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ORIGINALISM, CONSERVATISM, AND JUDICIAL RESTRAINT

DAVID A. STRAUSS*

“Judicial restraint” is not a well-defined term. Sometimes it is just an all-purpose term of praise for judges who have reached decisions that the speaker likes, in the same way that “judicial activism” is often an epithet used for decisions that the speaker dislikes.¹ But it might be possible to give at least some minimum content to “judicial restraint.” Let’s say that, at a minimum, “restrained” judges are careful about not letting their views of policy or morality displace the law.

If you believe in judicial restraint in that sense, then you should not be an originalist. You should firmly reject originalism, at least in the form in which most self-identified originalists today define it.² Instead, you should adopt a view that emphasizes the role of precedent in constitutional law. I’ll go further. Whatever judicial restraint means, if you are a conservative today, you should be deeply skeptical of originalism. Instead, you should be receptive to a precedent-based view of constitutional law.³

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1. Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19 (“[T]he word ‘activist’ is rarely defined. Often it simply means that the judge makes decisions with which the critic disagrees.”).

2. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (discussing how to apply originalism).

3. See David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y 969, 969 (2008) (arguing that “conservatives [should] abandon their allegiance to originalism and instead adopt an approach to constitutional interpretation that is based in precedent”).

There is a paradox here.⁴ A couple of generations ago, many people would have thought it obvious, true almost by definition, that both judicial restraint and conservatism mean adherence to precedent. Precedent keeps judges from going off in a direction of their own choosing;⁵ cut judges loose from precedent, and you invite unrestrained adjudication. As for conservatism, precedent is a matter of adhering to what has gone before, of conserving what has been done in the past. So, according to a common definition of conservatism,⁶ adherence to precedent should be a core conservative view. Today, there are conservatives who would say that adhering to tradition is not the core of conservatism.⁷ Even for conservatives who take that view, though, originalism, at least today, is a bad match.

Let me begin by addressing originalism and explaining why originalism is not a viable alternative to a precedent-based approach. This is true at least for an originalist approach to our Constitution, because nearly all of the controversial provisions of our Constitution are very old. If we were dealing with newer constitutions, or newly enacted constitutional provisions, originalism would be more defensible. But nearly all the provisions of our Constitution that generate controversy were adopted either in the aftermath of the Civil War or earlier, as part of the original Constitution or in amendments adopted in its wake, like the Bill of Rights.⁸

For a constitution like ours, there are at least two principal problems with originalism. These are familiar criticisms of originalism, but I do not think they have been answered satisfac-

4. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273 (2005) ("Judicial restraint is generally thought to be a conservative value, yet most conservative constitutional law scholars today seem to favor a weak theory of precedent.").

5. See, e.g., *id.* at 276–78 (discussing how precedent promotes the equal treatment of litigants across cases by judges and requires judges not to bend the rules).

6. See, e.g., BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 6 (1960) ("The Conservative approach is nothing more or less than an attempt to apply the wisdom and experience and the revealed truths of the past to the problems of today.").

7. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

8. See, e.g., Richard L. Aynes, *The 39th Congress (1865–1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019, 1019 (2009) ("The 14th Amendment is the basis of more litigation than all the other provisions of the Constitution.").

torily. The first is the problem of ascertaining the “original understandings,” the original public meanings, or whatever historical fact or condition an originalist is supposed to ascertain.⁹ However originalism is conceived, this is essentially a project in intellectual history: it calls for trying to reconstruct what people who lived in an earlier time thought about their world.¹⁰

Intellectual history is a valuable and important discipline, but it is also a discipline that, by its nature, leaves a lot of questions unsettled. Intellectual historians disagree among themselves about the best way to understand the ideas of earlier generations.¹¹ But perhaps more important for purposes of constitutional law, intellectual historians have the incalculable advantage of being able to choose their own battles. They can decide what period they want to try to understand, and which issues within that period. A judge cannot do that.¹²

Suppose, for example, that a historian wanted to analyze how people in an earlier era talked about a constitutional issue. She would examine public statements, public records, and the like—the kinds of materials that originalists say should be the sources of constitutional law.¹³ But suppose that the historian, after examining those materials carefully and sympathetically, decides that she just cannot make head or tail of the intellectual currents of that period. The people back then seem to have been confused. Enough of them agreed on what the language of the Constitution should be, but among those who agreed on the language, there were many different accounts of what was

9. Strauss, *supra* note 3, at 970–71.

10. See, e.g., Scalia, *supra* note 2, at 856–57 (“[Originalism] requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.”).

