

ORIGINALISM, PRECEDENT, AND JUDICIAL RESTRAINT

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There are, in theory, ways of reconciling originalism and respect for precedent. But, in practice, these approaches have not been consistently adopted by the Roberts Court. Justice Antonin Scalia has described Chief Justice Roberts's attitude toward precedent as "faux judicial restraint" — a kind of "judicial obfuscation" that should discomfit originalists and nonoriginalists alike.¹ And from the other side of the Court, Justice Stephen Breyer has been similarly critical of the Chief Justice's approach to precedent.² If the Chief Justice is to succeed in his admirable goal of persuading his colleagues to converge around narrow, unanimous opinions that the country can accept as legitimate,³ he will need to characterize precedents in terms that his colleagues regardless of ideology can accept as neutral and transparent.

Courts do not overturn constitutional precedents very often. The Marshall Court did not overturn a single constitutional precedent.⁴ The Taney Court overturned only one.⁵ The Hughes Court, during the New Deal era, overturned twenty-five.⁶ The Warren Court, which is often viewed as a bogeyman in its attitude toward precedents, overturned thirty-two—the most up to that time.⁷ But that was nothing compared to the record of the Burger Court, which overruled no fewer than seventy-six

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1. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 498–99 n.7 (2007) (Scalia, J., concurring).

2. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting) (accusing Chief Justice Roberts of "distort[ing] precedent" and seeking to "rewrite this Court's prior jurisprudence, at least in practical application").

3. *See infra* notes 15–17 and accompanying text.

4. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 11 (2008).

5. *Id.*

6. *Id.* at 11–12.

7. *Id.*

precedents.⁸ The Rehnquist Court overturned thirty-nine precedents, a handful more than the Warren Court.⁹

What is the Roberts Court's attitude toward precedent? There are two unapologetic originalists on the Roberts Court: Justices Scalia and Thomas. Their approaches to precedents will not gladden the hearts of all members of the Federalist Society. Some originalists, like Professors Gary Lawson and Randy Barnett, argue that it is unconstitutional for the Supreme Court to follow a precedent that deviates from the original meaning of the constitutional text, period.¹⁰ That is a principled position on steroids. But even Justice Scalia does not embrace this position. He calls himself a fainthearted originalist because he would sometimes allow judicial precedent or societal custom to trump the original meaning of the Constitution.¹¹ Justice Scalia distinguishes himself from Justice Thomas in this regard. According to Justice Scalia, Justice Thomas would overrule any precedent that is inconsistent with the Constitution's original meaning but he himself would not.¹² Chief Justice Roberts rejects both positions. In his confirmation hearings, the Chief Justice said he cares more about precedent than original meaning, describing himself not as an originalist but as a bottom-up rather than a top-down judge.¹³ He suggested that bottom-up judging includes respect for stare decisis, and he famously likened himself to an umpire.¹⁴

I am especially interested in Chief Justice Roberts's vision of precedent, as I had the fortunate opportunity to interview him at the end of his first term.¹⁵ During the interview, Chief Justice

8. *Id.*

9. *Id.*

10. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994); see also Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 18 (2006).

11. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

12. KEN FOSKETT, JUDGING THOMAS 281–82 (2004).

13. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56, 550 (2005) (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States Supreme Court).

14. *Id.* at 56.

15. Interview with John Roberts, Chief Justice of the United States Supreme Court (July 2006); see Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC, Jan.–Feb. 2007, at 104 (publishing a selection of Chief Justice Roberts's interview responses).

Roberts expressed frustration that his colleagues were acting more like law professors than members of a collegial court. He said that serving on the Court should not be an academic exercise, and that, in this polarized age, it was important for the country that the Court converge around narrow, unanimous opinions.¹⁶ He also said that he would try to persuade his colleagues to embrace narrow, minimalist opinions rather than five-to-four, ideologically polarized opinions.¹⁷

I was very impressed with Chief Justice Roberts and his vision of a more collegial Court. I also was distressed to see that in the Term following our discussion, the 2007 Term, thirty-three percent of the Court's decisions were five-to-four¹⁸—the highest percentage in ten years. Some of these decisions generated criticism from both liberal and conservative Justices for mischaracterizing contrary precedents rather than admitting that the Court was effectively overruling them. For example, in *FEC v. Wisconsin Right to Life*, a five-to-four majority opinion authored by Chief Justice Roberts struck down a provision of the McCain-Feingold law that limited expenditures by corporations.¹⁹ The Court had upheld the provision four years earlier in *McConnell v. FEC*.²⁰ The majority opinion refused to overrule *McConnell* openly, leading Justice Scalia to object in strong terms:

The principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.²¹

The majority again faced charges of faux judicial restraint in *Gonzales v. Carhart*,²² but they came from the liberal rather than the conservative wing of the Court. In an opinion written by Justice Kennedy, the same five-to-four majority upheld a federal

16. Rosen, *supra* note 15; Interview with John G. Roberts, Jr., *supra* note 15.

17. Rosen, *supra* note 15; Interview with John G. Roberts, Jr., *supra* note 15.

18. Jeffrey Rosen, *Roberts Versus Roberts*, THE NEW REPUBLIC, Mar. 2, 2010, <http://www.tnr.com/article/politics/roberts-versus-roberts>.

