

2005

Originalism, Stare Decisis and the Promotion of Judicial Restraint

Thomas W. Merrill

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Merrill, Thomas W., "Originalism, Stare Decisis and the Promotion of Judicial Restraint" (2005). *Constitutional Commentary*. 1092.
<https://scholarship.law.umn.edu/concomm/1092>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

ORIGINALISM, STARE DECISIS AND THE PROMOTION OF JUDICIAL RESTRAINT

*Thomas W. Merrill**

I. INTRODUCTION

If we consider constitutional law as a practice, it is clear that both originalism and precedent play an important role. Neither one is going to vanquish the other, at least not any time soon. We can engage in academic debate about originalism versus stare decisis, as if they were rival modes of interpretation that could operate to the exclusion of the other. But the question of practical importance is one of degree and emphasis: in cases where these two sources of authority arguably point in different directions, which one should have a greater claim to our allegiance?

Originalism—interpreting the text in accordance with the understanding of the Framers—is arguably the more fundamental principle. Insofar as our legal system rests on legal positivism or the command theory of law—which it largely does, at least with respect to enacted law—then the Constitution must be regarded as the supreme command of the ultimate lawgiver, the People. When asking what command the People have given, it makes sense to ask what the People understood the provisions of the Constitution to mean at the time they were adopted. Thus, when questions of first impression arise, or disputes erupt about whether particular precedents should be overruled, nearly all Justices seem to regard evidence of original understanding as being relevant to resolving the issue.¹

* Charles Keller Beekman Professor, Columbia Law School.

1. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) (“Although there are very few strict originalists, virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.”).

Yet if originalism has a strong claim to superiority in theory, *stare decisis*—resolving cases in accordance with the previous judgments of courts that have considered the question—undoubtedly dominates in terms of practice. By some counts, 80 percent of the justificatory arguments in Supreme Court constitutional law opinions are grounded in precedent,² and a very large proportion of cases are decided without any argument based on the text of the Constitution or any reference to historical evidence bearing on original understanding. I would add that no Supreme Court Justice since the days of John Marshall has been able to write constitutional law opinions without giving substantial weight to precedent—and this includes all of the current Justices, no matter how committed they may be in the abstract to originalism.³

Thus, both originalism and *stare decisis* are important to our constitutional system. The relevant question is which way we should tilt in cases of doubt. Simplifying a bit, the question of tilt can be reduced to how strong a version of *stare decisis* the Justices should apply in constitutional cases. Should the Justices embrace a weak theory of precedent, regarding prior judgments as presumptively correct but subject to overruling based on a demonstration of error? Or should the Justices adopt a strong theory of precedent, regarding prior judgments as legally binding and subject to overruling only on a showing of some special justification beyond mere error—such as a demonstration that the precedent has become unworkable or that it conflicts with other precedent?⁴

2. See Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567 (1991). Based on a paragraph-by-paragraph analysis of all constitutional law opinions of Justices Rehnquist and Brennan over a ten year period, the authors report that both Justices relied on arguments from precedent more than 80 percent of the time in majority opinions (somewhat less in nonmajority opinions). *Id.* at 594, Table 3. Textual, historical, and structural arguments accounted for less than 10 percent of the argument in Rehnquist majority opinions; just over 6 percent in Brennan majority opinions. *Id.* Since Rehnquist and Brennan were outliers on the Court during this period, both in terms of their substantive constitutional views and their professed interpretive theories, presumably the opinions of more centrist, pragmatically-oriented Justices rely on precedent to at least an equal degree.

3. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 582–83 (2001).

4. Philosophically-inclined legal scholars tend to draw a sharp distinction between weak and strong versions of precedent, the key point of differentiation being whether the decision maker adheres to precedent notwithstanding a conviction that it is otherwise in error. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 592–93 (1987). Although I follow this convention here, I am not sure that this sharp distinction accurately describes judicial practice. Instead, judicial practice seems to range over a spectrum from

In this essay, I argue that adopting a strong theory of precedent in constitutional law would have at least one consequence that I regard as desirable: it would promote judicial restraint. This is not, to be sure, the only relevant value by which to evaluate the choice.⁵ There are obviously other factors to consider, such as the alleged need to encourage “flexibility” in the interpretation of the Constitution given the difficulty of amending it.⁶ But judicial restraint is the only value I will focus on here, leaving the more complete (and complicated) weighing of pros and cons for another day.

