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William Forbath

Professor of Law and History, University of Texas :

The framers and us: How not to use history to argue about the Constitution and the Supreme Court

Why is it that conservatives are winning the national debate about the Supreme Court and the Constitution? And what can liberals do about it? Why can't liberal Supreme Court nominees, senators, and commentators make a stronger case for their vision of the Constitution and the role of judges in enforcing it? Part of the answer has to do with how each side uses history. Conservative judges use history to claim that when they strike down a law, they are merely applying the "original understanding" or "intentions" of the framers of the Constitution. This is bunk. But it is reassuring. It enables conservatives on and off the Court to claim that what liberal judges do is something different and illegitimate. Liberals are "judicial activists." When liberal judges strike down a law, they are "making up" new law. They are "betraying" the Founding Fathers. This is also bunk. Conservative and liberal judges alike bring their own present-day values and convictions to bear on interpreting and applying the Constitution. Conservatives are wrong to deny it. But they are right that appealing to history and "keeping faith with the past" is an indispensable part of our constitutional tradition - and one that helps mobilize popular support behind the constitutional commitments a judge, lawmaker, or citizen may prize. So, liberals need to get a better handle on the way to use history.

History rarely provides answers to the hard questions that come to the Court more than two centuries after the 18th century framers. Instead of answers, it usually provides resources for all sides. Of course, it is not difficult for a conservative to point out that the Founding

Fathers did not expect and could not have "intended" that the First Amendment would be used to safeguard freedom of expression on the internet or the freedom of speech of high school students. They had no internet, of course, and no public high schools either! But the language that the framers used in the Constitution's rights-protecting provisions was broad and general. As best as historians have been able to make out, the 18th century framers actually did not even want future generations to be governed by their own inevitably time-bound 18th century expectations about the particular concrete applications of that language!

So, judges today must attend to the text the framers gave us, the general principles it enshrines, the Amendments Americans have added, and the meaning and range of applications generations of judges, lawmakers and citizens have poured into them. And judges must consult their own conscience and experience as they sift through these materials that history provides and decide how best to keep faith with the past.

As long as they hew to this honest approach to history, liberals often draw compelling lessons from it. But lately, liberals are being drawn into the fictions and falsities of the "framers' intentions" in order to sound just as "true" to the Founding Fathers as our conservative foes. When we liberals play the "framers' intentions" game, however, we end up sounding silly and disingenuous.

Take for example constitutional scholar Geoffrey Stone's important op-ed piece in last Wednesday's New York Times. Looking ahead to President Obama's soon-to-be-announced nomination of a new Supreme Court Justice, Stone urges "a frank discussion .on the proper role of judges in our constitutional system." He laments that for thirty years or so, conservatives have dominated the national conversation about the Constitution and the Court, and he rightly points out that they have done so "in a highly misleading way" by claiming that conservative judges just "apply" the Constitution by enforcing the "framers' intentions." Stone goes on to contrast the kinds of laws that liberal judges strike down - laws that burden racial minorities, the poor and the powerless, with laws that conservative judges strike down - laws that "disadvantage corporations, business interests, the wealthy and other powerful interests in society." And he suggests that liberal judges surely have a wiser vision of the role of judges in a constitutional democracy, since they wield the power of judicial review to safeguard people most at risk of being shortchanged in the ordinary political process, while the conservative judges conjure up new safeguards for those who already enjoy ample sway in the political arena.

So far so good. But along the way, Stone proves unable to resist the siren song of "framers' intentions." He tries to turn the table on the conservatives. He goes to some lengths trying to cloak liberal constitutional values and commitments in the mantle of James Madison's "intentions." Stone has dressed up James Madison as a Great Society liberal. Says Stone, the "intentions of people like Madison who forged the American constitutional system" was to safeguard minorities like African-Americans, undocumented immigrants and the Guantanamo detainees against the tyranny of the majority. That is what liberal judges do. Conservatives, Stone declares, stand Madison's "idea on its head." They wield judicial review to overturn affirmative action, gun control, and restrictions on corporate speech; they "tend to exercise. judicial review to invalidate laws that disadvantage corporations, business interests, the wealthy and other powerful interests in society."

Stone's James Madison is bunk too. The real James Madison was largely hostile to any kind of judicial review. More important: while Madison did craft the Constitution to safeguard

minority rights against the tyranny of the majority, and while Madison, the wealthy slaveholder, was concerned about protecting religious minorities, he had no concern for the rights of "racial minorities," and it was mainly the rights of the wealthy over against the majority of Americans of modest means that Madison hoped to protect! Thus, the conservatives on today's Court have about as good a claim to Madison's mantle as we liberals do.

History is on our side; but that has much less to do with James Madison and much more to do with the bloodshed of the Civil War and the Civil War and Reconstruction Amendments that made the Constitution a charter of equal rights for all Americans, including the former slaves. It was the Republicans of the Reconstruction Era, the New Dealers, the Civil Rights Movement, and the twentieth-century Court who gradually enlarged Madison's original conception of minority rights and majority tyranny to make it a safeguard for the poor and vulnerable.

We do need "a frank discussion" on the Constitution and the proper role of judges, and we can't be half-frank about it. There are good arguments why the liberals' account is better. Stone offers a few. But wrapping ourselves in the mantle of the 18th century framers' intentions as he tries to do is not one. Our constitutional commitments have emerged over two centuries of tumultuous change. The arc of constitutional history generally has bent toward a more inclusive and generous vision of rights-bearing membership in We, the People. Conservatives are bending it back. The 18th century framers might have agreed with them; but the Civil War, the Reconstruction Amendments, and much else have intervened in the mean time; and, in any case, the choice - about how to keep faith with our constitutional past - is ours.

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