

CONSTITUTIONAL CLICHÉS

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Popular discourse on constitutional interpretation and judicial review tend to employ a series of catch phrases that have become constitutional clichés. Phrases such as “judicial activism,” “judicial restraint,” “strict construction,” “not legislating from the bench,” “Framers’ intent,” the “dead hand of the past,” and “stare decisis” so dominate public commentary on the Constitution and the courts that quite often that is all one hears. Unfortunately, even law professors are not immune. There was a time when each of these catch phrases meant something and, although each could mean something again, in current debates all have become trite and largely devoid of substance. In short, they have become clichés.

In this Essay, I explain why these clichés should be abandoned even in casual conversation. Somewhat surprisingly, it turns out that several of them are connected by a common thread: the apparent desire by commentators to avoid substantive constitutional argument in favor of a process-based analysis that can be easily leveled in the absence of any expertise on the issues raised by a particular case. In other words, at least some of the appeal of these constitutional clichés is that they enable commentators to criticize the Court or particular decisions without actually having to know much about the Constitution itself.

I. “JUDICIAL ACTIVISM” AND “JUDICIAL RESTRAINT”

Perhaps the most widespread constitutional cliché is that of “judicial activism” and its conjoined twin, “judicial restraint.” Nowadays, usage of judicial activism is associated with political conservatives,¹ but the term apparently first appeared in a 1947 *Fortune* magazine article about the New Deal Supreme Court by historian Arthur Schlesinger Jr., a nonlawyer and an ardent New Dealer.² In a piece directed at a popular audience,

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¹ See, e.g., Rush Limbaugh, *American Conservatism: A Crackdown, Not a ‘Crackup’*, WALL ST. J., Oct. 17, 2005, at A18; Editorial, *The Rehnquist-Roberts Court*, WALL ST. J., September 6, 2005, at A28.

² See Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441, 1445–50 (2004).

Schlesinger categorized the New Deal Court into three groups: “judicial activists” (Justices Black, Douglas, Murphy, and Rutledge), “Champions of Self Restraint” (Justices Frankfurter, Jackson, and Burton) and a middle group (Justice Reed and Chief Justice Vinson).³ Schlesinger distinguished the first two of these groups as follows: “One group [the activists] is more concerned with the employment of the judicial power for their own conception of the social good; the other with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn.”⁴ In sum, the first “group regards the Court as an instrument to achieve desired social results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse.”⁵

“Judicial activism” is a term notoriously devoid of any consistent meaning. Keenan Kmiec offers the following useful summary of meanings it has been given over the years: “(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial ‘legislation,’ (4) departures from accepted interpretive methodology, and (5) result-oriented judging.”⁶ Still, its origins in New Deal ideology make clear that it involves judicial interference with the will of the legislative branch by holding statutes unconstitutional.⁷ Of course, such a term need not be pejorative and some have purported to use it neutrally,⁸ or even positively.⁹ But without its pejorative connotation,

³ *Id.* at 1446. Schlesinger wrote:

The Black-Douglas group believes that the Supreme Court can play an affirmative role in promoting the social welfare; the Frankfurter-Jackson group advocates a policy of judicial self-restraint. . . . In brief, the Black-Douglas wing appears to be more concerned with settling particular cases in accordance with their own social preconceptions; the Frankfurter-Jackson wing with preserving the judiciary in its established but limited place in the American system.

Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 201.

⁴ Schlesinger, *supra* note 3, at 201.

⁵ *Id.*

⁶ Kmiec, *supra* note 2, at 1444.

⁷ See Schlesinger, *supra* note 3, at 201.

⁸ See, e.g., CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42 (2005) (“On a different account, the word ‘activist’ is purely descriptive, and a decision that is activist is not necessarily wrong.”).

⁹ See, e.g., CLINT BOLICK, DAVID’S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY, at x (2007).

“judicial activism” adds little or nothing of substance to the more neutral term “judicial review.” Normally, however, “judicial activism” is used to criticize a judicial practice that is to be avoided by judges and opposed by the public.¹⁰ It is in this pejorative sense that “judicial activism,” I contend, is an empty constitutional cliché.