In arguing for a strong theory of precedent on grounds of judicial restraint, I recognize that I am staking out an idiosyncratic position. 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. Gary Lawson and Michael Paulsen, for example, have argued that precedent should always give way to a showing of inconsistency with the original meaning of the Constitution.⁷ Randy Barnett and Steve Calabresi, although adopting more nuanced positions, are sympathetic with this view.⁸ In contrast, defenders of a precedent-based approach, such as David Strauss, are more likely to be liberals.⁹ To some extent, I suspect these positions have been

giving no weight to precedent to giving it conclusive authority, depending on context and the proclivities of the individual judge. For purposes of the present essay, however, nothing turns on whether precedent-following behavior is better characterized by a dichotomy or by a spectrum. My claim is simply that the further one pushes the Justices of the Supreme Court toward the “binding” pole with regard to constitutional precedent, the more restrained the Court will become.

5. In a previous essay, I argued that precedent-following is superior to originalism when assessed against a range of values embraced by conservatives. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509 (1996). Although there is overlap in the arguments, some of the values considered there—such as skepticism about using human reason to order society—are not considered here.

6. The argument that constitutional law requires a weak theory of precedent in order to permit constitutional change can be traced to Justice Brandeis’s dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–11 (1932). Brandeis, of course, wanted to encourage the Court to overrule decisions giving constitutional protection to contract and property rights, in order to facilitate more aggressive government intervention in the economy.

7. 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 Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257 (2005); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311 (2005).

9. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); see also Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4,

shaped by controversies over particular precedents, most notably *Roe v. Wade*,¹⁰ and by the direction a decision overruling these controversial precedents would likely take, given the current composition of the Supreme Court. My claim is that, abstracting away from these controversies and contingencies about the political values of the current Court, someone who believes in judicial restraint should favor a strong theory of precedent, at least in constitutional law.

My remarks are divided into three parts. I will first define what I mean by judicial restraint and set forth some reasons why it is a good thing. Then I will offer some thoughts as to why, in theory, a strong theory of precedent is more likely to lead to judicial restraint than a weak theory of precedent. Finally, I will offer some casual empirical evidence that I think supports the claimed relationship between the theory of precedent and judicial restraint.

II. THE VALUE OF JUDICIAL RESTRAINT

Judicial restraint is a contestable concept open to a variety of definitions.¹¹ It is important to define the term so as to avoid rendering the argument circular. Sometimes judicial restraint is defined to mean fidelity to the original meaning of the Constitution.¹² If this is what judicial restraint means, then obviously originalism—and only originalism—promotes judicial restraint. Other times judicial restraint is defined to mean fidelity to prior precedent.¹³ If that is what judicial restraint means, then obviously *stare decisis*—and only *stare decisis*—promotes judicial restraint.

As I use the term, judicial restraint refers to a style of judging that produces the fewest surprises. Restrained judges render decisions that conform to what an experienced lawyer, familiar with the facts of the case and the relevant legal authorities,

37–41 (2003); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J. L. & PUB. POL'Y 67 (1988).

10. 410 U.S. 113 (1973).

11. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 304–34 (1996); Ernest A. Young, *Judicial Activism and Conservative Politics*, 72 U. COLO. L. REV. 1139, 1144–74 (2002).

12. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 52 (2001) (noting that “if one believes in the determinacy of the underlying legal texts” then judicial restraint may mean “fidelity to the texts themselves.”).

13. See Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1178 n. 320 (1995), cited in Nelson, *supra* note 12, at 51.

would counsel a client would be the most likely outcome. A restrained judge, in this sense, is not necessarily deferential to other political institutions. A restrained judge is simply a highly predictable judge, and this may include being predictably non-deferential to other institutions. For example, suppose a State were to enact a law punishing persons who spit on the American flag. Since the U.S. Supreme Court has consistently struck down flag desecration laws,¹⁴ an experienced lawyer would predict that the flag-spitting law would also be invalidated. A restrained judge would reach the same result, even though this involves invalidating a democratically-enacted statute, and hence in this sense entails imposing the judicial will against the wishes of other political institutions.¹⁵

Defining judicial restraint in terms of predictability is not circular in terms of whether originalism or precedent-following is more likely to lead to restraint. Restraint in this sense simply requires that the judge adhere to whatever method produces the most easily-predicted results. If originalism is the best predictor, then the restrained judge would use originalism; if the tenets of socialism are the best predictor, then the judge would follow the tenets of socialism, and so forth. In other words, the value to be maximized—judicial restraint in the sense of a minimum of surprises—does not logically entail any particular methodology; the question of which methodology produces the most restraint is contingent upon other features of the legal system.

