# Inquiring Minds topic – 30 November 2018

Albert Myers, Moderator

## Strict Constructionism vs. Adapting to Changing Situation

### Definitions:

**Constructionism - to construe or apply in accord with the original meaning, somewhat akin to textualism (adhering strictly to the written document) - judges apply the text only as it is written**

**Originalism – to use the original meaning – similar to constructionism**

**Activism – in juridical practice, the adjusting or reinterpreting of the document or prior decision to adapt to changed circumstances - modern, relevant interpretation of existing law, or, when applicable, the United States Constitution**

## Issues for discussion:

- Did the founding fathers intend for “originalism” in judicial decisions?
- Has Congress gone too far toward adapting the commerce clause of the federal constitution? - e.g. regulations enforced across state lines
- Is the Roe v. Wade decision firmly “established” precedent (*stare decisis*)?
- States created the U. S. Constitution and voluntarily entered the Union – should they be permitted to withdraw (like BREXIT)?
- Where on the continuum between originalism/strict constructionism and evolution/adaptation should SCOTUS' decisions be? Judicial restraint? - or judicial activism?

Consider the major arguments for and against so-called "strict constructionism" when it comes to the issue of judicial discretion. What do you perceive are the strengths and weaknesses of each side in the debate? Which side do you agree with and why, or is there a middle way? **Explain and defend** your arguments well.

# Strict Constructionism vs. Broad Constructionism

- **Strict constructionists: Congress should be allowed to exercise very few implied powers so that government will remain small**
- **Broad constructionists: Congress should be allowed to exercise many implied powers so that government can take a greater role in shaping events**
- **Americans have disagreed about this since the beginning; Jefferson (strict constructionist) vs. Hamilton (broad constructionist) was first major political dispute in US history**

Almost immediately following the creation of the Constitution, the Founding Fathers split into two

opposing camps over the question of how loosely or strictly to interpret the Necessary and Proper Clause.

One faction, the strict constructionists, was led by Thomas Jefferson. Arguing that "that government is best which governs least," the strict constructionists desired a small federal government, one that would leave most power to the states and to the people. Thus they argued that Congress should only be allowed to exercise those expressed powers specifically listed in the Constitution, recognizing few or any other implied powers as legitimate. Jefferson wanted to ensure that government would charge few or no taxes, mostly leaving the people at liberty to pursue their own objectives free from government interference. Only a very strict reading of the Necessary and Proper Clause, he thought, would prevent the government from giving itself more and more unnecessary power over citizens' lives.

The other faction, the broad constructionists led by Alexander Hamilton, argued for a much more powerful federal government and a much broader reading of the Necessary and Proper Clause. Hamilton, unlike Jefferson, wanted to use the federal government to pursue an aggressive strategy of industrialization and economic development. Hamilton's vision called for the government to organize banks, build roads, and invest in other useful infrastructure, all in the interest of transforming the young United States from a country of farmers into a thriving economic powerhouse. But the Constitution did not expressly grant the government the power to do most of those things; only a liberal interpretation of the Necessary and Proper Clause would allow Hamilton's vision to be considered constitutional. Hamilton and the broad constructionists argued that the national interest could be best served by creating a powerful government able to exercise a wide variety of implied powers, all justified by a loose reading of "necessary and proper."

The argument that began with Jefferson and Hamilton split George Washington's government, leading to the formation of the very first American political parties—Jefferson's Democratic-Republicans opposing Hamilton's Federalists. And the argument has continued, in one form or another, all the way to the present. Should the government be large and strong, able to exercise powerful influence over many areas of American life? Or should it stay small and restrained, leaving the people free to manage their own affairs? Does the Constitution require sharply limited government, or does it allow government to gain broad new powers as needed to deal with new challenges as the world changes?

It all depends on what your definition of "necessary and proper" is.

The strict constructionists have won plenty of victories over the years. Jefferson won the election of 1800 by promising to limit the size and scope of government [as a political, not a judicial, matter]. The Supreme Court enforced a very narrow reading of the commerce clause from the 1870s through 1937, blocking many federal attempts to regulate economic activity. However, the general trend in American history has been toward the broad constructionist view. In times of war, economic upheaval, and other crises, most people have tended to favor granting the government wide powers of action; over the decades, those gradual expansions of power have led to a government much larger—and an interpretation of the Necessary and Proper Clause much broader—than anything Jefferson *or* Hamilton could have ever imagined. Almost all of us now accept that the federal government has a huge array of implied powers—powers to impose environmental rules, labor regulations, educational policies, and a hundred other kinds of interventions into American life, even though those powers are explicitly mentioned nowhere in the Constitution. Perhaps our definition of "necessary and proper" will change again in the future, but for now, there seems to be a broad consensus in favor of broad constructionism among most Americans.