This is so because nearly everyone thinks that judges should *sometimes* invalidate unconstitutional laws.¹¹ Consequently, unless one rejects judicial review entirely, “judicial activism” cannot refer simply to striking down a statute; it must instead refer to *improperly* striking down a statute. But this means that, before one can level a charge of judicial activism, one must provide an argument for why a particular invalidation is improper.

Such a charge of impropriety requires one to identify and advocate a method of constitutional interpretation and an account of how a particular decision striking down a law is improper according to one’s favored method. “Judicial activism” is just a label to stick on the end of a methodological and substantive analysis of a particular decision. This, in turn, entails that the epithet “judicial activism” means nothing more than that a court is incorrect in its ruling.¹²

¹⁰ See, e.g., Charles Krauthammer, *The Constitution is Whatever Sandra Day O’Connor Says It Is*, TOWNHALL.COM, July 4, 2003, http://www.townhall.com/columnists/CharlesKrauthammer/2003/07/04/the_constitution_is_whatever_sandra_day_oconnor_says_it_is (“The argument against judicial activism is that it impedes, overrides and in effect destroys normal democratic practice.”).

¹¹ The evidence that the original meaning of the “judicial power” in Article III includes the power to invalidate unconstitutional laws is overwhelming. See Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 121–32 (2004) (citing records of the Constitutional Convention, materials from the ratification conventions, and writings immediately following ratification showing that the original meaning of the “judicial power” included the power to invalidate unconstitutional laws).

¹² Cf. SUNSTEIN, *supra* note 8, at 42 (“When people criticize judges as activist, they mean just this: *The court is not following the right understanding of the Constitution*. To label a decision ‘activist’ is to label it wrong.”). Although I avoid using the pejorative term “judicial activism,” when compelled by circumstances to do so—for example, when participating in a symposium devoted to the topic—I define it this way:

[I]t is activist for courts to adopt doctrines that contradict the text of the Constitution *either* to uphold or nullify a law. In sum, it is activist for courts to substitute for the relevant constitutional provision another provision that they think, for whatever reason, is preferable. According to this definition, it is not judicial activism to strike down a statute that violates the text of the Constitution. To the contrary, it would be

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However, this is not at all what those who use the term “judicial activism” hope to accomplish by its use. They wish to avoid discussion of the correctness or incorrectness of the *substance* of a court’s ruling invalidating a law in favor of accusing a court of somehow exceeding its proper *role*. In other words, the charge of judicial activism is meant to short circuit any discussion of substance by shifting analysis to process or the judicial role. The gravamen of the complaint of judicial activism is that (unelected and unaccountable) *judges* are somehow interfering with (elected and accountable) *legislatures*, not simply that the judges have reached an erroneous conclusion about the Constitution.¹³

Such a charge is an easy and therefore appealing device for legal “pundits” to use on short notice in the absence of studying a particular decision closely or having an informed opinion on its substantive correctness. Even where a commentator is informed about the substance of a particular decision, the process objection of “judicial activism” can resonate with popular audiences and help the commentator avoid the difficult task of explaining exactly why a particular decision was incorrect.

But, to repeat, unless one opposes any and all judicial review of legislation, the charge of judicial activism—and the correlative term “judicial restraint”—is no substitute for a substantive critique of a court’s decision and accomplishes nothing short of undermining the legitimacy of an independent judiciary whose appropriate role is to place the requirements of the Constitution above that of any statute. For some, this may well be its desired effect.

II. “STRICT CONSTRUCTION” OF THE CONSTITUTION

When not referring to judicial activists, politicians have adopted other constitutional clichés to describe what they think judges should and should

activist to do nothing in the face of legislation that runs afoul of the written Constitution.

Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276–77 (2002).

¹³ Cf. Kevin Jefferies, *Judicial Activism and the Necessity of Auxiliary Precautions*, 43 S. TEX. L. REV. 213, 218 (2001) (“Perhaps the key argument made against activism is that the authors of the Constitution intended the federal jurists to be restrained and leave policymaking completely to the legislative and executive branches. Therefore, activist judges violate this traditional role when they interpret the laws and the Constitution broadly.”).

not do. For a long time, presidents have vowed to appoint what they call “strict constructionists.”