If judicial restraint means predictability, then restrained judges are plodders, not innovators. They are long on diligence, and short on imagination. They are utterly conventional and boring. How can something so dull be a good thing?

One reason should immediately spring to mind: In a democracy, innovation in law and policy is supposed to come from officials elected by the People, not from unelected judges. The tension between democracy and judicial activism has been rehearsed so endlessly in the literature that it is virtually as bor-

14. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

15. Both Posner and Young, *supra* note 11, prefer definitions of judicial restraint that stress a court's willingness to subordinate its value preferences to those of other governmental institutions. Although my definition is different, I would note that the more predictable judicial decisions become, the more this tends to enhance the power of other political institutions, because parties seeking change will have to turn to other institutions to obtain it. In this sense, judicial predictability may be the best guarantor that courts remain subordinate to other political institutions.

ing as judicial restraint itself.¹⁶ In an attempt to be original, I would explain the connection between judicial restraint and democracy in the following way. If judges are restrained, that is, if they adhere to the jurisprudence of no surprises, then the proponents of social change through law will have to look elsewhere in order to achieve their reforms. The logical place for them to look is to elected politicians—Congress and the President. Judicial restraint changes the payoffs to interest groups to seeking legal change through litigation—and it does so in a way that channels pressure for legal change to electorally accountable institutions.¹⁷ In so doing, it reinforces the basic theory on which our political system is grounded.

A second reason why judicial restraint is a good thing is that it protects expectations and reduces retroactivity in legal decision making. Legal change is not ruled out. The Constitution can be amended, statutes can be enacted, new administrative regulations can be promulgated. But these sorts of changes occur prospectively, allowing individuals to adjust their behavior before they take effect. If legal change is prospective, and courts fore-swear legal change through litigation, then individuals can be confident the law applied by courts will be the same as the law on the books. We tend to forget how liberating this kind of security of expectation is. As the experience of many former communist or developing countries trying to develop a rule of law tradition reminds us, uncertainty about how the courts will apply the law can chill dissent and make it difficult to engage in long-ranging planning and investment for the future.

A third reason why judicial restraint is a good thing is that it promotes equal treatment, in terms of treating similarly-situated litigants similarly. The jurisprudence of no surprises means that today's litigant is treated the same way yesterday's litigant was treated—for good or ill. Obviously, if both are treated ill there is reason to complain about the legal system. But insofar as we regard equal treatment as an element of fairness that exists inde-

16. A great deal of modern constitutional law scholarship consists of attempts to explain away the so-called "countermajoritarian difficulty," that is, to explain why, notwithstanding our commitment to rule by the People, it is okay for judges to be innovators in matters of social policy. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (seeking to explain how the innovations of the Warren Court were consistent with a basic commitment to democracy).

17. See Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y. 219 (1997) (discussing variables that influence interest group choice whether to seek change through judicial innovation or conventional legislative action).

pendent of the substantive justice of the law, judicial restraint promotes fairness. And remember—there are ways to change the law other than judicial innovation.

Finally, and related to the last point, judicial restraint helps judges resist pressure to bend the rules in ways that operate to the disadvantage of unpopular claimants or minorities. Justice Scalia made an analogous argument in his famous article about the importance of a jurisprudence of rules,¹⁸ but I think the point carries even more force when expressed in terms of judicial restraint. When we look at the problems of emerging democracies, we can see that two of the most important functions courts can perform are resolving legal disputes in an impartial manner, and assuring that executive officials adhere to the law. A restrained judiciary is in a much stronger position to perform these functions, because such a judiciary can claim to be doing no more or less than what it always does—enforcing established legal principles. Moreover, a restrained judiciary will not have dissipated any of its institutional capital through the pursuit of controversial social reforms. To the extent that the maintenance of these rule of law values is probably the most important contribution the judiciary makes to society, this gives us a further reason to prefer judicial restraint.