11. William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1067 (1997) (“[D]isputes over [intellectual historical methodologies] are sharper now than ever.”).

12. See U.S. CONST. art. III, § 2, cl. 1; *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (“[T]he exercise of the judicial power is limited to ‘cases’ and ‘controversies.’ Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.”).

13. See e.g., Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493–95 (2005) (directing originalists to refer to eighteenth-century newspapers, dictionaries, judicial opinions, and the like when interpreting a constitutional clause enacted in the late 1780s).

actually going on. The people had different ideas of what the Constitution should accomplish. No coherent approach to the issue emerges from the historical materials.

In these circumstances a historian can just walk away. She can decide to spend her time and energy understanding some other period or some other issue. But a judge cannot do that. The judge has to decide the case before him. That makes the originalist project a particularly difficult, challenging form of intellectual history and one that often will, to the honest originalist, turn up the answer "I don't know," or "there were various ideas and none clearly prevailed," or "they were just confused back then." That is one difficulty with originalism. Too often, it will be just too hard to figure out the answers to the relevant historical questions.

The second problem, which is even more severe, is what you might call the problem of adaptation or translation.¹⁴ Suppose we have a very clear idea of what people in an earlier generation were thinking when they adopted the First, Second, Fourth, or Fourteenth Amendment. Still, their understanding pertained to their world—they were adopting the constitutional provision for the world in which they lived. It is fanciful to suppose that Americans would have had a clear understanding, in the late eighteenth or mid-nineteenth century, about our twenty-first century world—a world that would have been, to them, in every way wildly hypothetical, and in some respects literally inconceivable.¹⁵

So an originalist somehow has to adapt or translate the original understandings or original meanings to our world. Does the "freedom of speech" mentioned in the First Amendment include the freedom to make and show movies? You might say that it is obvious that the First Amendment extends to movies, and, under current law, it does.¹⁶ But why does the First Amendment include movies? Because the original understanding was that it applied to movies? "What's a movie?," the Founders would have said, when they adopted the First

14. Strauss, *supra* note 3, at 971–72.

15. *Id.* at 972; see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.").

16. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

Amendment. You might say that protecting movies serves the purposes of the First Amendment. But once you start talking about purposes that way, you have gone beyond originalism, at least if originalism is supposed to provide any limits at all. An originalist who invokes purposes in that way could argue, for example, that the purpose of the Fourteenth Amendment was to promote equality, so the Constitution requires the redistribution of wealth—or, if you prefer, that the purpose of the Just Compensation Clause was to protect private property from government interference, so it is unconstitutional for the state to (insert your least-favorite form of regulation here).

The Fourth Amendment protects people's persons, houses, papers, and effects from unreasonable searches and seizures.¹⁷ Do wireless communications fall within that phrase? Wireless communications are not literally persons, houses, papers or effects. Should they nonetheless be treated as papers or effects? How do we determine the original understanding on that issue? Do we imagine a hypothetical eighteenth-century conversation about whether the "public meaning" of "persons, houses, papers, and effects" includes wireless communications? If so, with whom? A typical member of the eighteenth-century public? An especially well-informed member of the eighteenth-century public? A clairvoyant member of the eighteenth-century public who knew all about cell phones? How are we going to determine how that conversation comes out? And do we really want the law to depend on every judge's reconstruction of that imaginary conversation—possibly subject to reversal when another judge reconstructs it differently, because, according to some originalists at least, precedent does not matter?¹⁸

These are familiar problems, and originalists have come up with various interesting and creative ways of dealing with them.¹⁹ But I do not think originalists have not been able to mitigate the exceptionally open-ended and speculative nature of these inquiries. What's more, these problems are endemic, not episodic. Developments in electronic communication are one example, but the problem is not limited to technological innovation. The same problem, in principle, applies to economic, demographic, and so-

17. U.S. CONST. amend. IV.

18. See, e.g., Lawson, *supra* note 7.

19. See, e.g., Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006).

cial changes too. For example, if an issue arises under the Commerce Clause, we are confronted right away with that fact that the nation—vastly larger in area and population, vastly more interconnected, vastly more complex commercially and financially—is very different from the nation of 200-plus years ago.²⁰ Original understandings of the extent of the power to regulate commerce among the states (in view of the Necessary and Proper Clause), or the original meanings of those clauses, would also have to be adapted to or translated for current circumstances.²¹

