Originalism and Activism: The Supreme Court's Ideological Divisions and the Battle to Mend Them

From the conception of the court system, adjudicators of criminal justice in the United States have either ascribed to originalist or non-originalist systems of thought, and have engaged in heated controversy over which interpretation is better suited for serving justice. However, the crux of this philosophical dispute lies between the philosophies of judicial activism and restraint. To clarify, judicial activism refers to those more willing to overrule precedents, decide constitutional issues, and essentially defy the golden rule of *stare decisis*[1]. Conversely, judicial restraint is used in reference to judges who are more originalist in their rulings, are unwilling to decide constitutional issues unless imperative to the case and uphold *stare decisis* to the best of their ability[2]. The term 'activism' is traditionally used in the context of progressive 'left-wing' judges who feel more comfortable expanding constitutional rights. Nevertheless, it has become somewhat hollow after being used by both parties to delegitimize opposing judge's rulings, and frequently functions as a blanket term for any decision that breeds litigation[3]. The seemingly illusory ideological division between 'activism' and 'restraint' is indicative of how current media sensationalism and partisan lines have biased even those who are sworn to be impartial arbiters of justice. The frequent practice of partisan 'judicial obfuscation',when judges mischaracterize precedents instead of overturning them so as to not have to practice judicial 'activism', has led to a widening ideological gap between Supreme Court justices. Roughly 33% of recent Supreme Court cases were resolved in very close 5-4 decisions, which was the highest rate seen in over 10 years[4]. This clear disconnect of opinion between those who are seen as the supreme arbiters of justice is quite disconcerting - division about 'impartial' justice only undermines confidence in the court's ability to adequately resolve conflict and simply raises partisan tensions. As surveillance technologies develop, the line between reasonable and warrantless searches grows thinner, forcing even the most conservative judges to intervene. Thus, the Fourth Amendment is a great framework to evaluate both judicial activism and restraint's merits. In the midst of rising partisan resentment corrupting judgement, the ability of judicial agents to accurately apply the law, no matter their political affiliation, is key to solving this acrimony.

Since the *Katz v. In The United States* ruling, there has been rampant uncertainty amongst judges as to how they ought to characterize the precedent in new cases, especially with regard to novel technological developments. In light of this, the current Supreme Court has the crucial duty in expanding Fourth Amendment jurisprudence to include newfound degrees of privacy created by technology. These past 20 years, where modern technology has forced even the most staunch originalists to step out of their comfortable frameworks of stare decisis, have been conceivably most impacted by the landmark 2001 Supreme Court case, *Kyllo v. United States*[5]. Suspicious that the petitioner Kyllo was growing marijuana in his home, federal agents used a thermal imaging device to determine whether the heat emanating from his house was consistent with the lamps utilized to grow the drug. The agents then acquired a warrant based on the data collected from the imager, and later arrested Kyllo. Before the court, petitioner Kyllo's counsel Kenneth Lerner advocated that because the government used a device not generally used by the public to acquire details of a home that would be unknowable without an intrusion, the surveillance constituted a warrantless search and thus was

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[1] Roosevelt, Kermit. *Myth of Judicial Activism: Making Sense of Supreme Court Decisions.* Yale University Press, 2008.
[2] Rosen, Jeffrey. "Originalism, Precedent, and Judicial Restraint ." *Harvard Journal of Law & Public Policy*, vol. 34, 2013.
[3] Easterbrook, Frank H. "Do Liberals and Conservatives Differ in Judicial Activism?" *University of Chicago Law School Chicago Unbound*, no. Faculty Scholarship, 2002. (can i call you to explain the rest, i am lazy
[4] Rosen, Jeffrey. "Originalism, Precedent, and Judicial Restraint ." *Harvard Journal of Law & Public Policy*, vol. 34, 2013.
[5] Kyllo v. United States, 533 U.S. 27 (2001)

unconstitutional. The government's argument, delivered by Deputy Solicitor General Dreeben, was that thermal imaging was permissible because it only detected heat radiating from the external surface of the home, and that because it did not identify "intimate details" it was constitutional. As the foremost adjudicator of justice, the Supreme Court was given a crucial duty: additional to the given role of evaluating constitutional engagement, the Justices, no matter their position on originalism, would be forced to analyze current circumstances to determine the legitimacy of a litany of both past and future arrests. At this point, the judiciary had to abandon their conservative comfort zones of relying on precedents, disregard political expectations, and had to fulfill the daunting task of being the Framers of the 20th century.