In sum, judicial restraint means judicial predictability. Judicial predictability is a good thing because it promotes the use of democratically accountable institutions in achieving legal change, protects expectations, promotes equality of treatment among litigants, and makes it easier for judges to protect unpopular litigants.

III. STARE DECISIS AND JUDICIAL RESTRAINT

How do originalism and stare decisis compare in terms of achieving these benefits of judicial restraint? As always, the judgment must be made in comparative terms. No interpretative approach will be perfectly constraining.¹⁹ Arguments from text and original understanding can be manipulated, by emphasizing some sources rather than others, and by varying the level of generality at which the original understanding is sought. Arguments from precedent can be manipulated, by emphasizing some

18. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

19. See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 768 (2000).

precedents or language in precedents rather than others, and by varying the level of generality at which the precedent is interpreted. How then do we choose? Let me briefly offer some reasons why, at least in theory, a strong theory of precedent—and a correspondingly reduced role for originalist reasoning—will result in more judicial restraint, at least in the context of modern American constitutional law.²⁰

First, precedent provides a thicker body of norms with which to resolve constitutional disputes than originalism does. Take virtually any constitutional dispute you want on the recent docket of the Supreme Court—whether the Commerce Clause permits Congress to regulate the use of home-grown pot used for medical purposes,²¹ whether the Takings Clause permits property to be condemned solely to promote economic development,²² whether the Cruel and Unusual Punishment Clause permits the execution of juveniles.²³ A Court that tried to resolve these issues solely in accordance with the text and original understanding would have much less “stuff” to go on than a Court that tried to resolve these issues by examining precedent. The thinness of the set of relevant norms would make the outcome less predictable. In fact, if we could somehow conceive of a Court that tried to resolve each of these sorts of issues completely *de novo*, looking only at text and original understanding, the range of possible outcomes would be enormous. This is not to say that there is no difficulty in predicting the outcome once precedent is introduced. But the difficulty goes down. And if we posit that the Court would apply a strong theory of precedent, the difficulty of prediction goes down even further.

The thickness of norms under a system of precedent is of course largely a contingent variable, depending on the age of the text in question and the volume of litigation it has generated since it was adopted. For the Marshall Court, attempting to construe the Commerce Clause or the Contracts Clause, precedent was thin if not nonexistent. The text of the Constitution and the common understanding of the Framers’ purposes may have sup-

20. I should emphasize that my argument rests on certain contingent features of American constitutional law. It is quite possible that with respect to other judicial functions, such as statutory interpretation or judicial review of agency action, decisional techniques other than precedent-following would produce greater judicial restraint. Deferring to longstanding and consistently held agency interpretations of statutes would be an example.

21. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

22. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

23. *Roper v. Simmons*, 543 U.S. 551 (2005).

plied a thicker body of norms. Today, however, the ratio is clearly reversed. Evidence of original understanding has advanced to some degree, with additional historical researches. But this is probably more than offset by the fact that the Justices have a very uneven sense of the Framers' purposes, since they are so remote in time. On the other hand, we now have nearly two hundred years worth of precedent construing provisions like the Commerce Clause and the Contracts Clause, and similar volumes of precedent for most other constitutional clauses litigated with any degree of frequency. These precedents cover a great many issues that the original understanding materials do not address at all, at least not with any degree of specificity. Thus, it is much more likely that guidance will be found in precedent than in originalist materials.²⁴

Second, precedent is more accessible to lawyers and judges than evidence of original understanding. Not only is there more of it, it is easier to find. Supreme Court precedents are highly accessible. A full set of U.S. Reports resides in the chambers of every federal judge in the country, and is easily accessed by most state judges and practicing lawyers. These decisions have long been headnoted and indexed in various ways and collected in commentaries. Today of course they are on line and fully searchable electronically.²⁵ The constitutional text is likewise highly accessible. But other evidence of original understanding is much less so. Records of the debates at the Convention were not published until more than half a century after the Constitution was ratified.²⁶ And the debates at the ratifying conventions were often not recorded at all. For example, there are no records of the ratification debates for the Bill of Rights.²⁷

24. Studies by political scientists tend to be skeptical about the constraining force of precedent. See, e.g., SAUL BRENNER & HAROLD J. SPAETH, *STARE DECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992* (1995). But these studies may be misleading in their focus on overruling decisions, which represent a tiny fraction of the Court's workproduct. Jack Knight and Lee Epstein point out that precedent is the dominant mode of justification in judicial opinions, and that the Justices spend significant amounts of time discussing precedents at their conferences on cases. JACK KNIGHT & LEE EPSTEIN, *THE CHOICES JUSTICES MAKE 170-72* (1998). These behaviors are hard to explain if precedents are not perceived as having constraining force.