*[The above is from https://www.shmoop.com/legislative-branch/strict-constructionism-broad-constructionism.html]*

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# Difference Between Judicial Activism and Judicial Restraint

differencebetween.net/language/words-language/difference-between-judicial-activism-and-judicial-restraint

July 6, 2011

**Judicial Activism vs Judicial Restraint**

Judicial activism and judicial restraint are true opposite approaches. Judicial activism and judicial restraint, which are very relevant in the United States, are related to the judicial system of a country, and they are a check against the fraudulent use of powers of the government or any constitutional body.

Judicial activism is the interpretation of the Constitution to advocate contemporary values and conditions. On the other hand, judicial restraint is limiting the powers of the judges to strike down a law.

In judicial restraint, the court should uphold all acts of the Congress and the state legislatures unless they are violating the Constitution of the country. [John Moore comments, "The point is that the court comprises judges who have different philosophies on this and that their judgments reflect the differences."] In judicial restraint, the courts generally defer to interpretations of the Constitution by the Congress or any other constitutional body.

In the matter of judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. This means that judicial activism has a great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and political unfairness.

Judicial restraint and judicial activism have different goals. Judicial restraint helps in preserving a balance among the three branches of government; judiciary, executive, and legislative. In this case, the judges and the court encourage reviewing an existing law rather than modifying the existing law. [John Moore comments: "At common law, judges may rightly be said to make the law; the accumulation of decisions actually constitutes 'the law.' Statutory law is different. There the legislated statute is the law. The role of the judge is to determine whether the law is consistent with existing law and/or the Constitution. The judge's decisions may affect the legitimacy of the law, but to say that they make or modify the law seems not quite right."] When talking about the goals or powers of judicial activism, it gives the power to overrule certain acts or judgments. For example, the Supreme Court or an appelate court can reverse some previous decisions if they were faulty. This judicial system also acts as checks and balances and prevents the three branches of government; judiciary, executive and legislative from becoming powerful.

Summary:

1.Judicial activism is the interpretation of the Constitution to advocate contemporary values and conditions. Judicial restraint is limiting the powers of the judges to strike down a law.
2.In judicial restraint, the court should uphold all acts of the Congress and the state legislatures unless they are violating the Constitution of the country.
3.In the matter of judicial activism, the judges are required to use their power to correct any injustice especially when the other constitutional bodies are not acting. [John Moore: "Not 'judges are required' but judges tend to correct, etc."]
4.Judicial activism has a great role in formulating social policies on issues like protection of rights of an individual, civil rights, public morality, and political unfairness. [John Moore: "Consider a case involving the right of free speech. Is it 'activist' to enforce First Amendment rights? On campuses of late, such actions are seen as reactionary. Does this mean that activism can be 'reactionary'?"]
5.When talking about the goals or powers of judicial activism, it gives the power to overrule certain acts or judgments. For example, the Supreme Court or an appellate court can reverse some previous decisions if they were faulty. [John Moore & AEM: This is not necessarily activism, is it?]

**Professor Sunstein of the University of Chicago Law School wrote:**

Here is a passage from an excellent essay: "I am not a strict constructionist, and no one ought to be . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."

This passage is from Justice Scalia's essay in the book, “A Matter of Interpretation: Federal Courts and the Law” (Princeton University Press, 1997). In his essay, Justice Scalia defends "textualism." He thinks that a strict constructionist is "better . . ., I suppose, than a nontextualist." But he describes strict constructionism as "a degraded form of textualism that brings the whole philosophy into disrepute."

Justice Scalia's discussion is relevant because the President seeks judges who believe in "strict construction"; because nominee Harriet Miers has said that the Constitution should be strictly construed; and because several prominent Republicans want some assurance that Ms. Miers believes in "strict construction." But as with "not legislating from the bench," so too here: It is not at all clear what "strict constructionists" do or believe.

It is doubtful that strict constructionists believe in upholding legislation unless it is very clearly, and beyond the slightest doubt, in violation of the Constitution. (Justice Oliver Wendell Holmes tended to believe that, but Justice Scalia doesn't.) Apparently strict constructionists are textualists, but almost everyone is a textualist; the hard cases arise when the text is unclear. Are strict constructionists supposed to believe that the Constitution should be interpreted to mean what it originally meant? Justice Scalia is a committed originalist, but to his credit, he describes himself as a "faint-heated" originalist: He does not want to use the original understanding as a kind of bomb that would explode many decades of American law, even when there have been large-scale departures from the original meaning. Is he therefore disqualified from the camp of strict construction? Does a nominee have to be an originalist, or at least a faint-hearted one, to be a strict constructionist? (If so, Chief Justice Roberts seems disqualified, because he has not embraced originalism.)

Maybe strict constructionists will refuse to use ambiguous phrases in the Constitution to create new rights. But it's pretty new to use the Constitution to protect commercial advertisers from regulatory restrictions, and it's pretty new to understand the equal protection clause to give white people the right to be free from affirmative action programs. (The constitutional attack on affirmative action programs is extremely hard to defend on originalist grounds, as explained in my book, Radicals in Robes.) Over the long arc of American history, it's even fairly new to understand the Constitution to protect property owners from "regulatory takings" -- regulation that diminishes the value of property, without physically invading it. Do strict constructionists want to uphold restrictions on commercial advertising, affirmative action programs, and regulatory takings?