Following careful analysis, the Supreme Court reached a verdict: a controversial 5-4 decision in favor of the plaintiff, Kyllo. Immediately, the case redefined the outdated precedents outlining the Fourth Amendment, and clearly delineated the extent to which the government can search, and subsequently arrest, individuals. This decision was a landmark case in a multitude of ways, as Scalia, arguably one of the most conservative originalists on the Supreme Court in recent years[6], was not only in favor of the decision but passionately delivered the opinion. To be more precise, the court's contentious opinion expanded Constitutional protections, despite the clear prejudices amongst the Justices. After the case was decided, each justice was sharply divided over their philosophical approaches to constitutional regulation, with only Scalia daring to trespass into activist territory for the sake of his constitutional interpretation. The decision, in spite of the conservative vote that composed it, was unequivocally an 'activist' approach to constitutionality, as it plainly expanded the definition of constitutionally-protected spaces. Prior to this decision, Justice Scalia and Justice Roberts had argued about their alternate methods of judicial restaurant, with Scalia calling Roberts's rulings as "faux-judicial restraint" as he believed that Roberts would mischaracterize and obfuscate judicial precedents to maintain his conservative label, instead of simply overturning them. This detail makes Scalia's interpretation of the Fourth Amendment particularly curious, as he has historically been characterized as a 'right-wing' justice desperate to obstruct 'left-wing' constitutional expansion. As a self-proclaimed "faint-hearted" practitioner of judicial restraint, Scalia's alignment with 'liberal' justices in this case blurred the line between judicial activism and restraint, and introduced the idea of intervention as restraint. Antonin Scalia, being arguably one of the most conservative justices on the Supreme Court in recent years, has consistently gone beyond the limitations of judicial restraint to serve justice, which is a testament to how judges, in spite of political affiliations, can and should blur the line between activism and restraint. Although not all justices have strayed from party lines, the mere fact that Scalia did so successfully highlights the intrinsic limitations of staticizing what judicial activism and restraint look like.

Judicial restraint is largely regarded as legal conservatism and non-intervention, but its definition ought to be regarded as a fluid concept[7]. For instance, in this case, Scalia blatantly defied the lines his party had carefully drawn for him, and proactively ruled in Kyllo's favor as a method of strategic intervention to maintain constitutional liberties[8]. In such instances, it is evident that overruling or modifying precedents may even be more consistent with conservative values than simply sitting back and adhering to *stare decisis* as expected[9]. In so far as this is true, this principle indicates that restraint and activism both are fluid philosophies that should be

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[6] Rosen, Jeffrey. "Originalism, Precedent, and Judicial Restraint ." *Harvard Journal of Law & Public Policy*, vol. 34, 2013.
[7]Cover, Robert M. "The Origins of Judicial Activism in the Protection of Minorities." *The Yale Law Journal*, vol. 91, no. 7, June 1982.
[8]Charles, Guy-Uriel E., and Luis E. Fuentes-Rohwer. "Judicial Intervention as Judicial Restraint." *Harvard Law Review*, 2018.
[9]Posner, Richard A. "The Rise and Fall of Judicial Self-Restraint." *University of Chicago Law School - Chicago Unbound,* Faculty Scholarship, 2012.

observed and defined on a particularist, or case-by-case, basis. With hindsight, this case serves as a lesson depicting how the partisan labels used to partition ideologies ought to be broken in order to uphold the integrity of justice.

In recent years, the distinction between judicial activism and restraint has become slightly nebulous as a result of judges deviating from their respective philosophical traditions. This shift can be observed in the 2012 Supreme Court case *United States v. Jones,* which has further demonstrated how practices of judicial activism and restraint have evolved. A hallmark of Fourth Amendment jurisprudence, the Jones lawsuit exemplifies how judicial restraint can become activism, and vice versa[10]. The case concerned the government's attachment of a GPS device to a vehicle and determined that the use of the device to collect data on the vehicle's movements constituted a search under the Fourth Amendment. Similar to the *Kyllo* lawsuit, the case was a narrow 5-4 vote decided in favor of the plaintiffs, and Scalia's characteristically originalist vote was, ironically, the pro-activist tie-breaker[11]. The Supreme Court's ultimate duty to the public is to fill the role of a non-partisan adjudicator of justice, and static notions of how a conservative or liberal judge ought to practice law is not only an illusory distinction, but a hindrance to correctly interpreting law.

With the inevitability of progress in American life, impending cases will unequivocally have to redefine the Constitution's boundaries notwithstanding originalist activist ideology. However, if these legislative battles have set any ideological precedent, it is probable that hollow partisan labels will be discarded in favor of constructive judicial deliberation. Essentially, the mere notion of judicial activism as opposed to judicial restraint is a meaningless binary whose definition shifts with every case encountered. Each of the approaches solidify a static course of judicial action -activists expand the constitution while originalists restrain it- which only serves as the final nail in the coffin of true justice. The Supreme Court, in given time, ought to be trusted to overcome both of these trivial, fallacious labels that constrain them and will restore the integrity of impartial justice in a polarized era.

[10]United States v. Jones, 565 U.S. 400 (2012)

[11]Segall, Eric J. "Reconceptualizing the Judicial Activism Debate as Judicial Responsibility: A Tale of Two Justice Kennedys." *Georgia State University College of Law Reading Room*, no. Faculty Publications, 1 Jan. 2009.