25. See M. ETHAN KATSCH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* (1989).

26. Madison's "Notes" were not published until 1840. See *NOTES OF DEBATES IN THE FEDERAL CONVENTIONS OF 1787 REPORTED BY JAMES MADISON XXIV* (Adrienne Koch ed. 1966). The first publication of a journal reporting on debates at the Convention occurred in 1819. *Id.* at viii.

27. DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 243 (1990).

Closely related to accessibility is the critical problem of how to define what counts as authority under a system of precedent as opposed to a system based on original understanding. Precedent presents some familiar problems in this regard, such as how to distinguish between holding and dicta. But there is no ambiguity about what constitutes the outer limits of the database—the full text of all published opinions of the Supreme Court. With respect to originalism, in contrast, once we leave the relatively sparse text of the Constitution, there is no clear convention limiting what sorts of evidence count as authoritative. For example, legal scholars who debate the original understanding of the Religion Clauses of the First Amendment canvass an enormous range of historical material, including contemporary statutes and constitutions, contemporary judicial decisions construing these enactments, private correspondence, philosophical and political tracts, and sermons.²⁸ Much of this material is available only in local historical archives. It is all potentially relevant in attempting to fix the original understanding of these provisions, but most of it is not very accessible. Indeed, some of it has not yet been discovered.

Again, we can see that the accessibility point is a contingent one. One can imagine a world in which only judgments of the Supreme Court opinions were published, not opinions, and where, conversely, great care was lavished on transcribing records of constitutional debates and distributing them to every courthouse in the nation. Similarly, one can imagine a world in which courts and lawyers spent little time determining how to glean what is authoritative in judicial opinions, and a great deal of time spelling out what is most authoritative in ascertaining original intent. Thus, we can imagine living in a world in which evidence of original understanding is more accessible than evidence about precedent. But we do not live in such a world. The accessibility gap is probably narrowing a bit, as additional archival material bearing on original understanding is reproduced and made available on line.²⁹ Nevertheless, as almost any lawyer or judge will attest, it is far easier to research a constitutional question using precedent than to attempt to recreate the original understanding.³⁰ This too makes it easier to rule in accordance with

28. See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

29. See, e.g., <http://press-pubs.uchicago.edu/founders/> (online edition of *The Founders' Constitution* (edited by Philip Kurland & Ralph Lerner)).

30. A particularly telling example is provided by Justice Scalia's concurring opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517–18 (1996). Justice Scalia opined

precedent than to try to rule in accordance with the original understanding.

Third, the interpretation and application of precedent is more compatible with the skill set of the typical judge than is the interpretation and application of evidence of original understanding. Judges are trained in law, and law training, at least in this country, is grounded in the study of common law and the common law method. To a significant degree—and I recognize that this cuts against my thesis—this is training in the art of manipulation. Students are taught how to read precedents broadly and narrowly, how to exact principles not expressly stated, how to limit precedents to their facts. But training in the common law method is also—and this is less recognized—a socialization process that allows the lawyer to recognize the difference between propositions that are settled, and hence are not eligible for manipulation, and propositions that remain unsettled, and hence open to divergent approaches. There is, lurking in the background, a conservative bias in favor of preserving what is settled, and limiting manipulation to the margins.³¹ In this way the common law method, if it does not generate anything like perfect judicial restraint, at least produces a style of decisionmaking that is more restrained than some imaginable alternatives.

