FROM JUDICIAL RESTRAINT TO JUDICIAL ENGAGEMENT: A SHORT INTELLECTUAL HISTORY

Mark Tushnet[*]

INTRODUCTION

Perhaps some cynicism—or realism—about the idea of judicial engagement can be excused. To an outsider, the call for judicial engagement recalls developments within liberal thinking about constitutional law in the 1950s and 1960s.[1] In the early decades of the twentieth century, Progressive constitutionalists, such as Felix Frankfurter, decried the Supreme Court's displacement of legislative judgments about social and economic policies in the name of the Constitution.[2] Their criticisms of specific decisions invoking the Due Process Clauses and the Commerce Clause to limit legislative power were the scaffolding on which they built a more general criticism of judicial authority. Progressives argued that, absent quite specific constitutional language directed precisely at the problem before them, the courts should not invalidate legislation on constitutional grounds as long as they could generate an interpretation of the relevant constitutional provisions according to which the statute was constitutional.[3] Or, as later theorists put it, courts should resolve reasonable disagreements about what the Constitution means in favor of the interpretation viewing the challenged statute as consistent with the Constitution. Although the term did not come into wide use until much later, that criticism was the theory of judicial restraint.

I. THE RISE AND FALL OF LIBERAL JUDICIAL RESTRAINT

The theory of judicial restraint dealt with the proper judicial role in our constitutional system, but it was developed against a political background, where Progressives believed correctly that, as a general matter, legislatures produced legislation consistent with the Progressive political program. Judicial restraint meant that courts would uphold Progressive legislation. Lib-

---

[*] William Nelson Cromwell Professor of Law, Harvard Law School.

[1] For a good introduction to the intellectual history I describe here, see generally LAURA KALMAN, THE STRANGE CAREER OF LIBERAL LEGALISM 13-163 (1996).

[2] *See* JAMES S. OLSON, HISTORICAL DICTIONARY OF THE 1950S, at 105 (2000) (noting that in the 1920s, Felix Frankfurter disagreed with the U.S. Supreme Court assuming "an activist, centralized role in overturning social legislation").

[3] And, as *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 425-29 (1934), indicates, the standard of specificity was quite demanding.

erals largely accepted the theory of judicial restraint for the first decade or so after President Franklin Roosevelt transformed the Supreme Court through his many appointments.[4] That was particularly true when theorists—though as it happened, not judges—were able to tweak the theory of judicial restraint. Theorists supplemented the theory's general skepticism about judicial review with the process-based justifications for judicial intervention, as articulated in "Footnote Four" of *United States v. Carolene Products Co*.[5] That tweak allowed theorists to support judicial action on behalf of disenfranchised African Americans and with respect to at least some aspects of free speech law.[6]

Scholars shaped by the constitutional confrontations during the New Deal remained fond of the theory of judicial restraint. But, the political and institutional ground shifted. By the late 1960s, liberals could no longer be confident that legislatures would generally produce legislation that they favored—or, at least, found themselves unable to secure the repeal of older statutes incompatible with liberalism as it had evolved. Outside constitutional theory, Legal Realism had produced an intellectual universe in which scholars understood courts as just another institution that made policy. Other institutions responded, with developments like the public interest bar that sought to use the courts as policymakers similarly to the way in which lobbying groups used legislatures. As a new generation of scholars matured and the memory of the New Deal confrontation faded, the theory of judicial restraint, with its Footnote Four tweak, would not produce all and only those results that liberals desired.

Liberals' responses took varying forms, but had a common core. Scholars could use "living constitutionalism"—an invigorated Footnote Four approach with a Dworkinian focus on high-level principles said to underlie and thereby justify specific constitutional provisions—to fill in the gaps left by the constitutional theory that liberals inherited. Again, the ideas were set against a political background in the legislatures and an institutional background in the courts. Roughly, liberals controlled the courts, but they did not reliably control legislatures. Under the circumstances, theories of judicial restraint became markedly less attractive to liberals.