The phrase appears to have become popular as a campaign slogan used by Richard Nixon when he ran for President in 1968. Nixon promised that he would appoint judges who were “strict constructionists” as opposed to the “judicial activism” that characterized the Warren Court, but the phrase has much earlier origins and may go back as far as the late eighteenth century.¹⁴

As President Bush stated during the 2004 presidential campaign: “We stand for the appointment of federal judges who know the difference between personal opinion and the strict construction of the law.”¹⁵

The term “strict construction” is of ancient vintage, but the original phrase referred to “strict construction” of enumerated federal powers. For example, in the earliest commentary on the Constitution, Virginia jurist and law professor St. George Tucker wrote:

Whether this original compact be considered as merely federal, or social, and national, it is that instrument by which power is created on the one hand, and obedience exacted on the other. As federal it is to be *construed strictly*, in all cases where the antecedent rights of a state may be drawn in question; as a social compact it ought likewise to receive the same *strict construction*, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute¹⁶

Elsewhere in his treatise, Tucker connected this interpretive maxim to the Ninth and Tenth Amendments.¹⁷ In Tucker’s view, the “sum of all which

¹⁴ Laurence B. Solum, *Legal Theory Lexicon: Strict Construction & Judicial Activism*, LEGAL THEORY BLOG, Aug. 03, 2008, <http://lsolum.typepad.com/legaltheory/2008/08/legal-theory-le.html>.

¹⁵ John L. Micek, *Bush Visits Hershey, Rips Kerry on Health; President says Challenger Would Put Government in Charge*, ALLENTOWN MORNING CALL, Oct. 22, 2004, at A1.

¹⁶ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, (Dennis & Co., Inc. 1965) (1803), Appendix, Note D, *140, *151 § 1 (emphases added).

¹⁷ *Id.* at *154.

[T]o guard against encroachments on the powers of the several states, in their politic character, and of the people, both in their individual and

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appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most *strict construction* that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.”¹⁸

Finally, when discussing the interpretive implication of the Ninth and Tenth Amendments, Tucker maintained that

every power which concerns the right of the citizen, must be *construed strictly*, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution: and, in like manner, every power which has been carved out of the states, who, at the time of entering into the confederacy, were in full possession of all the rights of sovereignty, is, in like manner to be *construed strictly*, wherever a different construction might derogate from the rights and powers, which by the latter of these articles; are expressly acknowledged to be reserved to them respectively.¹⁹

According to Tucker’s approach, federal powers are to be narrowly or “strictly” construed when they potentially intrude on either the retained rights of individuals or the reserved rights and powers of states, whereas the federal powers protecting personal rights of individuals are to be broadly or “liberally” construed.

Later, Justice Story chided proponents of “strict construction,” of constitutional powers—a position for which President Jefferson and the newly constituted Democratic Republicans were famous²⁰—for advocating

sovereign capacity, an amendatory article was added, immediately after the government was organized, declaring; that the powers not delegated to the United States, by the constitution; nor prohibited by it to the states, are reserved to the states, respectively, or to the people. And, still further, to guard the people against constructive usurpations and encroachments on their rights, another article declares; that the enumeration of certain rights in the constitution, shall not be construed to deny, or disparage, others retained by the people.

Id.

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.* at *308 (emphasis added).

²⁰ See, e.g., SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, 188 (1999) (“[T]heory of strict
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the constitutionality of the embargo of 1807 and the Louisiana Purchase.²¹ “These measures were brought forward, and supported, and carried, by the known and avowed friends of a strict construction of the constitution; and they were justified at the time, and can be now justified, only upon the doctrines of those, who support a liberal construction of the constitution.”²²

A commitment to “strict construction” of the Constitution was an original and long-standing tenet of the Democratic Party.²³ As time passed, the idea of strict construction of federal powers in favor of retained individual rights and the reserved powers of states came to be associated exclusively with the rights of Southern states to pursue their segregationist policies. The platform of the States Rights Democratic Party—the segregationist breakaway faction of the Democratic party known as “Dixiecrats”—read: “We stand for social and economic justice, which, we believe can be guaranteed to all citizens only by a strict adherence to our Constitution and the avoidance of any invasion or destruction of the constitutional rights of the states and individuals.”²⁴

With the repudiation of Southern apartheid, the phrase “strict construction” became disassociated from anything at all and rendered a mere constitutional cliché. As Justice Scalia has explained: “I am not a strict constructionist, and no one ought to be A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”²⁵ In other words,

construction became another cornerstone of Democratic-Republican jurisprudence.”); and David M. O’Brien, *Reflections on Courts and Civil Liberties in Times of Crisis*, 3 J. INST. JUST. & INT’L STUD. 11, 12 (2003) (referring to Jefferson as “a renowned ‘strict constructionist’”).