Originalism, in contrast, if it is to be done well, requires a skill set that is beyond the ken of most lawyers and judges. Part of this reflects the generally dismal performance of American lawyers in matters of textual interpretation. Textual exegesis is poorly taught in American law schools. Perhaps as a consequence, American lawyers have difficulty reading statutes and regulations carefully. When they are required to interpret these texts, they frequently revert to dogmatic assertions about plain meaning, wooden applications of various canons of interpretation, and opportunistic culling of legislative history materials for supporting quotations. Very few lawyers or judges have the temperament or training to engage in a carefully considered struc-

that the proper degree of protection for commercial speech under the First Amendment should be determined by “the long accepted practices of the American people.” *Id.* at 517. In order to determine this, he said, it would be particularly relevant to know what the state legislative practices were toward commercial speech at the time of the adoption of the First Amendment and the Fourteenth Amendment. Unfortunately, he lamented, “[t]he parties and their *amici* provide no evidence on these points.” *Id.* at 518. Instead, they discussed Supreme Court precedents. Evidently Justice Scalia did not have the time or energy to undertake to do the historical research himself, either.

31. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 766–67 (1988).

tural analysis of a text. Most cannot go beyond a clause-bound approach to textual interpretation, focusing on particular words and phrases rather than larger inferences about purpose and meaning.

Even more problematically, insofar as originalist textual interpretation is the alternative to precedent, and insofar as the text is relatively old—like the text of the U.S. Constitution—even more severe professional disabilities come into play. Very few lawyers or judges have the skills of a professional historian seeking to imaginatively reconstruct the past. These skills include great patience and persistence in gathering all relevant archival material, and the ability to suspend judgment until having fully immersed oneself in this material. The project of originalism requires even more. Once the past is imaginatively reconstructed, it is necessary to project the meanings gleaned from this exercise forward to new issues and factual circumstances never contemplated by the Framers.³² The pitfalls here and many and obvious.

I am not one who believes that the project of originalism is incoherent. It is simply very difficult, and very alien to the skill set of the typical lawyer and judge in America. To the extent we ask the Justices to tilt more toward originalism and away from precedent, we are asking them to perform a task that they are incompetent to do particularly well. This in turn would likely result in greater variability in outcomes, more room for manipulation than even precedent provides, and hence less restraint.

IV. EMPIRICISM ANYONE?

Theory is one thing, proof another. It is obviously difficult to test a proposition such as the one I am contending for here: that a strong theory of precedent is more likely to produce judicial restraint. But there are several sources of comparative evidence that may shed light on the question. I will provide a suggestive rather than an exhaustive account of these sources, and offer my own impressions of what a more complete investigation would reveal.

First, it would be instructive to compare the behavior of the U.S. Supreme Court with courts of last resort in other legal sys-

32. Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993); Robert W. Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 *S. CAL. L. REV.* 647 (1985).

tems. Comparative law scholars have occasionally examined the proclivities of different national courts toward activism. These efforts invariably rank the U.S. Supreme Court as world champion of activists.³³ There are no doubt a variety of explanations for this, including the heavy emphasis on rights in American culture, the opportunities for forum shopping created by federalism, various types of subsidies provided to groups seeking to secure social change through litigation, and the absence of a professional career path for American judges. But it is plausible that a weak theory of *stare decisis* also plays a role. A weak adherence to precedent invites parties seeking social reform to invest in constitutional litigation. If they succeed often enough in enlisting courts to adopt new social policies, the pipeline of litigation will continually be refurbished with new legal theories, sponsored by both the left and the right.

I suspect, but cannot prove, that a more complete survey of courts of last resort would show a strong correlation between the respect for precedent and proclivity toward activism. Certainly, the contrast between the U.S. Supreme Court and the appellate courts of England suggests such a relationship. The U.S. Supreme Court employs a weak theory of precedent in constitutional law, and is notoriously activist. English courts, in contrast, follow a strong theory of *stare decisis*, and are generally regarded as highly restrained. Judge Richard Posner has observed the relationship between “the modesty of the English judges” and their commitment to *stare decisis*.³⁴ He explains the relationship in jurisprudential terms. For English judges, precedent is law, and hence to overturn precedent is to engage in inappropriate judicial “legislation.” Whatever the explanation, the hide-bound attitude of English judges helps to account for a much lower level of litigation in England relative to the U.S.

Other comparisons suggest a more complex relationship between precedent-following and activism. The Canadian Supreme Court, for example, has historically been more precedent-minded than the U.S. Supreme Court. But the Canadian Court, in recent years, has thrown its support behind a “rights revolution” similar to the innovations sponsored by the Warren and

33. See, e.g., *JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE* 2 (Kenneth M. Holland ed., 1991) (providing an overview of judicial activism in 11 countries and listing the United States courts being the “most active”).