Yet, for precisely the same reason, theories of judicial restraint became increasingly attractive to conservatives. In the 1960s and 1970s, the conservative challenge took the form of a rather generalized attack on judicial activism and a defense of judicial restraint—terms taken directly from lib-

---

[4] Progressivism as a political movement disappeared in the late 1930s, replaced by pluralist liberalism.

[5] 304 U.S. 144, 152 n.4 (1938).

[6] *See* Mark Tushnet, *The Rights Revolution in the Twentieth Century*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920-) 377, 388-89 (Michael Grossberg & Christopher Tomlins eds., 2008) (discussing how Footnote Four arguments supported constitutional doctrines dealing with free expression and discrimination).

eral constitutional theorizing by New Dealers and their liberal successors. But, the terrain had shifted. At some point, the idea that the courts *should* invalidate *some* statutes became unassailable, which made a general theory of judicial restraint problematic. Most notably, at some point *Brown v. Board of Education*[7] became canonical. Any account of the proper judicial role that did not justify the Supreme Court's decision in *Brown*—though not necessarily its successors, including *Cooper v. Aaron*[8] and the Court's decisions on remedies for unconstitutional segregation[9]—was, for that reason alone, unacceptable.[10] And, a general theory of judicial restraint could not justify *Brown*.

II. ORIGINALISM AS A CONSERVATIVE RESPONSE

The initial conservative response was originalism. The intellectual history of originalism is well-known, and I need not summarize it here.[11] For present purposes, I think several points are sufficient. First, originalism proved to be a good theory for explaining why courts should not invalidate legislation, but not a good one for explaining when they should—at least with respect to much modern legislation. In many forms, originalism did not justify *Brown*, which, as I have suggested, it had to.[12] Second, and in some tension with the preceding point, many versions of originalism were *too* aggressive, threatening too much modern legislation. A theorist can say, "*Fiat justitia ruat coelum*," but people engaged in the real world of judicial politics cannot. That is why Justice Scalia describes himself as a faintheartened originalist, and—in contrast to Justice Thomas—not a nut.[13] Third, the

---

7 347 U.S. 483 (1954).

8 358 U.S. 1 (1958).

9 *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 298-301 (1955) (assigning district courts the task of implementing school desegregation and requiring that desegregation be carried out "with all deliberate speed").

10 *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952-53 (1995).

11 For a good, sympathetic account of the intellectual history of originalism, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005).

12 I feel compelled to include a footnote noting that the most prominent effort to reconcile *Brown* with originalism, see McConnell, *supra* note 10, would be laughed out of a room of originalists were its methods used to justify any other result. The core of the argument is that in the years following the Fourteenth Amendment's adoption, those members of the House and Senate who remained in those bodies voted in overwhelming numbers and as a matter of what they regarded as constitutional compulsion in favor of proposals, never enacted, to ban school segregation by statute. *Id.* at 953. This is an idiosyncratic—though defensible—version of originalism, and I have never seen it used by anyone else in connection with any other question.

13 *See* Michael C. Dorf, *Did Justice Scalia Call Justice Thomas "a nut?"*, DORF ON L. (Sept. 21, 2007, 8:28 AM), http://michaeldorf.org/2007/09/did-justice-scalia-call-justice-thomas.html (arguing against author Terry Gross's claim that Justice Scalia intentionally implied that Justice Thomas is "a

academic theories of originalism, though not the popular understanding, diffused in two senses: they became more widely accepted, and they became less focused. When academic theorists are all originalists, we get formulations like "Living Originalism,"[14] and originalism qua academic theory no longer serves its original purposes of defining the contours of proper behavior by conservative judges in their restrained and activist modes. In these circumstances, we get efforts to police the borders of originalism, which simply bring the political dimension of constitutional theory to the fore.[15]

Finally, and probably most important, conservatives came to face a political environment structurally quite similar to the one liberals faced in the 1960s and 1970s. They controlled some legislatures, but not all, and they controlled the courts. As many have observed, judicial activism—perhaps by another name—becomes much more attractive after gaining control of the courts. But, in another parallel to liberals, conservatives discovered that originalism, in most of its variants, would not generate all and only those results they favored.

