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Conservative or Constitutionalist?

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The persistence of the question posed by the editors of this journal demonstrates that legal conservatives have an identity crisis. In large measure, that crisis is an artifact of the ambiguity in the term "legal conservative." I use the term roughly to mean someone who believes in a variant of original meaning for interpreting constitutions and statutes[1] and who views the common law as a device for securing social coordination within a spontaneous order—all overlaid with a strong respect for the Anglo-American, Rule of Law tradition. As definitions go, this is pretty imprecise. There is no single meaning for original meaning;[2] it is hardly self-evident what it means for the common law to promote social coordination within a spontaneous order;[3] and the rule of law is one of the most slippery concepts in the legal lexicon.[4] Moreover, it is easy to confuse legal conservatism with political or cultural conservatism, even though there is no necessary connection among those positions; some devotees of law and economics, for instance, would be considered conservative by most political standards but may not be legal conservatives.[5]

But even after one wades through these definitional problems, a substantive

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1. In this short essay, I am assuming away a question that normally takes center stage in my scholarship: what does it mean to "believe in" original meaning? Is it a descriptive position about the objective meaning of a document or a normative position about what people ought to do as a matter of political morality? *See generally* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997) (distinguishing positive from normative constitutional theories). My scholarship normally focuses on the former, descriptive enterprise; I try to uncover the meaning of the Constitution and leave it to others to figure out what, if anything, to do with that meaning in the actual course of events. I assume, however, that most readers of this journal believe, for whatever reasons, that the Constitution's meaning has some normative significance, and my aim here is to see how that belief coheres with certain other beliefs often associated with normative constitutionalism.

For the record, I believe that a limited, contingent case can be made for the normative authority of the Constitution, but I do not think that I can make that case with the kind of rigor that is appropriate for academic scholarship. Nor do I think that anyone else in this business can make the case for his or her normative political theory with the necessary rigor; I am (or so I immodestly believe) simply more fastidious than most about keeping legal scholarship in its proper place. *See generally* Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 775-783 (1988); *cf.* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 57 n.16 (1992).

2. *See* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

3. The classic treatment, notable for its lack of transparency, is FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER (1973). For a somewhat different perspective within the same general tradition, *see* BRUNO LEONI, FREEDOM AND THE LAW (3d ed. 1991).

4. *See* Gary Lawson, *A Farewell to Principles*, 82 IOWA L. REV. 893, 899-902 (1997).

5. Richard Posner, for instance, is not a legal conservative along any of the dimensions that I have identified. If Judge Posner is an originalist, he has concealed it very well, and the use of the common law as an engine of social efficiency is no more conservative than is the use of the common law as an engine of social egalitarianism. Oh, for want of a potted plant. By the same token, I defy anyone to identify Raoul Berger as a political or cultural conservative based on his published writings. None of

problem remains that profoundly affects the identity of legal conservatism. The previous generation of giants of legal conservatism—and this includes names such as Berger, Bickel, and Bork—grew up in the shadow of the Warren Court (and the Burger Court that held faith with much of the Warren Court legacy). That generation's battle cry was "judicial activism," in response to an adjudicative approach that viewed judging largely as an exercise in social engineering on behalf of the prejudices of the intellectual elites.[6]

In the wake of that legacy, for many conservatives today, the essence of their legal philosophy remains a *theory of judging* rather than a *theory of interpretation*. To a large extent, modern legal discourse—by conservatives and nonconservatives alike—fails to distinguish questions of judicial role from questions of legal philosophy more generally.

This is understandable in the context of common law theorizing, where the common law is essentially defined by a theory of the judicial role. The common law process is a process of judging, and a normative theory of the common law is effectively a normative theory of judicial behavior. There is, however, less excuse in the constitutional (and statutory) realm for failing to distinguish theories of judicial behavior from theories of interpretation. In the context of constitutional interpretation, for instance, the meaning of the Constitution is one question, while the role (if any) of judges in constitutional adjudication is quite another question. There is a profound difference between criticizing courts for being active and criticizing them for being wrong. Is the problem for legal conservatives active judges or bad judges? Constitutionalism and judicial restraint do not always go hand in hand. Conservatives need to decide where their loyalties lie.

Of course, the dichotomy between activism and constitutionalism only holds up if the Constitution does not *require* a passive judicial role. If the Constitution expressly said, for instance, "There shall be no judicial review; judges must accept constitutional judgments embodied in legislative and executive action," life would be much simpler. (One could debate whether life under such a Constitution would be *better*, but it surely would be simpler.) By the same token, if the Constitution said, "Despite anything else contained in this document, judges can also do whatever they happen to think is a good idea at the

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this is to say that there are not empirically significant overlaps between the various species of conservatism (however any of them are defined), but only that those overlaps are contingent.

