolitical and altruistic.[2] Popular rule and checks and balances—the Constitution's cornerstones—were obstacles to good government.[3]

The Great Depression gave supporters of this vision the catalyst they needed to put it into practice. Franklin Delano Roosevelt began to remake the government in line with this vision. Although his policies often failed to cure the problems of the Depression and in some cases extended or exacerbated them, this new vision was not repudiated. World War II and the pains of a wartime economy provided something to blame for its failures, and the post-war boom fueled by American industry roaring to the rescue of a ruined world provided boons that the new vision could claim as victories. FDR's success as a wartime President gave him long-term power over the country and the ability to push this reformation through its early stages.

At first, the Supreme Court was not on board with this reformation, but eventually, it relented. The infamous "switch in time that saved nine" usually gets the credit, but in truth, the switch was inevitable. This new vision took such hold that even many conservatives agreed with it in principle, squabbling only over the particulars. After all, hadn't this vision saved us from the Great Depression and from the terrors of World War II?

Consequences of Deferring to Experts

Deference to experts became the primary rule, and the Constitution's rules began to fade into the background. Economic issues and property rights are where this trend started (and continued for the rest of the 20th century), but it did not stay there. On social issues too, the Supreme Court put experts first, even when they provided the weakest possible foundation for a particular judgment.

In *Brown v. Board of Education*,[4] for example, the Court struck down the infamous "separate-but-equal" rule of *Plessy v. Ferguson*[5] in schools, and to do so, it relied on a poorly conducted and unscientific study. That study found that when given white and black dolls to play with, black children picked white dolls and concluded that this was so because separate schools made black children feel inferior. On that basis, the Court struck down the separate-but-equal rule.

Now, the study, despite its flaws, may have been correct. Certainly, many other people, including black litigants and advocates for integration had for a very long time argued that segregation imposed on black children "the stigma of degradation" and "feelings of abasement and of servile fear."[6] But what if the study had come out the other way? If black children chose the black dolls, *Brown*'s analysis would have *upheld* racial segregation.

How flimsy a foundation for racial equality! And how unnecessary when the text of the Fourteenth Amendment, with its guarantee of equality for all, was at hand! To quote an unfortunately forgotten judge named John Watson Barr, the Fourteenth Amendment "rounded out and perfected our government."[7] It set racial equality in stone, but the Supreme Court chose instead to write the story of America's racial progress in the soft sand of social science.

Nine Justices: The Experts of All Experts

As this trend continued, as judges turned to the wisdom of others and away from the Constitution, they grew arrogant. At first, they claimed the

wisdom to decide which experts were best. But why stop there? If they could choose the best experts, were they not qualified to choose the best policies? And if their wisdom chose the best policies, wouldn't it also create the best policies? Why let other experts rule when the nine Justices were the experts of all experts?

This thinking reached its peak—up to that point in time, anyway—in *Griswold v. Connecticut*.[8] Connecticut had outlawed contraceptives, and a woman sued to strike the law down. When the case reached the Justices, their own sense of what was good policy decided the case: The law must go.

Perhaps it was good policy. It certainly aligns with modern sensibilities. But what part of the Constitution gave the Justices the power to pick it? By this point in history, the Court was nearly beyond such questions. And yet, the flash of a distant memory seemed to remind the Justices that there was, somewhere, a written charter of government that constrained them. So they decided that they ought to pay it lip service. Sure, there is nothing in that old charter that gives judges the power to pick and choose policy, but there are "penumbras, formed by emanations" of many of its clauses, that create a right to privacy.[9] What that right is, what it means, and what judges may do with it were all irrelevant questions as far as the Court was concerned.

This was a shocking flexing of judicial power over the Constitution and over the people. The Court effectively replaced the Constitution with its own wisdom. But if there was a silver lining to *Griswold*, it was that the Court felt the need at least to nod at the Constitution as it rendered it an irrelevant old artifact.

The Court would not feel the need to do even that when an anonymous woman brought a suit challenging a law outlawing abortion. In *Roe v. Wade*,[10] the Court followed its arrogance to its logical conclusion and struck down the law on no firmer basis than because-we-say-so. The Justices, not the Constitution, were the supreme law of the land.

Roe was a wake-up call that made many Americans realize that Woodrow Wilson's vision was a bad deal, at least insofar as it had come to infect the judiciary. Parents could govern their children by the because-I-said-so rule because parents knew best for their children. But the American people were not the Supreme Court's unruly children. The American people were sovereign.

It was not only conservatives who wanted to end the Wilsonian reformation of the courts. Liberals, too, were shocked by *Roe* and rebelled. Some of the greatest liberal minds in the legal academy called it—and some today still call it—an act of raw judicial power that didn't even pretend to be constitutional law.[11] And so began an effort to restore the Constitution.