Why do these problems matter to an advocate of judicial restraint, or to a conservative? They matter because even if people are approaching the original materials with perfect good faith, many different originalist conclusions will all seem plausible, and there will be no criteria that dictate a choice among them.²² At that point, some originalists do something that seems to me like conceding defeat: They say that originalist “interpretation” should be used only when the original materials provide a relatively certain answer. When the original materials are unclear, a judge should engage not in “interpretation,” but in “construction.”²³ Construction requires resorting to things like precedent and policy. But in most cases controversial enough to generate disagreement, let alone litigation, the original materials will not be so clear, even assuming that clarity is possible in principle—a heroic assumption, in my view, in light of the difficulties of translation. So construction will be the day-to-day rule in constitutional law. And that means that constitutional law, whenever issues are difficult, will depend on precedent and policy, not originalist materials.

There is a deeper problem, though. If the original materials are routinely murky, the purportedly originalist interpreter

20. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 23 (2010).

21. *See, e.g.*, *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (reaffirming that the Necessary and Proper Clause grants legislative authority to implement a statute when it “constitutes a means that is rationally related to the implementation of a constitutionally enumerated power”).

22. *Compare* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358 (Thomas, J., concurring in the judgment) (determining, after an originalist analysis, that an Ohio election law was inconsistent with the First Amendment), *with id.* at 371 (Scalia, J., dissenting) (determining, also after an originalist analysis, that the Ohio election law was consistent with the First Amendment).

23. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *CONST. COMMENT.* 257, 263–66 (2005).

will be tempted to read his or her own views into them.²⁴ This need not be a matter of bad faith. There is a natural tendency for any interpreter to think that the founding generations were composed of smart, sensible people, like—well, the interpreter himself.²⁵ It is very difficult, when the historical materials are unclear, not to see things through one's own eyes. If judicial restraint means abjuring one's own views in favor of the law, then originalist interpretation is, contrary to its claims, an open invitation to be unrestrained.

These problems with originalism are very severe—so severe that they generally disqualify originalism as a way of deciding controversial cases. Then the question becomes: Why do people still profess to be originalists, if originalism does not do the work it purports to do? One answer is that originalism is a rhetorical device.²⁶ Rhetoric is important, and people in public office, including judges and justices, legitimately use rhetorical devices to accomplish their objectives. Originalism, in particular, can be an especially valuable rhetorical device in one particular setting: to attack the status quo. The two most prominent originalists of the last hundred years—Justice Black and Justice Scalia—were both trying to sweep away what they saw as an established but mistaken approach to the Constitution.²⁷

Justice Black was trying to overturn the legacy of the pre-New Deal Court, which had declared unconstitutional various kinds of regulatory and redistributive legislation.²⁸ Justice Scalia is trying to sweep away, I think, certain elements of the legacy of the Warren Court.²⁹ When you are trying to get rid of an established tradition, you cannot rely on precedent, obviously; precedent is the problem. So you need to offer an alterna-

24. See David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL'Y 1, 3–4 (2009).

25. See Strauss, *supra* note 3, at 974.

26. *Id.* at 975.

27. See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1754 (2007) (describing how Justice Scalia is engaged in an “effort . . . to challenge the very notion of a living Constitution”); Strauss, *supra* note 3, at 975 (describing how Justice Black “used originalism . . . to attack . . . the tradition of the pre-New Deal Court”).

28. Strauss, *supra* note 3, at 975.

29. JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* 324 (2006) (labeling Scalia the Court’s “counterrevolutionary” because he seeks to return the law to original principles and to “overturn many of the decisions of the Warren and Burger Courts”).

tive. That is what originalism provides. It enables you to say: We should get rid of the corrupt traditions that have built up and return to the original, fundamental principles.³⁰ Perhaps the greatest of all originalist movements—the Protestant Reformation—did exactly this.³¹ It attacked the existing order, the existing tradition, as corrupt and wrongheaded and called for a return to the text and the original understandings.

Originalism is, therefore, in its essence, a destructive creed. It does not provide answers. It gives you a way of challenging the received wisdom. It is a way of getting rid of things. When you want to rebuild, when you want to start building up a doctrine, originalism does not really help you; it is too indeterminate. That is when you have to resort to precedent.