19. 551 U.S. 449 (2007).

20. 540 U.S. 93 (2003).

21. *Wisc. Right to Life*, 551 U.S. at 498–99 n.7.

22. 550 U.S. 124 (2007).

partial-birth abortion law even though the Court struck down an almost identical state law in 2000.²³ Again, the Court did not formally repudiate the earlier decision, but instead narrowed and twisted it in ways that the dissenters found unpersuasive.²⁴ Like Justice Scalia in *Wisconsin Right to Life*, the dissenters suggested that they had been played for dupes.²⁵ The precedent was not overturned, they said, but neither was it characterized fairly.

Then the Court decided *Hein v. Freedom from Religion Foundation*.²⁶ Justice Alito announced the judgment of the Court, from which the four liberal Justices dissented. Justice Alito stated that state taxpayers have no standing to pursue an Establishment Clause challenge to a faith-based initiative.²⁷ The Court in *Flast v. Cohen*, however, recognized taxpayer standing to pursue an Establishment Clause challenge to congressional spending.²⁸ Justice Scalia concurred in the judgment, but accused the plurality of avoiding the “principled option” of applying *Flast* or overruling it.²⁹

In the *Parents Involved* affirmative action case, Chief Justice Roberts again faced accusations from his colleagues of faux judicial restraint, of cleverly rewriting or chipping away at precedents without formally overturning them. This time, Justice Breyer charged Chief Justice Roberts with mischaracterizing and unsettling precedents dating back to *Swann v. Charlotte-Mecklenburg Board of Education*.³⁰ *Swann* held that a school board may voluntarily adopt race-conscious measures to improve racial balance even when it is not constitutionally obliged to do so.³¹ Justice Breyer wrote that no previous affirmative action case—from *Adarand*³² to *Grutter*³³ to *Gratz*³⁴—had endorsed Chief

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

24. *Carhart*, 550 U.S. at 170 (Ginsburg, J., dissenting).

25. *Id.* at 171.

26. 551 U.S. 587 (2007).

27. *Id.* at 593.

28. 392 U.S. 83 (1968).

29. *Hein*, 551 U.S. at 628 (Scalia, J., concurring).

30. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 830–31 (2007) (Breyer, J., dissenting).

31. 402 U.S. 1, 16 (1971).

32. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

33. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

34. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Justice Roberts's claim that all racial classifications have to be treated the same, whether they seek to exclude or include.³⁵

Thus, the charge of faux judicial restraint has become something of a familiar theme in criticisms—from both the right and the left—of Chief Justice Roberts's characterization of precedents. Why should the Chief Justice be concerned about this charge? Perhaps the dissenters are displaying nothing more than sour grapes for having been outvoted. At the very least, the Chief Justice should take these criticisms seriously because of what Michael Gerhardt calls the "golden rule of precedent."³⁶ Justices have to treat others' precedents as they want their own to be treated, or else risk being treated with the same disdain they show others once they are out of power. The model for a golden-rule-type Justice is the second Justice Harlan, a judicial conservative whom Democrats and Republicans alike admired for his transparency and honesty.³⁷ He vigorously defended precedents he thought the majority was distorting, and he followed precedents with which he disagreed without mischaracterizing them.³⁸

This brings me to the litmus test for the Roberts Court's treatment of precedent: the *Citizens United* case.³⁹ Justice Markman criticized the Warren Court for embracing a disembodied form of justice that basically left Justices untethered to text, history, precedent, and tradition.⁴⁰ In my view, both the principal opinion by Justice Kennedy and the concurrence by Chief Justice Roberts suggest the resurrection of Chief Justice Earl Warren. There are good arguments for striking down the McCain-Feingold law, and many reasons are embraced by civil-libertarian liberals as well as libertarian conservatives. One can be a good defender of the First Amendment and have problems with McCain-Feingold.

What one cannot be is a restrained originalist or someone who is devoted to precedent or tradition, and still defend the sweeping reasoning of *Citizens United*. There was a vigorous debate about original understanding in *Citizens United* between Justice Scalia,

35. *Parents Involved*, 551 U.S. at 832.

36. GERHARDT, *supra* note 4, at 79.

37. See Charles Nesson, *Mr. Justice Harlan*, 85 HARV. L. REV. 390, 390 (1971).

38. See Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 35 (1991).

39. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

40. Stephen J. Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 211 (1986).

who said the Framers did not distinguish between corporations and other speakers,⁴¹ and Justice Stevens, who said a central concern of the Framers—not to mention the Reconstruction Republicans—was monopoly power and corporate corruption.⁴² Justice Kennedy’s majority opinion, however, embraced a remarkably abstract notion of the First Amendment divorced from its historical understanding and from previous precedents.⁴³ The majority showed no deference to Congress, the states, or to settled tradition dating back to 1907. But most important for present purposes, the majority showed no deference to precedent.