The Advent of Originalism

Restorers thought that a good place to begin was the Constitution's actual text, and where they started is where they stayed. The Constitution is written, the people are sovereign, and its text controls until the people change it. The approach would come to be called "originalism," but this new name did not refer to a new idea. Originalism was a new name for what jurists going back at least as far as England's William Blackstone had long thought of as, simply, "what judges do." They interpret the law as written, faithfully applying the people's expressed will to discrete cases.

Originalism took the world of legal scholarship absolutely by storm. Just about everyone realized that the judiciary was off the rails. It was not constrained by the Constitution—or anything else, for that matter. The law was nothing more than the subjective whim of five of nine Justices. And yet, by this point in time, liberal activists had grown very accustomed to getting from the Court what democracy would not give them. Thus, originalism was a danger to their agenda, and they fought it with everything they had.

But originalism was simply too compelling. Any liberal, after all, who preferred the judicial activism of the 20th century knew that if that activism had been used to deliver conservative policy preferences, then he too would be singing originalism's praises.

Originalism's triumph among the legal elite made it seem, however, like it was more powerful and influential than it was. Justice Antonin Scalia and Justice Clarence Thomas adopted it, and it appeared sometimes in the opinions of other Justices, but it was the method of a minority. It was not until President Donald Trump completed his appointments that a majority of the Court supported the originalist method.

But even after his appointments, a great question loomed: Would originalism triumph in practice as it had in theory? Could it heal the wound *Roe* caused the Constitution, or would the new Justices prove it to be a paper tiger?

A Victory for the Restorers

As far as jurisprudence is concerned, the Wilsonian reformation is over. This latest Supreme Court term represented victory for the restorers. Once again, the Constitution's text means something. Once again, it controls until the sovereign—the people—change it. And once again, judges are judges and not philosopher kings.

It was not just *Dobbs*[12] overruling *Roe*, where the Constitution's text usurped judicial whim. The Court committed to an originalist approach for the Second Amendment[13] and religious liberty[14] and may even have started the project of reining in the vast Wilsonian administrative bureaucracy.[15] The Court's text-first approach in the Second Amendment case hints that it will expand that approach to other constitutional rights as well. We may see an end to the arbitrary "tiers of scrutiny" and a move towards an approach grounded in Constitutional text and history.[16] What's more, the Court's decisions in the vaccine mandate case,[17] the eviction moratorium case,[18] the church closure cases,[19] the Medicare repayment case,[20] and the EPA climate regulation case[21] suggest that the era of blind deference to experts is over.

Originalism puts the Constitution—not experts or judges—first. Not surprisingly, this is very unpopular with people who share the Wilsonian vision. Perhaps recognizing, however, the intellectual appeal—or at least ascendance—of originalism, they have turned their fire away from it and onto the Constitution itself.[22] It is old, broken, and bad, they say, so we should throw it out.

Reconciling the Irreconcilable

At the beginning of this speech, I said that the Constitution was born of political philosophy. That political philosophy recognized and accounted for fundamental truths about the relationship between human nature and power. It saw that democracy was good but that every majority faces the same temptation to wield power to hurt minorities that every tyrant has ever faced. And it saw that majorities are no better than individuals at resisting that temptation. The way to protect both interests—majority rule and minority rights—is to split power and set it against itself.[23] The Constitution thus "reconciles the irreconcilable" by "accommodat[ing] power to freedom and vice versa."[24]

Those fundamental truths are still true today. We still see the good in democracy, but we still see majorities eager to harm minorities. Today, many blue states enact laws whose purpose is only to make life difficult for religious minorities. Not that long ago, we saw the Southern white majority make life miserable for the black minority when the Supreme Court all but erased the Fourteenth Amendment's constraints on majority power. And today, liberals are turning many of those same discriminatory tools against different racial groups for similar purposes.[25]

So when we evaluate the claim that the Constitution should be thrown away, we should ask whether it has ceased to strike the right balance

between majority power and minority rights. Certainly, the balance is off in some respects today. But where it is off—the rise of a too-powerful judiciary, the rise of an omnipresent administrative state, and the diminishment of Congress to a glorified cash register—are places where we have deviated from the Constitution, not places where it has failed us.

Conclusion

As for me, I think the Constitution as written still strikes the balance quite well, and the fact that the people sitting atop the commanding heights of government, business, media, and culture see the Constitution as a problem is good evidence that it does. The Constitution has not stopped them from gaining power, but it has stopped them from using power in the worst ways that people in power everywhere have always tried to use it. That's good for today's minority. And when, as always happens, the winds of democracy shift and today's majority finds itself in tomorrow's minority, it will be good for them too.

GianCarlo Canaparo is a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. This lecture is adapted from a speech delivered to a group of Tennessee Young Republicans and Tennessee College Republicans at the Tennessee State Capitol on September 6, 2022.

Endnotes

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23. See Publius (James Madison or Alexander Hamilton), *The Federalist* No. 51, https://avalon.law.yale.edu/18th_century/fed51.asp (accessed September 22, 2022) ("Ambition must be made to counteract ambition.").
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