

ORIGINALISM AND PRAGMATISM: FALSE FRIENDS

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The idea that either pragmatism or originalism can restrain judges meaningfully in hard cases is illusory. Professors McGinnis and Rappaport have suggested that pragmatism and originalism should be thought of as friends.¹ The friendship they provide is pallid and unsatisfying, however, because both promise more than they can deliver.

Both pragmatism and originalism are defended by their most prominent champions as ways of promoting democracy and judicial restraint. Judge Easterbrook, one of our most distinguished originalists, gave that defense when he said, “When originalism fails, so does judicial power to have the final say. And democracy remains.”² Justice Breyer’s new book makes a similarly passionate consequentialist defense of pragmatism as a way of promoting both values of democracy and restraint.³

After studying the hard cases and analyzing the results of originalism and pragmatism, I am not convinced that either theory consistently follows through on this promise. Therefore, it seems better for those who care about promoting democracy to abandon these abstract, and ultimately unproductive, methodological debates and to embrace openly a tradition of bipartisan judicial restraint.

This is the tradition of Thayer, of Holmes, of Frankfurter, and most recently of the lamented Justice White.⁴ The tradition has

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1. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917 (2008).

2. Frank H. Easterbrook, *Pragmatism’s Role in Interpretation*, 31 HARV. J.L. & PUB. POL’Y 901, 904 (2008).

3. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5–6 (2005).

4. See Alan A. Stone, *Book Review*, 95 HARV. L. REV. 346, 360 (1981) (reviewing H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981)); Dennis J. Hutchinson,

no consistent defenders on the current Supreme Court. It would require deference to democratic processes in most situations, striking down very few federal or state laws. Neither originalists nor pragmatists have shown a willingness to embrace such restraint. So when Professors McGinnis and Rappaport challenge us to find a better theory,⁵ the theory is clear: defer, defer, defer.

I should confess that I am something of a recovering originalist. I was a student of the wonderful Professor Akhil Amar at Yale and imbued his infectious enthusiasm for the promise that originalism, when applied in a principled way, might lead to genuinely bipartisan results. Learn the history better than the judges, said Amar, and you can be more principled than the originalists themselves.⁶ I was caught on fire with the promise of that superb teacher. I took it seriously and devoted years of my early career trying to learn enough about the history of the Fourteenth Amendment to be able to interpret it in a principled way. Imagine then my earnest sense of disappointment and shock when I read the U.S. Reports and found in case after case no trace of the complicated history that Amar had taught me to learn. Instead, there was a deafening silence on all of the issues where one would have most expected it to be found.

In particular, I want to discuss three of these issues: affirmative action, federalism, and religion. There is no Justice on the current Supreme Court who has studied the history of the Fourteenth Amendment with the rigor that one should expect of a principled originalist. Few appellate judges have put in that dark and lonely work either.

There is, however, one judge in particular who has done that work. This is the esteemed Judge Michael McConnell. If I had to pick an Originalist-in-Chief, and if I could turn over the whole enterprise to a single person in the United States, it would be Judge McConnell.⁷ He deserves bipartisan recogni-

Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court, 74 U. COLO. L. REV. 1409, 1409 (2003).

5. McGinnis & Rappaport, *supra* note 1, at 935.

6. See, e.g., Akhil Reed Amar, *Rethinking Originalism: Original intent for liberals (and for conservatives and moderates, too)*, SLATE, Sept. 21, 2005, <http://www.slate.com/id/2126680/> (discussing the importance of historical context in constitutional interpretation).

7. For a sampling of Judge McConnell's writings on originalism, see Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. &

tion for the scrupulousness and care with which he has studied the history and tried to apply it.

Should we not then be angry, indignant, and appalled that Judge McConnell's history, his insights, and his reminders of the complicated lessons that history teaches are absent from all of the most important cases in the areas I have described?

First, consider affirmative action. A seemingly simple question is whether affirmative action is permissible in public contracting.⁸ Is affirmative action in public contracting a violation of the original understanding of the Fourteenth Amendment? Judge McConnell has taught us not to ask whether there is a rule of colorblindness across the board for all state action. Instead, he says that the question is whether a particular public benefit should be considered a privilege or immunity of citizenship. If it is, the government must be colorblind. If not, it is free to discriminate against or in favor of whomever it chooses.⁹

But the question whether the rights of the subcontractor on a highway project are privileges or immunities of citizenship is complicated. One could argue either way.¹⁰ First take the case against this position, because it is easier. Privileges or immunities, says Judge McConnell, are uniform from state to state.¹¹ They do not vary. They are a matter of entitlement rather than discretionary privilege.

At the time of the Fourteenth Amendment's ratification, building highways was mostly a concern of private businesses.¹² If building highways were not a civil right that the Framers would have thought of as a privilege or immunity, the consequences are jarring. That conclusion means the government is free to distinguish on the basis of race. It is free to discriminate

PUB. POL'Y 457 (1996); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

8. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

9. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1103–04 (1995).