²¹ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1282 at 158 (Lawbook Exch. 2005) (2d ed. 1851).

²² *Id.*

²³ SIMEON D. FESS, THE HISTORY OF POLITICAL THEORY AND PARTY ORGANIZATION IN THE UNITED STATES 12–13 (1910) (“Power, strong central government, loose construction of the Constitution, were principles of the Federalist party. Liberty, local self-government, and State rights, strict construction of the Constitution, were principles of the Anti-Federalist party.”); and *id.* at 204 (“The [democratic] party repeated in every platform from 1840 to the time of the Civil War the policy of strict construction of the Constitution and pledged itself to protect the rights of the States against undue interference by the national government.”).

²⁴ 1 NATIONAL PARTY PLATFORMS 468 (Donald B. Johnson ed., 1978).

²⁵ Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION 3, 23 (Amy Gutmann ed., 1997).

the Constitution should be construed *correctly*. And this returns us once more to the substance of a particular constitutional.

On the other hand, when protecting liberty, it may well be that judges should view claims of governmental powers with some degree of skepticism. Reviving the approach identified by Tucker²⁶ would reconnect strict construction of federal powers with the protection of personal liberties and the discretionary powers of states to set their own policies, the latter now being qualified by the added constraints of the Thirteenth and Fourteenth Amendments. The Presumption of Liberty I have proposed is a form of this approach.²⁷ But without this sort of connection to individual rights and governmental powers, “strict construction” remains an empty constitutional cliché.

III. “NOT LEGISLATE FROM THE BENCH”

Recently, politicians have taken to vowing to select judges who will “interpret the law” and “not legislate from the bench.” In his 2005 State of the Union speech President Bush stated: “Because courts must always deliver impartial justice, judges have a duty to faithfully interpret the law, not legislate from the bench.”²⁸ While banal, this position is unobjectionable. Judges surely should not legislate. The rub is identifying the sorts of decisions that can accurately be characterized as “legislating from the bench.”

Consider the Ninth Amendment that reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁹ Assuming the best evidence of its original meaning supports the conclusion that the meaning of this provision refers to individual natural rights,³⁰ would the judicial *enforcement* of these unenumerated rights against the government under this provision constitute “legislating from the bench”?

²⁶ See *supra* notes 18–19 and accompanying text.

²⁷ See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION].

²⁸ George W. Bush, State of the Union (Feb. 2, 2005), in *State of the Union: The President's Address*, N.Y. TIMES, Feb. 3, 2005, at A22, available at 2005 WLNR 1474976.

²⁹ U.S. CONST. amend. IX.

³⁰ I offer substantial evidence supporting the conclusion that the Ninth Amendment refers to individual natural rights in Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006); and Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty*, 60 STAN. L. REV. 937 (2008).

Although he does not use this cliché, Justice Scalia made a similar argument in his dissenting opinion in *Troxel v. Granville*.³¹ There he affirmed that an unenumerated “right of parents to direct the upbringing of their children”—which was protected by the majority³²—is “among the ‘othe[r] [rights] retained by the people’ which the Ninth Amendment says the Constitution’s enumeration of rights ‘shall not be construed to deny or disparage.’”³³ But he then asserted that “the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”³⁴ Instead, Justice Scalia contended that the unenumerated rights to which he says the Ninth Amendment refers should be asserted “in legislative chambers or in electoral campaigns . . .”³⁵ He then denied “that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”³⁶ Notice how Justice Scalia shifted his analysis from faithfully *interpreting* the Constitution, which is conceded by this cliché to be within the judicial role, to asserting that *enforcing* an unenumerated right supported by such an interpretation is outside the proper role of a judge. That Justice Scalia was making a role-based argument is underscored by his italicizing “as a judge.”