This is why conservatives and advocates of judicial restraint should reject originalism in favor of a precedent-based approach to the Constitution. Someone who believes in judicial restraint should—at the very least—be skeptical of originalism, because originalism is a way of opening things up, of getting rid of the traditions and precedents that might limit judges.³² Originalism substitutes historical materials that will routinely be open-ended and that will invite the interpreter to inject his own views. Precedent, by contrast, narrows things. Sometimes, in routine cases, precedent dictates a certain choice. In cases that reach the higher levels of the appellate system, precedent often does not dictate a single choice; but even then, it narrows things down. Precedent limits the outcomes that a judge can reach in good faith and, unlike originalism, it often forecloses the wholesale reexamination of an area of law. That is why, if you favor judicial restraint, you should believe in precedent and be wary of originalism.

What about conservatism, at least conservatism of the form that is not, by definition, concerned with conserving the past? In the last generation or so, the law has turned in a direction that is much more appealing to many conservatives.³³ Increasingly, the

30. See, e.g., Edwin Meese III, U.S. Att’y Gen., Speech before the American Bar Association (July 9, 1985), available at <http://www.fed-soc.org/resources/id49/default.asp>.

31. See SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

32. See Merrill, *supra* note 4, at 278–82.

33. See, e.g., McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment’s individual right to keep and bear arms is a fundamental right incorporated against state and local governments); Citizens United v.

accepted understanding, the governing tradition, is conservative. So if originalism is a way of getting rid of accepted understandings, one would expect to see conservatives moving away from originalism. And who will the next wave of originalists be? My bet is that they will be liberals or progressives.³⁴ Progressives will be the ones trying to change things by invoking, rhetorically, fundamental principles and original understandings.

There is some evidence to support both of these speculations. Chief Justice Roberts and Justice Alito do not seem to think of themselves as originalists.³⁵ Their opinions generally draw on precedent, shaped by their views of policy. When they want to change the law, as the Court recently did in recasting First Amendment limits on political expenditures,³⁶ they build the foundations case by case; they do not simply invoke the text and original understandings. They are essentially common lawyers. They came of age, after all, in a period in which precedents were increasingly congenial to conservatives. They are not interested in overthrowing the existing order. On the other side, though we have not yet seen progressive originalists on the Supreme Court, we do see them in the academy.³⁷ That is what you would expect.

FEC, 130 S. Ct. 876, 886 (2010) (reversing the Court's earlier prohibition on the use of corporations' treasuries to make political expenditures as a violation of the First Amendment's Free Speech Clause); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (holding that a racially informed school admissions system is unconstitutional); *Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007) (upholding the federal ban on partial birth abortion); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act is an unconstitutional exercise of congressional authority to regulate interstate commerce).

34. See, e.g., Martha Neil, *Progressive Originalism: 'Way More Liberal Than Conservative'*, A.B.A. J. ONLINE (Mar. 16, 2009), http://www.abajournal.com/news/article/progressive_originalism_way_more_liberal_than_conservative/.

35. See Jeffrey Rosen, *Alito Vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006 § 4 (Week in Review), at 1, 3 (quoting Chief Justice Roberts as saying he "ha[s] no overarching judicial philosophy"); *Nomination of Samuel A. Alito, Jr., of New Jersey, to be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 465 (2006) ("[The Framers] didn't purport to adopt a detailed code . . . [T]hey left it for the courts [and] the legislative body . . . to apply that principle to the new situations that come up.").

36. *Citizens United*, 130 S. Ct. at 898–99 (declaring unconstitutional, under the First Amendment, certain restrictions on corporate funding of political broadcasts).

37. For a synopsis of progressive originalism, see Jess Bravin, *Rethinking Original Intent*, WALL ST. J., Mar. 14, 2009, at W3. See also Jennifer Bradley & Doug Kendall, *Constitutional Craving: At long last, Democrats are finally trying to reclaim the Constitu-*

Unlike, I suspect, most members of the Federalist Society, I am sympathetic to the underlying views of some of those progressive originalists. But I do not think their originalism is the right way to approach constitutional interpretation, and on that point, at least, we ought to have some common ground. Today, members of the Federalist Society—if they are conservative, or if they believe in judicial restraint—should not be originalists, either.