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THE CONSERVATIVE CASE FOR PRECEDENT

THOMAS W. MERRILL*

This Essay offers some reasons why conservatives should favor giving great weight to precedent in constitutional adjudication. Let me start with some preliminary observations about the debate between originalism and precedent more generally.

First, the debate has been dominated to far too great an extent by specific cases, *Roe v. Wade*¹ in particular. It is distressing that the only issue that has seemed to matter in recent confirmation hearings is what a nominee thinks about *Roe v. Wade*. Similarly, in the precedent versus originalism debate, much of the discussion—even in the law reviews—is animated by what commentators think about *Roe v. Wade*. So, if you think *Roe v. Wade* was an illegitimate usurpation of power by the judiciary, and you want to overrule it, it somehow follows that you think all constitutional law should be based on something other than precedent. On the other hand, if you like *Roe v. Wade*, and you want to reaffirm it, somehow all precedent must be a good thing. This is an extraordinarily myopic way of thinking about the problem. Those who regard themselves as conservatives and embrace some of the values that David Strauss mentions—the rule of law, stability and predictability in the law, judicial restraint, the belief that social policy decisions should be made by elected representatives of the people rather than by the judges²—should not have their views on precedent versus originalism driven by one case.

Second, we cannot resolve the debate by adopting the conceptual apparatus of one school or the other, and by pointing out that the rival approach has no place within the conceptual apparatus we adopt. To a large extent, originalism and precedent reside in parallel universes that do not intersect. The case for originalism starts with legal positivism, the idea that only

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1. 410 U.S. 113 (1973).

2. See David Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008).

enacted law is the law of the land.³ Starting from this assumption, it follows that when there is an ambiguity in the law, we should try to resolve it by determining the meaning of the law-giver. Such an approach naturally leads to looking at original sources for interpreting the law. As Steven Calabresi implicitly frames the question, "Does originalism say that precedent can trump the enacted law?"⁴ The answer, of course, is "No, it does not." If we start from originalist premises, we do not leave much room for precedent or *stare decisis*.

Conversely, if one starts from the universe of precedent, that universe is founded in the Holmesian observation that the law is, ultimately, the judgments of the courts.⁵ If you adopt this perspective, you say, "Well, what predicts the judgments of courts is the precedents of courts, and therefore precedent is law." So, if we want to know whether or not following precedent is permissible, we find the answer by looking to precedent. And guess what we find? Judges say we ought to follow precedent. So precedent it is. This universe does not leave much space for the Constitution and enacted law. Thus, we have two parallel universes that operate on different planes: the universe of enacted law, and the universe of judge-made law. One cannot reason from the premises of one to oust the other.

The reality is that every Justice, at least since the days of the Marshall Court, has relied to some extent on both originalist reasoning and precedent. Professor Calabresi is absolutely correct that when moments of high drama and crisis arise, the Justices tend to revert to the constitutional text and to the statements of the Framers.⁶ On the other hand, studies of the Justices have indicated that approximately eighty percent or more of the authorities they cite in their constitutional opinions are precedents of the Supreme Court.⁷ The most careful study examined the opinions of Justices Rehnquist and Brennan, who were the prototypical ideological outliers at the time the study was conducted.⁸ Presumably, centrist judges rely on precedent to an

3. See, e.g., Steven Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 948 (2008).

4. *Id.*

5. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61, 61 (1897).

6. See Calabresi, *supra* note 3, at 951-55.

7. 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, 583, 594 (1991).

8. *Id.* at 594.

even greater extent. Even Justices Scalia and Thomas routinely rely on precedent. To some extent, then, precedent also has to be considered in the equation.

A final preliminary point is that the ultimate question for conservatives or people who value the rule of law is not so much what theory a judge applies, but rather the attitude with which the judge approaches the task of deciding cases. We want our judges to apply the law in good faith, seeking the best answer that the law provides, rather than attempting to advance their personal policy preferences by manipulating legal authorities to reach certain predetermined ends. It is very hard to legislate this attitude.