In this respect, this constitutional cliché resembles the previous two as devices to criticize the courts for exercising their constitutional power of judicial nullification while avoiding the need to argue the merits of a particular constitutional claim. In *Troxel*, Justice Scalia actually conceded the merits of the claim of an unenumerated right, but only because he was about to make a role or process-based objection to enforcing it.³⁷

In *Troxel*, Justice Scalia skillfully shifts the terrain from that of original meaning, which is a method of interpretation, to a noninterpretive assertion about judicial role. In this way, he is able to elide the substance of a constitutional provision in favor of a process-based reason to uphold legislation *regardless of what the Constitution, properly interpreted*, may say. When taken in this direction, the injunction against “legislating from

³¹ 530 U.S. 57 (2000).

³² *Id.* at 66, 68–69.

³³ *Id.* at 91 (Scalia, J., dissenting).

³⁴ *Id.*

³⁵ *Id.* at 92.

³⁶ *Id.* (emphasis in original).

³⁷ *Id.* at 91–92.

the bench” could be more accurately phrased as “not interpreting from the bench.”

IV. “FRAMERS’ INTENT”

On July 9, 1985, President Ronald Reagan’s Attorney General, Edwin Meese III, delivered a speech before the annual meeting of the American Bar Association in Washington, DC in which he sharply criticized decisions made during the Court’s most recent term concerning federalism, criminal law and religion.³⁸ His critique echoed the concept of “judicial activism” discussed above³⁹ without employing the term. In these three areas,

far too many of the Court’s opinions were, on the whole, more policy choices than articulations of constitutional principle. The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution—its text and intention—may demand.⁴⁰

In place of what he characterized as the “ad hoc fashion” in which the court decides constitutional cases, he proposed a “coherent jurisprudential stance,” which he called “a Jurisprudence of Original Intention.”⁴¹ Such an approach, “[b]y seeking to judge policies in light of principles, rather than remold principles in light of policies,” would enable the court to “avoid

³⁸ See Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1, 9 (1986).

³⁹ See *supra* Part I.

⁴⁰ Meese, *supra* note 38, at 9. Notwithstanding his critique of these three lines of cases, earlier in his speech he presented a more mixed overall assessment of the Court’s decisions:

[T]he 1984 term did not yield a coherent set of decisions. Rather, it seemed to produce what one commentator has called a “jurisprudence of idiosyncrasy.” Taken as a whole, the work of the term defies analysis by any strict standard. It is neither simply liberal nor simply conservative; neither simply activist nor simply restrained; neither simply principled nor simply partisan. The Court this term continued to roam at large in a veritable constitutional forest.

Id. at 3.

⁴¹ *Id.* at 9.

both the charge of incoherence *and* the charge of being either too conservative or too liberal.”⁴²

Meese contended that a “jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.”⁴³ His normative defense of this approach rested in part on “a deeply rooted commitment to the idea of democracy” in which the Constitution “represents the consent of the governed to the structures and powers of the government.”⁴⁴

He also invoked the written nature of the Constitution: “Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was.”⁴⁵ In a later speech, he elaborated on this latter theme: “Our approach to constitutional interpretation begins with the document itself. The plain fact is, it exists. It is something that has been written down The presumption of a written document is that it conveys meaning.”⁴⁶ Consequently,

[w]here the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.⁴⁷

Meese’s speeches evoked a storm of academic reaction. Many argued that it was simply not possible to determine an original intent from the many unknowable and conflicting intentions of those who framed the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 9–10.

⁴⁶ Edwin Meese III, Speech to the DC Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION, *supra* note 38, at 31, 33–34.

⁴⁷ *Id.* at 36.