10. See generally Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998).

11. See McConnell, *supra* note 9, at 1028.

12. The Fourteenth Amendment was ratified in 1868. As of the late 1930s, highway construction was still primarily a private enterprise. See LEE MERTZ, *FED. HIGHWAY ADMIN., ORIGINS OF THE INTERSTATE 3* (2006).

against or in favor of particular people when contracting, an outcome that no current Justice would be willing to embrace.

But the issue can be argued the other way. Imagine that the right to be a subcontractor is a privilege or immunity of citizenship. That position has vastly disruptive consequences. It means that the right to work on federal highway projects, as well as other benefits that the government doles out, would be subject to a colorblindness rule and to a general prohibition on discriminatory classifications. If the right to be a subcontractor has to be given to everyone on equal terms, presumably any discrimination among subcontractors would have to be evaluated under strict scrutiny rather than under rational basis review.

As a result, much of the post-New Deal jurisprudence would no longer be good law. Consider *Williamson v. Lee Optical*, the case that upheld as rational a distinction between opticians and ophthalmologists.¹³ The *Williamson* case could not stand. The *Beazer* case, involving the question whether methadone users can be excluded from working on railway cars,¹⁴ similarly could not stand. Essentially, we would be ripping up root and branch the bulk of the post-New Deal jurisprudence.

Such a possibility might gladden the hearts of that small and shadowy movement that a few liberal conspiracy-mongers have called the effort to resurrect “the Constitution in Exile.”¹⁵ I know that for many, the movement is really just a conspiracy cooked up by me, Cass Sunstein, and the *New York Times Magazine* photo department.¹⁶ But it would be impossible to claim that this prospect of striking down the New Deal is consistent with judicial restraint. Adopting such an approach would require a radical uprooting of much precedent and practice, as well as being dramatically activist in striking down a great many federal and state laws.

Affirmative action is merely the first example. The second example, federalism, is well known. Judge McConnell has reminded us that the framers of the Fourteenth Amendment ex-

13. 348 U.S. 483, 486–87 (1955).

14. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 570–71 (1979).

15. See, e.g., Cass R. Sunstein, Op-Ed., *Why We Must Strive For Balance*, CHI. TRIB., July 6, 2005, at A27.

16. See, e.g., Randy Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 *FORDHAM L. REV.* 669, 669 (2006).

pected Congress, not the courts, to be the primary enforcer of Section Five rights.¹⁷ Imagine what they would have made of cases like *Kimel*¹⁸ and *Garrett*.¹⁹ Surely they would have thought that *Hibbs*,²⁰ the one that deferred to Congress, was the correct case, not the other two.

The objections to the atextual, ahistorical Eleventh Amendment jurisprudence are now commonplace.²¹ They need an answer. If one is going to be a principled originalist, one must think of the earnest skeptic, like the Akhil Amar student. Professor Amar sends them out every year happily into the world. They go out into the world like little lambs, eagerly looking for principled debate about originalism. The student, however, finds no answer to legitimate questions. The principled originalist must respond to these charges.

My third and final example of ahistorical originalism involves religion. Judge McConnell has made a very powerful case for the importance of neutrality as the preeminent vision contemplated by the First Amendment.²² He has said that, according to this neutrality vision, graduation prayers would be difficult to defend on grounds of neutrality.²³ What, then, are we to make of the religious supremacists, like Justices Scalia and Thomas, who know far less of this history than Judge McConnell, but insist that these prayers are constitutional?²⁴

Taken together, these three examples amount to more than the thirteenth chime of the clock. They are the most contested

17. See McConnell, *supra* note 9, at 1111.

18. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

19. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

20. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

21. See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666–68 (2004) (discussing the Court's extension of state sovereign immunity beyond the literal reading of the Eleventh Amendment, and mentioning literature disputing the Court's historical interpretation of the Amendment).

22. See Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 149 (1986) (stating that neutrality "is a sound starting point for analyzing religious freedom issues").

23. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116–17 (1992) (suggesting that there should not be "government prayer" at high school graduation ceremonies).

24. *Lee v. Weisman*, 505 U.S. 577, 641–42 (1992) (Scalia, J., dissenting (joined by Thomas, J.)).

issues facing the country, the ones most closely watched—affirmative action, federalism, and religion—and it turns out that the history not only is contested but fails to constrain the Court in any meaningful way. When Justices ignore the history in a way that instead leads to the enactment of what one has to assume are their political preferences, we have to conclude that the claim that originalism is a meaningful way of constraining judges and promoting democracy is illusory.