Yet again, a sense of faux judicial restraint led the dissenters to claim that they were being played for dupes.⁴⁴ *Citizens United* overturned not only *Austin*,⁴⁵ *McConnell*,⁴⁶ and *Wisconsin Right to Life*⁴⁷, but also *Beaumont*,⁴⁸ *Massachusetts Citizens for Life*,⁴⁹ and *California Medical Association*.⁵⁰ The Court’s disregard for this long line of precedents led Justice Stevens to observe that “[r]elying largely on individual dissenting opinions, the majority blaze[d] through our precedents” and “treat[ed] the distinction between corporate and individual [speech] as an invidious novelty born of *Austin*.”⁵¹ Justice Stevens also charged the majority with mischaracterizing *Buckley v. Valeo*⁵² as being concerned with only quid pro quo political corruption, whereas in fact, the concern was much broader.⁵³ He went on to accuse the majority of mischaracterizing *First National Bank of Boston v. Bellotti*⁵⁴ by suggesting that corporate speech had always been protected the same way in different contexts, even though *Bellotti* explicitly recognized that corporate campaign

41. *Citizens United*, 130 S. Ct. at 925–26 (Scalia, J., concurring).

42. *Id.* at 953 (Stevens, J., dissenting).

43. *See id.* at 929.

44. *Id.* at 930.

45. *Austin v. Mich. Chamber of Commerce*, 454 U.S. 652 (1990).

46. *McConnell v. FEC*, 540 U.S. 93 (2003).

47. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).

48. *FEC v. Beaumont*, 539 U.S. 146 (2003).

49. *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986).

50. *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981).

51. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., dissenting).

52. 424 U.S. 1 (1976).

53. *Citizens United*, 130 S. Ct. at 964–65.

54. 435 U.S. 765 (1978).

expenditures pose a greater danger of undue influence on general elections than on referenda.⁵⁵

Thus, the *Citizens United* opinion represents anti-Harlanism. The majority failed to characterize precedents in ways that its critics could accept as honest, transparent, and fair. Rather, the opinion reads as an amalgamation of resuscitated dissents. As Justice Stevens explained, “[t]he only relevant thing that ha[d] changed since *Austin* and *McConnell* [was] the composition of [the] Court.”⁵⁶

Why should we care? Many may applaud the result in *Citizens United*, which is perfectly plausible as a legal matter, even if it cannot be called restrained. I believe, however, that we should be concerned for the same reason that Chief Justice Roberts expressed concern: It reflects poorly upon the Court when people read in newspapers about five-to-four decisions along predictable, ideological lines. This undermines confidence in the Court’s ability to mete out impartial justice in a polarized age.

It is true that most citizens, if they follow Supreme Court decisions at all, are more interested in the outcome than in the reasoning. But the public still needs to believe that judges are not on an ideological crusade, using clever chess moves to get their preferred results by any means necessary. I have been critical of the Warren Court’s free-floating activism, but at least the Warren Court was transparent and had the courage of its convictions. It was unafraid to overturn precedents openly, rather than twisting them, chipping away at them, of mischaracterizing them in this “faux judicial restraint” way.

We should all be concerned when the public concludes that the law is nothing more than politics. Eighty percent of the public is opposed to the *Citizens United* decision,⁵⁷ not because the public is following this “faux judicial restraint” debate, but presumably because the public believes that the curse of corporate corruption in American democracy is one of the central political issues of our day. And when the dissenting Justices charge their opponents with being less than candid in their reading of prece-

55. *Citizens United*, 130 S. Ct. at 959.

56. *Id.* at 942.

57. Dan Eggen, *Poll: Large majority opposes Supreme Court’s decision on campaign financing*, WASH. POST, Feb. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

dents, it only increases the public's cynicism about the ability of judges to transcend their political preferences.

The beauty of originalism is that it offers an objective standard. An originalist judge says: "hold me to these principles, and if I violate them, then hold me accountable." By contrast, there is nothing objective, as Justice Scalia suggests about picking and choosing among methodologies to get the desired result,⁵⁸ to sometimes be an originalist, sometimes be a traditionalist, other times be a textualist, or sometimes to vote in favor of precedent.

Many believe that *Roe v. Wade*⁵⁹ is not a principled decision because the *Roe* majority failed to make plausible constitutional arguments. Many people on the other side of the political spectrum feel the same when they read a decision like *Citizens United*. They feel that the Court was not playing fair in characterizing precedents. This cynicism is precisely what Chief Justice Roberts pledged to avoid when he was elevated to the High Court. As someone who continues to wish the Chief Justice well, I hope that he will in time achieve his original vision of collegiality and minimalism. To do so, the Court must characterize precedents in terms all of the Justices can accept.

58. See Scalia, *supra* note 11, at 855.

59. 410 U.S. 113 (1973).