In my view, it is certainly correct to say that judges should not use ambiguous constitutional phrases to impose large-scale social reforms on the American public. But Justice Scalia was right to criticize the idea of "strict construction," and as with not "legislating from the bench," we seem to have some kind of code here.

A suspicion: Whatever strict construction is, Roe v. Wade is taken, by many people, to be what strict construction isn't; and when a judge is said to believe in strict construction, she is said to reject the approach in Roe (along, perhaps, with efforts to require states to recognize same-sex marriage or to remove religion from the public domain). So far, perhaps, so good. The problem is that the idea of strict construction promises a general theory of interpretation, and it isn't able to fulfill that promise.

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## What Is Judicial Restraint? Definition and Examples

by Marcus Hawkins - July 30, 2018

Judicial restraint is a legal term that describes a type of judicial interpretation that emphasizes the limited nature of the court's power. Judicial restraint asks judges to base their decisions solely on the concept of *stare decisis*, an obligation of the court to honor previous decisions.

### The Concept of Stare Decisis

This term is more commonly known – at least by laypeople, although lawyers employ the word as well – as "precedent." Whether you've had experiences in court or you've seen it on television, attorneys often fall back on precedents in their arguments to the court. If Judge X ruled in such and such a way in 1973, the current judge should certainly take that into consideration and rule that way as well. The legal term stare decisis means "to stand by things decided" in Latin.

Judges often refer to this concept as well when they're explaining their findings, as if to say, "You may not like this decision, but I'm not the first to reach this conclusion." Even Supreme Court justices have been known to rely on the idea of stare decisis.

Of course, critics argue that just because a court has decided in a certain way in the past, it doesn't necessarily follow that that decision was correct. Former Chief Justice William Rehnquist once said that state decisis is not "an inexorable command." Judges and justices are slow to ignore precedent regardless. According to Time Magazine, William Rehnquist also held himself out "as an apostle of judicial restraint."

### The Correlation With Judicial Restraint

Judicial restraint offers very little leeway from stare decisis, and conservative judges often employ both when deciding cases unless the law is clearly unconstitutional. The concept of judicial restraint applies most commonly at the Supreme Court level. This is the court that has the power to repeal or wipe out laws that for one reason or another have not stood the test of time and are no longer workable, fair or constitutional. Of course, these decisions all come down to each justice's interpretation of the law and can be a matter of opinion – which is where judicial restraint comes in. When in doubt, don't change anything. Stick with precedents and existing interpretations. Do not strike down a law that previous courts have upheld before.

## Judicial Restraint vs. Judicial Activism

Judicial restraint is the opposite of judicial activism in that it seeks to limit the power of judges to create new laws or policy. Judicial activism implies that a judge is falling back more on his personal interpretation of a law than on precedent. He allows his own personal perceptions to bleed into his decisions.

In most cases, the judicially restrained judge will decide a case in such a way as to uphold the law established by Congress. Jurists who practice judicial restraint show a solemn respect for the separation of governmental problems. Strict constructionism is one type of legal philosophy espoused by judicially restrained judges.

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## Why Is Judicial Activism Good?

*from https://www.reference.com/government-politics/judicial-activism-good-88af9669bdebb90b*

Judicial activism is desirable and important because it allows judges to re-evaluate and reinterpret old laws and precedents in terms of modern society. However, it has become one of the most polarizing and controversial topics in the U.S. government because of the vast impact it has on society and policy.

There are two major sources of reference that judges at any court level, but especially the Supreme Court, use to make a decision in a case. First and foremost, judges look at the Constitution of the United States. This document is the ultimate source for determining what rights citizens do or do not have, and Supreme Court judges are faced with the task of interpreting the statutes it puts into place. The second consideration judge make is based on precedent. Precedent is any ruling established by a previous court that clarifies a question of rights in a constitutional case.

The problem the courts face is that the Constitution was established hundreds of years ago in a different society than subsequent ones. The same can be said for the rule of precedent. Judicial activism is good because judges can make an informed decision on how to apply an outdated law or precedent to a current society and culture.

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**A suggested example of loose interpretation-- Columbia V. Heller--2008 (http://www.law.cornell.edu/supct/html/07... )**

**"The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."**
**-- Justice Scalia**

**Loose because there is nothing in the 2nd Amendment of the Constitution that gives people the right own guns for the purpose of self-defense, only for the purposes of being in a militia.**

## Also consider:

https://connectusfund.org/11-principal-pros-and-cons-of-judicial-activism
http://articles.latimes.com/keyword/judicial-activism
https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus- decisions/
https://en.wikipedia.org/wiki/Chevron_U.S.A.,_Inc._v._Natural_Resources_Defense_Council,_Inc.
https://www.law.cornell.edu/supremecourt/text/467/837