

## **Restraining the Judges**

by Gordon Silverstein

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**The Most Democratic Branch: How the Courts Serve America** by Jeffrey Rosen (*Oxford University Press, 256 pages, \$25.00*)

Worried about stem-cell research? Concerned about education, affirmative action, gay marriage, environmental quality, and the criminal-justice system? Do you find campaign fund-raising objectionable? Want to change the way congressional district lines are drawn? And just who did win the 2000 election?

Once upon a time these issues would have been fought out primarily through elections, in Congress, and from one state legislature to another. No longer. Even when legislation is adopted, it seems only the prelude to a lawsuit that will ultimately determine public policy. Little wonder then that the struggle over replacing William Rehnquist and Sandra Day O'Connor on the Supreme Court sparked intense debate.

*The New Republic*'s legal affairs editor, Jeffrey Rosen, thinks the courts have assumed too much power, and in his new book he puts the blame squarely on the justices of the Supreme Court. Their unilateral determination to take the nation in directions not supported by a majority of the public has led, in Rosen's view, to a polarized politics and impotent Congress. Instead of imposing their constitutional interpretations on the other branches, he argues, judges should generally adhere to a broad national consensus on the meaning of the Constitution and overturn laws and executive decisions only when the Constitution is unambiguously and flagrantly violated.

Rosen's book joins a small but growing chorus of calls for judicial modesty from liberals who recognize that instead of moving from liberal activism to traditional conservatism, the Court is close to tipping over to conservative activism, if it isn't already there. A judicially conservative court hews closely to precedent and upholds the Court's own status quo—something that liberals could probably accept, as the standing precedents are mostly the liberal rulings of the 1960s and 1970s. This legacy creates the through-the-looking-glass world where movement conservatives denounce a true judicial conservative such as David Souter for adhering to the status quo, while

ideological conservatives such as Clarence Thomas haven't the slightest hesitation about reversing decades of precedent to return the law to the era before the New Deal.

Rosen's argument is with all judicial activism, liberal and conservative alike. The bulk of his articulate and thoughtful book takes us through a historical parade of cautionary tales, ranging from the Supreme Court's overreach on slavery in the run-up to the Civil War, through Reconstruction, the Great Depression, and on into busing, abortion, and the redrawing of political districts in more recent years. These cases, Rosen argues, demonstrate that when the Court has gotten too far in front or behind a national consensus on the meaning and limits of the Constitution, it has done great damage to the nation and to the judiciary itself.

That these have been powerfully divisive issues is beyond debate. But does that mean the Court should simply bow out of the fight? Rosen argues for what he calls "democratic constitutionalism"—by which he means "judges should defer to the views of the political branches and the states about constitutional issues in the face of intense opposition or uncertainty." The Court's prime objective is to "promote democratic values," and it should strive to enforce "only those values that national majorities are willing to recognize as fundamental." To do otherwise will only further inflame partisan and ideological divisions.

Rosen's argument has a distinguished lineage, stretching back to justices such as Oliver Wendell Holmes and Felix Frankfurter and legal scholars led by Alexander Bickel. But as important as the democratic process is for Rosen, he does not endorse scholars such as John Hart Ely who see the court as distinctively charged with ensuring that the political process itself functions democratically. Here Rosen hews far closer to Frankfurter, who was loath to see the courts enter what he called the "political thicket."

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Rosen makes two distinct but related claims. "Democratic constitutionalism," he says, is in the nation's best interest. And it is also in the Court's institutional interest in preserving its own authority.

The first claim forces us to think a bit about why our system assigns so much power to unelected, insulated, and isolated federal judges, who hold their jobs for life. "The complete independence of the courts," Alexander Hamilton writes in The Federalist number 78, "is peculiarly essential in a limited Constitution"—that is, a government prohibited from doing certain things. If there are to be limits on the government's authority, there needs to be a relatively disinterested party to determine what those limits are. Independent courts are just the sort of institution for this task.

But, in Rosen's view, decisions about what falls within or outside the constitutional limits are so difficult and inherently controversial that judges should pronounce a law void only when it fails not just one theory of constitutional interpretation, but many of them: "Judges should be hesitant to strike down laws unless many of the traditional tools of constitutional interpretation—text, original understanding, historical traditions, previous judicial precedents, current constitutional consensus, and pragmatic considerations—seem to argue in favor of invalidation."