Constitution.⁴⁸ Some questioned whether it was the intent of the framers that their intent be followed.⁴⁹ Another problem was that the democratic legitimacy of the Constitution seemed to rest, not on its framers, but on those who ratified it on behalf of the people.⁵⁰ Of course, if this last critique is correct, it only magnifies the practical difficulties in determining original intent. Finally, as will be discussed in the next part of this Essay, many questioned why it was that we the living should be ruled by the “dead hand of the past.”⁵¹

At the time, I found all of these critiques of originalism based on Framers’ intent to be persuasive and, in the main, I still do. To these I would add a criticism based on how original intent originalism is actually practiced. Given that the Framers’ intent on almost any concrete case is going to be nonexistent, intentionalist inquiries amount to a process of channeling the framers.⁵² “Oh Framers, would you think that the thermal imaging of a house to detect increased heat emanating from marijuana plant cultivation to be a ‘search’?” Any such inquiry is counterfactual and not historical since there is no historical fact of the matter to be discovered by evidence. Therefore, in practice, reliance on original intent is entirely a product of judicial judgment in extrapolating speculative principles and metaphorical intentions from the meaning of the text. While this does not make the method impossible, it is the very type of speculative judicial inquiry that original intent originalism was largely devised to avoid.

Because of the power of all these criticisms, almost all originalists have abandoned the original intentions of the Framers as their method in favor of the original public meaning of the text.⁵³ As a result, because few

⁴⁸ The most famous and telling critique along these lines was Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980).

⁴⁹ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

⁵⁰ See, e.g., Brest, *supra* note 48, at 204 (“The Constitution manifests the will of the sovereign citizens of the United States—‘we the people’ assembled in the conventions and legislatures that ratified the Constitution and its amendments. The interpreter’s task is to ascertain their will.”).

⁵¹ See *infra* Part V.

⁵² I coined this phrase in an article that precedes my adoption in 1999 of original meaning originalism. See Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 HARV. J.L. & PUB. POL’Y 403, 405 (1996).

⁵³ Perhaps the first to make this move was Justice Scalia. See Scalia, *supra* note 25, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”). I
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today hold such a position,⁵⁴ references to “Framers’ intent” has become a constitutional cliché. Sometimes this cliché is still employed by those who are sympathetic to originalism but who are unaware of the progress of the debates over its proper formulation. More often nowadays, however, Framers’ intent is invoked by critics of originalism who either do not know they are attacking a straw man, or do not care. In either case, Framers’ intent has become a constitutional cliché to be avoided.

V. THE “DEAD HAND OF THE PAST”

To this point, I have discussed constitutional clichés that are employed mainly by conservatives, although “judicial activism” originated from and is recently being reasserted by progressives and “Framers’ intent” is nowadays more likely to be invoked by progressive critics of originalism than by conservatives. Let me now consider a cliché that is typically favored by political progressives: that to follow the original meaning of the Constitution is to be ruled by “the dead hand of the past.”

Dead hand arguments derive from early criticisms of the common law. The first Supreme Court decision to invoke the phrase was in 1918 where the Court held that because “the legislation and the very great weight of judicial authority which have developed in support of this modern rule . . . proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied. . . .”⁵⁵ In the

have heard Edwin Meese tell the story of then-Circuit Court Judge Scalia cautioning against the use of “original intent” and advocating a reliance on “original meaning” even before he became an Associate Justice in 1986.

⁵⁴ One notable exception is Richard Kay. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1259867>.

⁵⁵ *Rosen v. United States*, 245 U.S. 467, 471–72 (1918). Another example of its early application to the common law is *Price v. Charlotte Electric Ry. Co.*, 160 N.C. 450, 504–05, (1912) (Clark, J., concurring) (emphasis added):

There are . . . principles of the common law which are eternally just and which will survive throughout the ages. But this is not because they are found in a mass of error or were enunciated by judges in an ignorant age, but because they are right in themselves and are approved, not disapproved, as much of the common law must be, by the intelligence of to-day Every age should have laws based upon its own intelligence and expressing its own ideas of right and wrong. Progress and betterment should not be denied us by *the dead hand of the past*. The decisions of the courts should always be in accord with the spirit of

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1980s, the same type of objection was made by opponents of originalism and so-called “interpretive” methods. For example, in a famous 1983 article, Mark Tushnet disparagingly equated interpretivism with “the Dead Hand of the Past.”⁵⁶ The use of this trope continues to the present. In an article attempting to explain constitutional law to the everyman, Phillip C. Kissam asks:

[W]hy should any argumentative weight be given to evidence of the Framers’ intent? Our contemporary generations have never realistically consented to be ruled by “the dead hand of the past,” and the white property-owning males who constituted America’s political society in the late eighteenth and nineteenth centuries are certainly not representative of our contemporary generations.⁵⁷

Notice how the use of this cliché is expressly connected with the cliché of the Framers’ intent. In that context, it makes some sense. Why indeed should we be ruled today by the commands of our long dead ancestors or, in my case, someone else’s long dead ancestors?⁵⁸

But with the switch to original public meaning from original Framers’ intent, the new terms of debate have rendered the dead hand argument trope less compelling. This is because the principal reason for adhering to original meaning is that we the living, *right here, right now*, profess a commitment to a written constitution. And the function of a written constitution would be seriously compromised if its meaning can be altered by the will of judges or legislators.⁵⁹ In other words, the meaning of a

the legislation of to-day, which should not be misconstrued to conform to the views of dead and forgotten judges of centuries long over past, who were not always learned and able, and who, if wise, were rarely wise beyond the narrow vision of their own age.

⁵⁶ See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 789 (1983) (emphasis added) (“[A]ccording to the interpretivist, we are indeed better off being bound by *the dead hand of the past* than being subjected to the whims of willful judges trying to make the Constitution live.”).

⁵⁷ Phillip C. Kissam, *Explaining Constitutional Law Publicly, Or, Everyman’s Constitution*, 71 U.M.K.C. L. REV. 77, 89 (2002) (citation omitted).

⁵⁸ See Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 115–30 (2003) (rejecting consent theories of constitutional legitimacy as wholly fictitious).

⁵⁹ See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 27, at 89–117 (explaining how interpreting a written constitution according to its original meaning contributes to constitutional legitimacy).

written constitution should remain the same until it is *properly* changed, and judges and legislators have no power under our system to change its meaning.⁶⁰

Everyone agrees we should be governed by statutes that were written by persons who may no longer be alive. No one does a head count to see how many of the original legislators who voted for a particular statute are still living. Instead, they assume that laws that should remain the same until they are properly changed. Moreover, as I shall note in the next section on stare decisis, some of the very same people who, in popular discourse, object to relying on the dead hand of the Framers have no problem with relying on Supreme Court decisions written by long dead Justices.⁶¹

For all these reasons, the trope of “the dead hand of the past” has become yet another constitutional cliché.

VI. “STARE DECISIS”

When progressive judges were making hay in the 1960s and 70s, political conservatives decried the judges’ pervasive disregard of precedent.⁶² Now that the political tables have turned somewhat, it is political progressives who now assert the doctrine of stare decisis to resist the overturning of their favored precedents.⁶³ Today, a proper respect for precedent is all one hears about during Supreme Court confirmation hearings.⁶⁴

⁶⁰ *Id.* at 105, 106.

⁶¹ *See, e.g.*, Kissam, *supra* note 57, at 90–101 (explaining the doctrine of precedent without considering the applicability of the “dead hand” argument previously asserted against originalism).

⁶² *See, e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 344–46 (1977) (critiquing the Warren and Burger Courts’ disregard for precedents); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 37–38, 90–91 (1970) (criticizing the Warren Court’s overruling of precedents).

⁶³ *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 *GEO. WASH. L. REV.* 68, 72 (1991) (“[L]iberals denounce the Rehnquist Court’s attacks on their icons, but not the Warren and Burger Courts’ overrulings of conservative precedents.” [citations omitted]).

⁶⁴ *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 27 (2006) (statement of Sen. Feinstein reiterating Alito’s deep respect for precedent).

Whether asserted by conservatives or progressives, however, stare decisis has become a constitutional cliché. The reason for this is obvious: *No one* believes that *all* precedent should always be followed. Progressives cheered the overturning of *Bowers v. Hardwick*⁶⁵ in *Lawrence v. Texas*,⁶⁶ while some conservatives are eager to overturn both *Lawrence* and *Roe v. Wade*.⁶⁷ But all hail the overturning of *Plessy v. Ferguson*.⁶⁸

So *everyone* thinks precedent should sometimes be overturned, which gives rise to the obvious problem of identifying when. I have offered my own views on this subject elsewhere.⁶⁹ In sum, I contend that while stare decisis is vitally important to the development of rules of private conduct in a common law system,⁷⁰ it is far more problematic when interpreting a written constitution. In the latter situation, precedent can still play an epistemic role, placing some burden on a court to justify its departure from prior decisions.⁷¹ But when a justice is persuaded that the Court was previously in error and especially where its prior decisions do not even purport to be based on original meaning—which is all too common—stare decisis should provide no barrier to their reversal on originalist grounds.