6. I chose the word "prejudice" for its descriptive accuracy, not for its pejorative connotations. Moral theorizing in legal scholarship generally starts with conclusions and then reasons backwards. *See* Lawson, *The Ethics of Insider Trading*, *supra* note 1, at 775-783. That is a pretty fair description of a prejudice, even when that prejudice is held by a very smart person. A considered judgment, which has been critically sifted through an iterated process of reflective equilibrium, is still a prejudice unless it results from a foundationally sound argument. And it is a prejudice even if an overwhelming majority of the American legal professoriate agrees with it. To paraphrase Justice Scalia's concurring opinion in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 293 (1990), I see no obvious reason to prefer the moral sense of the legal academic elite to that of the clientele of a randomly selected honky-tonk.

time," there could be no constitutional debate about judicial activism. One could argue, as a normative matter, that such a Constitution was badly written, and one could seek to amend it. But one could not argue that aggressive judicial policymaking, ungrounded in any part of the Constitution except the hypothetical "judicial activism clause," was constitutionally suspect. This would present legal conservatives with a stark choice between fidelity to constitutionalism and fidelity to a theoretical conception of a limited judicial role.

Of course, there are no such "judicial passivism" or "judicial activism" clauses in the real Constitution; there is only Article III's grant of "[t]he judicial Power" to the federal courts.[7] But these examples suggest that one should consider whether the Constitution contains any subtler instructions concerning judicial role. Does anything in the Constitution, for instance, entail or imply that judges should presume, and perhaps even presume strongly, that legislative or executive constitutional judgments are correct?[8] Does the Constitution entail or imply that judges should presume, and perhaps even presume strongly, that prior judicial decisions embodying constitutional judgments are correct?[9] Does the Constitution entail or imply that judges should resolve doubts about constitutional meaning in any particular fashion?

Obviously, answering any of these questions would require separate articles (and probably books). I have elsewhere hinted at the answers that I believe originalism generates: I have argued that the Constitution does not generally require judicial deference to legislative or executive judgments about constitutional meaning;[10] I have suggested (with somewhat less confidence) that the Constitution does not generally require judicial deference to prior judicial judgments about constitutional meaning;[11] and I have argued that interpretive doubts about constitutional meaning should be resolved against whichever party has the burden of proof, which usually (but not invariably) means that the federal government loses and state governments win in the face of interpretative uncertainty.[12]

I have further argued that Congress (and the President) cannot control the judicial decision-making process by statute.[13] This does not describe a regime of extreme judicial passivity. Quite to the contrary, it contemplates an important

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7. U.S. CONST. art. III, § 1, cl. 1.

8. *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

9. See just about anything that isn't written by Mike Paulsen or me.

10. *See* Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381 (2001); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

11. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

12. *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1106-07 (1999); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411 (1996).

13. *See* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decisionmaking*, 18 CONST. COMM. 191 (2001).

role for judges in the constitutional order, as befits a department of the national government that is coequal to the legislative and executive departments. It does not permit the kind of judicial imperialism that claims a paramount or exclusive role in constitutional interpretation,[14] but neither does it suggest that judges are second-class citizens in the legal world. The Constitution fits the vision of John Marshall far better than it fits the vision of James Bradley Thayer.[15]

If I am right about even a fraction of the above propositions, the Constitution simply does not contemplate the kind of judicial role that would justify placing "judicial restraint" at the center of constitutional theory. When judges invalidate state laws restricting partial-birth abortions because they intuit a constitutional right to stick forks into babies' brains,[16] they are not being "activist," they are being *mistaken*—just as they are mistaken to uphold federal legislation granting open-ended authority to administrative agencies,[17] to uphold federal regulation of the production of home-grown wheat,[18] and to permit peacetime executive governance of federal territory without statutory authorization.[19] Constitutional sins can be sins of omission or commission, and there is no constitutional reason to think that the latter are more serious than the former.

Legal conservatives need to face squarely the difference between theories of interpretation and theories of the judicial role.[20] If legal conservatives are truly committed to constitutionalism, they can only complain about "judicial activism" if they can ground a theory of restraint in the Constitution's original meaning. If they cannot, they should either stop talking about judicial activism or stop talking about the Constitution.

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14. *See* Lawson & Moore, *supra* note 10; Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671 (1995).

15. *See* Gary Lawson, *Thayer Versus Marshall*, 88 NW. U.L. REV. 221 (1993).

16. *See* Stenberg v. Carhart, 530 U.S. 914 (2000).

17. *See* Whitman v. American Trucking Ass'ns, 121 S. Ct. 903 (2001); *see* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

18. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

19. *See* Cross v. Harrison, 57 U.S. (16 How.) 164 (1854); *see* Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U.L. REV. 581 (2001).

20. A model in this regard is Steve Calabresi, whose scholarship demonstrates an acute awareness of the differences between theories of judging and theories of interpretation. *See* Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 97 GEO. L.J. 2273 (1999) (reviewing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)). Michael Perry, who is an originalist but not necessarily a legal conservative by my broader definition, has done the seminal work in this area. *See* Michael J. Perry, *The Constitution in the Courts: Law or Politics* (1994); Michael J. Perry, *Normative Indeterminacy and the Problem of Judicial Role*, 19 HARV. J.L. & PUB. POL'Y 375 (1996).