But how can judges remain true to their oath of office if they honestly believe a law does not square with the Constitution even under a single theory? Here is where the question of the judiciary's institutional interest comes in. The courts have no enforcement powers. To avoid the

risk that their rulings might be ignored, judges need to think strategically and take into account, not just the case itself, but its political context. Institutional prudence, Rosen argues, is the reason that the justices themselves should choose a more modest approach to their role. Otherwise they risk the courts' legitimacy.

Legitimacy is the watchword of this book. According to Rosen, when judges act unilaterally, their rulings are "likely to be ineffective, to provoke backlashes, and ultimately to threaten the legitimacy of the courts." He offers his parade of cautionary historical tales as evidence for this claim. In *Dred Scott*, for example, Chief Justice Roger Taney "squandered the Court's carefully constructed reserves of legitimacy." In the 1960s and 1970s, court-ordered school busing aimed at ending segregated schools generated massive resistance, and 30 years later public schools in America are as segregated as ever. Getting far ahead of a national consensus about abortion, Rosen says, undermined the Court's legitimacy. And perhaps most dramatically, stepping in to end the struggle over the vote recount in Florida in the 2000 election emptied the Court's legitimacy bank account.

Rosen is far from alone in thinking that the Court's legitimacy is its most important currency. Commentators, journalists, lawyers, academics, and some of the justices themselves have viewed it the same way, while others are more concerned to put it to work. In a speech after the decision in Bush v. Gore, Justice Antonin Scalia declared that the Court's legitimacy shouldn't be regarded as a "shiny piece of trophy armor," but rather as something to be used and "sometimes dented in the service of the public."

For all the worries about the Court's legitimacy, how easily dented and damaged is it? Research by political scientists, including Gregory Caldeira and James Gibson as well as Dion Farganis, strongly suggests that the Court's legitimacy is extremely resilient. Rosen's historical cases notwithstanding, the Court's power has never been seriously threatened. Thomas Jefferson and Andrew Jackson railed against Chief Justice John Marshall's brilliant decisions, but bluster was about as far as they went. Abraham Lincoln condemned the Court's decision in *Dred Scott* but never questioned the Court's authority. And Franklin Delano Roosevelt in 1937, fresh from the second greatest landslide reelection in American history, failed miserably when he attempted to curb the Court. Fifteen years later, Harry Truman insisted that the president's power to seize vital industries in wartime was "inherent in the Constitution," yet when the Court ordered him to return steel mills he had seized in the midst of the Korean War, Truman did so without a struggle.

And the list goes on: Dwight Eisenhower ordered the troops into Little Rock to enforce a Supreme Court desegregation order he thought a mistake; Richard Nixon surrendered the White House tapes in the midst of Watergate, knowing full well it meant the end of his presidency, and Al Gore accepted the "finality" of the Court's decision in 2000.

But if legitimacy concerns really aren't much of a restraint on the Court, what check is there? If we want judicial restraint, the answer is not to convince those already sitting on the bench to reverse course and stand down from the fight. The answer is to appoint and confirm judges with a more modest view of the judicial power. And that is something only the president and the Senate can do. Nowhere does the Constitution say that judicial nominees can refuse to answer the Senate's questions. The Senate must assert its independent power, and if nominees aren't responsive, the Senate should reject them. And if we want judges who will give Congress some leeway, it wouldn't hurt to have a few who understand the elected branches. Where once the Court was replete with former senators and governors, none of its current members has ever run for public office, and just two (Clarence Thomas and Stephen Breyer) have even briefly worked on Capitol Hill.

Of course, once confirmed, justices may stray from their earlier convictions and commitments. But the courts remain just one of three co-equal branches of government. The judiciary is not the "most democratic branch," nor was it meant to be. That title and role belong to Congress. Rosen is right that on a host of controversial topics, from abortion to flag burning to gay marriage, members of Congress are delighted to have courts take the heat and the responsibility. But this is not the judges' fault. Much of the problem lies in Congress. Consider the reaction of Arlen Specter, chairman of the Senate Judiciary Committee, to the proliferation of presidential signing statements under George W. Bush. Rather than drag the cabinet through hearings, cut budgets, battle the president on television, and block his priorities, Specter introduced legislation that would allow Congress to *sue the president* for exceeding his constitutional authority by gutting laws passed by Congress.

Focusing on judicial imperialism alone is not now, nor has it ever been, the right way to frame the problem. Captivated as they were by Isaac Newton's theories of mechanics, the Founders created a complex, clanking, interdependent system. To make it work, the legislative branch cannot be the passive instrument of the executive, nor dependent on the kindness of judges—it needs to exert a force of its own, true to its democratic role. If we want a more modest Court, we must have a stronger Congress.

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