Indeed, originalists are not constrained when you take the most neutral definition of judicial restraint. I do not want to engage in a dreary discussion about what counts as judicial restraint, because I know that each individual has a different definition. But the definition that Cass Sunstein has offered is both neutral and useful: judicial activism is the decision to strike down a federal or state law, and judicial restraint is the decision to uphold it.²⁵ This definition does not say whether judicial restraint or activism is good or bad, it just describes it. Judged by this neutral standard, who were the most activist Justices on the Rehnquist Court? They were Justices Kennedy and O'Connor, followed by Justices Scalia and Thomas. Chief Justice Rehnquist and Justices Breyer and Ginsburg were the most restrained.²⁶ Looking at these results, one can see that the pragmatists, Rehnquist and Breyer, are on the restrained side, but you also find a pragmatist, O'Connor, among the most activist.

My second point, therefore, is that if pragmatism includes both the most activist member of the Court, Justice O'Connor, and one of the most restrained, Justice Breyer, then it must be a very big tent. It is hard to see pragmatism as a reliable constraint on judicial discretion.

Justice Breyer claims that pragmatism is defensible on two grounds. First, that it promotes democracy, and second, that it promotes restraint.²⁷ Although there is much to be said for his provocative book, these two goals seem to me in tension more often than Justice Breyer acknowledges.

First, consider promoting democracy. Although Justice Breyer respects empiricism, his book does not always offer extensive

25. Cass R. Sunstein, *A Hand in the Matter*, LEGAL AFFAIRS, Mar.–Apr. 2003, at 27.

26. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 10 (2007).

27. See BREYER, *supra* note 3, at 17.

empirical evidence about the effects of Supreme Court decisions. He claims, for example, that upholding the campaign finance laws would promote democracy because more citizens would participate.²⁸ But he does not stop to examine empirical evidence suggesting that the same amounts of money have flowed instead through “527” committees, and that the basic proportion of donations has not fundamentally changed.

Similarly, in saying that affirmative action would help people learn how to live together as democratic citizens,²⁹ Justice Breyer provides no empirical evidence to support his view. Like Justice Brandeis, who claimed to be interested in empirical evidence in theory, but who was not that interested in it in practice,³⁰ Justice Breyer is vulnerable to the same charge. When Justice Breyer is upholding laws, as he does most of the time, there is no objection because he is acting with restraint. But Justice Breyer is not always restrained. Just as I was disappointed by the originalists who failed to talk about their Achilles’ heel in affirmative action, federalism, and religion clause cases, I was similarly disappointed in Justice Breyer’s vote to strike down vouchers in the *Zelman* case because of the empirically-contested claim that vouchers would promote social divisiveness.³¹

Justice Breyer did not examine empirical evidence that suggests, on the contrary, that by allowing the education of a small percentage of children of minority parents, vouchers might decrease divisiveness rather than promote it.³² Similarly, in the partial-birth abortion case³³—another activist decision by Justice Breyer—there was no empirical discussion of whether the law might be construed in a more modest way, which was the way that Judge Easterbrook admirably construed it in a lower

28. *Id.* at 47–50.

29. *See id.* at 82–83.

30. *See* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 618 (1995).

31. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting) (emphasizing “the risk that publicly financed voucher programs pose in terms of religiously based social conflict”).

32. *See, e.g., id.* at 681–83 (Thomas, J., concurring) (discussing evidence relating to the importance of school choice for minorities).

33. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding unconstitutional a Nebraska law criminalizing partial birth abortions because it creates an undue burden on a woman’s right to abortion).

court case,³⁴ to avoid constitutional difficulties and to affect very few abortions. For all these reasons, although I admire Justice Breyer's book, I am more skeptical than he is that restraint and promoting democracy can always be achieved at the same time.

I will close on a simple note. I find myself losing interest ultimately in the question of which methodology is best in abstract terms. Judges should be evaluated by what they do, not what they say; by their willingness to embody the restrained virtues of modesty and deference, not in theory but in practice. This is the tradition of bipartisan judicial restraint that began with Justices Holmes and Frankfurter, and Justice White embodied it admirably.³⁵ I have come to regret a juvenile article I wrote years ago on Justice White's retirement,³⁶ and have come to admire his principled devotion to bipartisan judicial restraint. I hope that Chief Justice Roberts will keep up this tradition on the current Court. He strikes me as more of a pragmatist in the restrained tradition of his predecessor, Chief Justice Rehnquist, than a doctrinaire originalist. But, whatever emerges on the Roberts Court, there is a small and hardy group that is trying to keep alive the flame of bipartisan judicial restraint. Please join us.

34. *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999) (holding that state statutes criminalizing partial birth abortions "can be applied in a constitutional manner").

35. See Hutchinson, *supra* note 4, at 1409, 1411, 1417.

36. Jeffrey Rosen, *The Next Justice*, THE NEW REPUBLIC, Apr. 12, 1993, at 21.