Lawyers are familiar with these competing approaches because clients sometimes ask lawyers to tell them what the law is on some point, so the client can correct or guide her behavior accordingly. When the lawyer gets such a request for fair and impartial advice, he adopts one approach to analyzing legal authorities. On other occasions, the lawyer may be asked to defend a position a client has already taken, as by filing a brief in court. In this situation, the lawyer is in the position of being an advocate, and so adopts a very different mode of spinning legal authorities. Judges ideally should adopt the first or investigatory mode in deciding cases, not the second or spinning mode. That is, judges should seek to determine what the law is, not what it should be. But it is very hard to prescribe this attitude by using any particular technique of decision making.

Having said that, I think that technique does matter at the margins; the key issue here in terms of precedent versus originalism is whether the courts should adopt a strong theory of precedent in constitutional law cases—as they already have done in cases of statutory interpretation⁹—or whether they should adopt a weak theory. Steven Calabresi and Akhil Amar argue correctly that the Supreme Court is speaking with a forked tongue when the Justices profess to have a strong theory of precedent in constitutional law.¹⁰ At least since *Casey* they have in fact employed a weak theory of precedent. For a number of reasons, a strong theory of precedent would be better. Professor Strauss has given several excellent reasons. In the

9. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation . . .”).

10. See Calabresi, *supra* note 3, at 951; Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL’Y 961 (2008).

remainder of this Essay I will offer four other points, designed to appeal particularly to conservatives.

First, the legal norms that would apply in resolving disputed questions of law are much thicker in the universe of precedent than they are in the world of originalism. The Constitution itself is notoriously cryptic. It must be supplemented with some other source of law. At this stage in our legal evolution, precedent provides more law to draw upon in supplementing the language of the Constitution than do originalist sources.

Consider the question whether Congress could ban advertisements for pharmaceutical drugs in newspapers and magazines. The originalist answer would be extremely indeterminate, because there is virtually nothing in the original materials that speaks to the matter. If we turn to Supreme Court case law, there is still some room for argument, but the norms are much thicker, and the likelihood that the answer is one on which people could reach consensus is much greater.

Another point is accessibility. In order for law to have an impact on behavior, it must be accessible to legal actors other than Supreme Court Justices. The precedents of the Supreme Court are published in the United States Reports and similar volumes. They are online; they have been indexed; they are easily searchable; every lawyer and judge in the country can readily get her or his hands on them. The materials that bear on original understanding are vast, often inaccessible, and in some cases only now being discovered. People frequently find new documents that might bear on original understanding. As a result, it is much harder for us to get our hands on those materials. It follows that a world in which the Constitution was interpreted using originalist sources rather than precedent would be one in which the behavior of legal actors would be less constrained by law.

Third, as Professor Strauss suggested, the style of reasoning from precedent is much more compatible with the skill set of the typical American lawyer or judge than is reasoning from original materials.¹¹ This reason is contingent on the nature of the legal system; if we had different judges or if we taught them differently in law schools, they might become more competent at reasoning from such materials. The reality, however, is that lawyers and judges are much more comfortable dealing with precedent. It follows that decisions reached by following precedent are

11. See Strauss, *supra* note 2, at 970–71.

more likely to be comprehended and predicted than decisions reached using original materials would be.

The last point is, again, a kind of contingent, pragmatic point relating to the method by which judges and Justices are picked in this country. Many lawyers and legal scholars would like to see a process by which judges are selected because of their legal knowledge, legal skills, and judicial temperament, not because of their ideology or particular political beliefs. Which style of constitutional reasoning over time is more likely to push us to a system in which we pick judges based on their competence and their legal abilities, and which is more likely to produce tempestuous proceedings in which we pick people based on ideological considerations?

Here, I think the key variable is the capacity of different legal methods to produce change in the law. If the Court were to commit to a strong theory of precedent in constitutional law, it would reduce the prospects for change through constitutional interpretation. A strong theory of precedent would lock in some decisions that conservatives do not like. It would also lock in some decisions that they do like. Nonetheless, its greatest impact would be to make the Court a less attractive forum for achieving social policy outcomes through litigation. Consequently, the interest groups that are trying to get their various positions advanced through the courts would decide that the courts are not really the best hole in which to go fishing. They would decide that maybe they should try to get some laws passed by legislatures or get their policy preferences adopted by amending the Constitution.

A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy. This in turn would put a premium on legal knowledge and skills, rather than political preferences, in selecting future judges and Justices. The prospect of such a reorientation is reason enough to endorse the strong theory of precedent in constitutional law.