34. RICHARD A. POSNER, *LAW AND LEGAL THEORY IN THE UK AND THE USA* 90 (1996).

Burger Courts in the U.S.³⁵ A major cause of this change was the adoption of the Charter of Rights and Freedoms in 1982, which set forth a detailed menu of individual constitutional rights and encouraged judicial enforcement of those rights, including invalidation of nonconforming legislation. In effect, Canadians voted for judicial activism, which means that the adventurous turn of its Supreme Court cannot be criticized on legitimacy grounds. It is simply carrying out the wishes of its People. In this respect, Canada is following a world-wide trend favoring increased judicial involvement in setting and revising social policy—a trend which may suggest that judicial restraint, however important in theory, may be a value with a troubled future.³⁶

Second, it would be revealing to compare the behavior of the U.S. Supreme Court in constitutional cases with its behavior in statutory construction cases. The Court generally follows a weak theory of precedent in constitutional cases, but at least purports to follow a strong theory of precedent with respect to statutory decisions. As Thomas Lee has shown, this “two-tier” approach to precedent is an innovation of the twentieth century, and rests on premises that are questionable at best.³⁷ Nevertheless, the distinction is now well-entrenched. Moreover, it apparently has real consequences: Beginning with the Hughes Court (1930-41), the Court has overruled many more constitutional precedents than statutory precedents, by a ratio of about 3 to 1.³⁸

Does the Court’s weak theory of precedent in constitutional cases render it more activist, in the sense of being less predictable, in constitutional matters relative to statutory interpreta-

35. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 171–96 (1998).

36. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

37. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703–33 (1999). The weak theory of precedent in constitutional law has been justified by the judicial oath to uphold the Constitution and by the need for “flexibility” in interpretation, given the difficulty of amending the Constitution. *Id.* at 710–11; 728–29. The oath argument overlooks the fact that, through the Supremacy Clause, judges are also bound to uphold statutes and treaties. The flexibility argument overlooks the fact that the Constitution was intentionally made difficult to amend, rendering judicial amendment through reinterpretation an evasion of a deliberate design principle. The strong theory of precedent in statutory law is justified in part by the assumption that congressional failure to overrule the precedent constitutes an implicit ratification. *Id.* at 732–33. This overlooks the familiar objection that congressional failure to act is ordinarily not given the force of law because this is inconsistent with the bicameral and presentment requirements for the enactment of legislation.

38. See Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263 (1992) (Table 1).

tion? Although it would be difficult to answer this question with rigorous proof, there is little doubt in my mind that the answer is yes. The major innovations associated with the Supreme Court—such as outlawing segregation, mandating one person one vote in legislative districting, restricting gender discrimination, limiting the use of the death penalty, creating rights to abortion and to engage in homosexual relations, wiping out governmental efforts to control pornography on the internet—have come in constitutional rulings. It is difficult to think of rulings of equivalent innovation rendered as a matter of statutory interpretation.

To be sure, it is possible that the Court's preference for using the Constitution as a vehicle for innovative policymaking simply reflects its strategic perception that it can "get away with it" when it rules as a matter of constitutional law, whereas innovation in statutory interpretation would be vulnerable to legislative overruling. To the extent this explanation is plausible, the Court's embrace of a weak theory of precedent in constitutional cases may be more the effect, rather than the cause, of its commitment to innovation in constitutional law. I admit there is some force to this analysis. Still, given the evidence that judges behave differently in different cultures and at different levels of the judicial hierarchy, and that these differences have something to do with the judicial attitude toward precedent, it is plausible to think that a judicial commitment to a strong theory of precedent would have some constraining force on judicial willingness to engage in social engineering in constitutional law, at least at the margins.

Third, it is worth comparing the constitutional jurisprudence of the Supreme Court and the lower courts. The Supreme Court follows a weak theory with regard to its own constitutional precedents, whereas the lower courts are regarded as being absolutely bound by these precedents.³⁹ Sometimes this is referred to as the contrast between horizontal and vertical stare decisis. In our system of constitutional law, horizontal stare decisis is weak and vertical stare decisis is strong. This provides another point of comparison in evaluating the effects of different degrees of strength of precedent-following behavior.

39. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). See also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

One interesting contrast between the Supreme Court and the lower courts as constitutional interpreters concerns the range of authorities they rely upon. The Supreme Court, as we have seen, relies primarily on its own precedent in resolving constitutional cases. But it frequently supplements consideration of precedent with other types of authority, such as social policy, precedent from other legal systems, and occasionally even original understanding. Lower courts, in contrast, resolve constitutional cases almost exclusively in terms of applicable Supreme Court precedent. This contrast in the range of authorities considered is consistent with what we would expect, given the different theories of precedent in each area. Under a weak theory of precedent, it is always possible that some other types of authority will indicate that a precedent is in error and should be overruled. Thus, everything that is logically relevant should be considered. Under a strong theory of precedent, if there is precedent on point, that generally ends the matter. There is no point in going further.

The fact that lower courts rarely venture beyond Supreme Court precedent provides some inferential support for the supposition that a strong theory of precedent is at least potentially restraining. If Supreme Court precedent is regarded as sufficiently binding, that body of norms is generally thick enough and accessible enough so that there is little or no need to supplement it with other sources of authority. It is also plausible to suppose that decisions rendered following one interpretative methodology will be more predictable than decisions rendered using multiple methodologies.

Empirical support for these suppositions is provided by the observation, which again I believe to be true but again cannot rigorously prove, that relatively few constitutional innovations originate in the lower courts. Most innovations come from the Supreme Court itself. Certainly this is true of the desegregation decisions, the one-person, one-vote decisions, and the abortion decisions. Moreover, lower courts are often reluctant to expand upon innovative Supreme Court decisions decided by close margins, until they are confident that the Court intends to adhere to the innovation in the future.⁴⁰ Since the Supreme Court and the

40. Commentators have observed this behavior with respect to the Court's federalism decisions of the 1990s, most of which were adopted in 5-4 rulings. For example, the initial reaction by the lower courts to *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zone Act as exceeding congressional power under the Commerce Clause), was quite cautious. See Glenn H. Reynolds & Brandon P. Denning,

lower courts are looking at the same body of Supreme Court precedent, these observations suggest that the stronger the theory of precedent, the greater the reluctance of courts to engage in constitutional innovation.

Of course, there may be other reasons, like selection effects, that also explain the relative degree of innovation in the two court systems. The Supreme Court considers only the most difficult constitutional questions, as to which lower courts are often in disagreement. But I doubt this is the entire explanation. Constitutional law is a vast enterprise today, and there are a great many specific issues that have been addressed only by lower courts, not the Supreme Court. In resolving these issues, lower courts extrapolate from Supreme Court decisions, yet they do so in a way that generally attracts little attention, certainly not enough to trigger Supreme Court review. In other words, lower courts practice constitutional law in a more restrained, no-surprises fashion than does the Supreme Court itself. This in turn suggests that if the Supreme Court adopted a stronger theory of stare decisis, it too would become more restrained in its constitutional decisions.

CONCLUSION

Let me conclude with a final observation, which is that law professors are probably not the optimal group to arbitrate the question of whether courts should tilt more toward originalism or stare decisis in cases of constitutional doubt. Judicial restraint is greatly undervalued in legal academia, relative to the significance it is given by most ordinary citizens. One reason is that judicial restraint is boring. Academics overwhelmingly prefer dashing and innovative judges—judges who remake institutions, declare new rights, transform social values—if only because this style of judging is much more interesting. Another reason is institutional interest. Activist judging exalts the role of manipulators of legal arguments—including of course legal academics—in the political system. Judicial restraint, in contrast, conceives of lawyering as a craft rather than as social engineering, which puts

Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 WISC. L. REV. 369; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 712-729 (1995). Only after *Lopez* was reaffirmed did lower courts begin to venture forth with selective invalidations of federal statutes. See, e.g., *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) (holding that Congress lacks power under Commerce Clause to prohibit possession of homemade machine gun).

the manipulators of legal argument in a much less heady position.

Nonlawyers would therefore be well advised to pay little heed to what legal academics have to say about the correct style of judging. They should instead insist on a judicial selection process that gives maximum weight to picking the most boring possible individuals to serve on our courts. Plodding, precedent-following judges may exasperate academics. But courts filled with plodders will give strength to rule of law values like protecting expectations and assuring equality of treatment among litigants. A Supreme Court filled with plodders could do even more—it could help revitalize our beleaguered democracy.