In this context, adherence to stare decisis over the original meaning of the Constitution places the rule of judges above the rule of the written Constitution that judges have sworn to uphold. Those who now trumpet the virtues of stare decisis are often the same persons who deride the reliance on “the dead hand of the past.” Ironically, as was noted above,⁷² in place of the original meaning of the written constitution, they would adhere to the dead hand of judges.

⁶⁵ 478 U.S. 186 (1986).

⁶⁶ 539 U.S. 558 (2003).

⁶⁷ 410 U.S. 113 (1973).

⁶⁸ 163 U.S. 537 (1896).

⁶⁹ See Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical as it Sounds*, 22 CONST. COMMENT. 257, 262–66 (2006); Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006).

⁷⁰ See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 119, 127–30 (1998) (discussing the role of precedent in an evolutionary common-law system of adjudication).

⁷¹ Cf. Akhil Reed Amar, *Foreword: The Document and the Doctrine* 114 HARV. L. REV. 26, 28 (2000) (“Judicial precedent and nonjudicial practice can also serve important epistemic and default functions, helping us to find the best documentarian reading in cases of doubt.”).

⁷² See *supra* Part V.

Be this as it may, because it is almost inevitably asserted opportunistically and without regard to any consistent principle,⁷³ the invocation of “stare decisis” has become yet another constitutional cliché.

CONCLUSION:

TRANSCENDING THE CLICHÉD DEBATE OVER THE CONSTITUTION

Each of the constitutional clichés discussed in this Essay could be reformulated to capture the kernel of truth that led to its popular adoption. (1) *Judicial activism* could be defined as deviating from the text of the Constitution regardless of whether one is striking down or upholding legislation; conversely, *judicial restraint* is confining one’s decisions to the mandate of the Constitution and refusing to “update” it for something one prefers. (2) *Strict construction* is appropriate when determining the proper scope of government powers as a means of protecting the exercise of retained individual rights and reserved state powers. (3) Although judges should certainly not *legislate from the bench* by substituting their judgment for that of legislators, it is not “legislating” to require legislators to offer compelling justifications for restricting the enumerated and unenumerated liberties retained by the people. (4) The only *intentions of the framers* that are binding are those that were put in writing, and the public meaning of the written Constitution should remain the same until properly changed. (5) We are not being ruled by *the dead hand of the past* when we today, in the present, commit to a written constitution whose meaning remains the same until it is properly changed. Finally, (6) Justices should adhere to *the doctrine of stare decisis* unless they determine, after respectfully considering originalist precedents, that a previous decision of the Court has violated the original meaning of the Constitution. But each of these formulations would lead to the very sort of substantive and methodological discussion that the popular invocation of these clichés is typically intended to avoid.

The decades old debates that produced these constitutional clichés is a paradigm that has grown tired and stale. Signs point to a desire and willingness to transcend this discourse in favor of a new “center” in which the imperative of adhering to the original public meaning of the Constitution is accepted and we then debate the merits of particular

⁷³ See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (“[S]tare decisis has always been a doctrine of convenience, to both conservatives and liberals.”).

interpretations.⁷⁴ Originalists would candidly acknowledge the need to supplement original meaning with nonoriginalist constitutional constructions when the original meaning of the text is too vague solely to decide a particular case.⁷⁵ In short, perhaps the day is now arriving when public discourse can focus on how best to put the original meaning of the Constitution into practice rather than continuing to rely on lazy assertions of constitutional clichés.

⁷⁴ See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) (defending an originalist approach from a progressive political perspective); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) (same).

⁷⁵ See BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 27, at 118–30 (explaining why the underdeterminacy of language engenders a need for constitutional constructions that enhances constitutional legitimacy).