Just as liberals supplemented New Deal constitutional theories with others when they found that those theories no longer did the work that they wanted a theory to do, so have (or will) conservatives. "Judicial engagement" is, I think, one possibility. At present, the theory consists of a forceful attack on unwarranted judicial restraint or deference to elected legislatures, coupled with a promissory note about developing liberty-protecting constitutional interpretations. Much of the promise lies in the project's interest in enforcing the unwritten individual rights that the Constitution is said to guarantee. At that level of abstraction, liberals would find it hard to disagree because all the work will have to be done in identifying those individual rights.

One question about the project of judicial engagement is its relation to originalism, which is invoked, if at all, only in shadowy form in the project's "Declaration." Described at a sufficiently high level of generality, the project of originalism is not that different from the one laid out in the Declaration. So, for example, most originalists would agree that "[s]triking down unconstitutional laws and blocking illegitimate government actions is not activism."[16] Where legislatures enact laws inconsistent with the re-

---

nut" (internal quotation marks omitted)). I am not aware of anything asserting that Justice Scalia did not make the statement, at least in substance.

14 *See generally* JACK M. BALKIN, LIVING ORIGINALISM (2011) (arguing that originalism and living constitutionalism are compatible views).

15 For an example of this policing effort, see Ed Whelan, *Critique of Calabresi's "Originalism and Sex Discrimination"—Part 5*, NAT'L REV. ONLINE (Dec. 1, 2011, 2:18 PM), http://www.nationalreview.com/bench-memos/284637/critique-calabresi-s-originalism-and-sex-discrimination-part-5-ed-whelan.

16 *Declaration of the Institute for Justice Center for Judicial Engagement*, INST. FOR JUST., http://www.ij.org/cje/declaration (last visited Apr. 2, 2012) [hereinafter *CJE Declaration*].

strictions originally placed on the government, originalists do not object to courts striking those laws down. *District of Columbia v. Heller*,[17] properly lauded as the most originalist decision in decades, is the clearest example from the Supreme Court, but no originalist would disagree with the general proposition about the courts' proper role in striking legislation down. Originalism is not a theory of judicial restraint; it is a theory that describes when courts should and should not be activist.

III. JUDICIAL ENGAGEMENT AS DWORKINIAN LIBERTARIANISM

So, what is the project of judicial engagement about? That project has emerged because most versions of originalism do not support the results sought by the project's proponents. Or, perhaps better, to the extent that there is a version of originalism that supports those results, that version would do just as well in liberal hands. From an outsider's perspective, the project of judicial engagement is one of product differentiation, and its specific institutional location is at least as important as its intellectual content. Some institutions support various conservative versions of originalism; the Institute for Justice supports the project of judicial engagement.[18]

There is of course one important difference between the project of judicial engagement and most versions of originalism—though not all versions, in light of the proliferation of originalisms. The project of judicial engagement forthrightly asserts that the Constitution guarantees, and the courts should protect, unwritten constitutional rights.[19] As I have observed, the Declaration does not say much, if anything, about what those unwritten constitutional rights are. But, I think that it is easy to infer—for example, from the Declaration's reference to "a blanket of regulation,"[20] read in light of the project's affiliation with the Institute for Justice and its prior litigation efforts—that those rights are, broadly speaking, libertarian ones.

And then, once again, a question of product differentiation arises. There is already a respectable approach to constitutional theory that would authorize the courts to invalidate legislation inconsistent with libertarian principles. The theory is, simply, that courts are authorized to strike down

---

17 554 U.S. 570, 595, 635 (2008) (finding that there is "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms" and holding "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense").

18 The completely cynical view, which I do not completely disavow, is that the Declaration, and the project as a whole, functions as a fundraising device for the Institute for Justice, serving to appeal to potential donors not reached by its usual fundraising efforts or its prior litigation efforts.

19 *CJE Declaration*, *supra* note 16.

20 *Id.*

statutes inconsistent with principles of justice.[21] So, because—for libertarians—libertarianism is the correct theory of justice, courts can use it as the basis for invalidating legislation. Why, then, is a new name needed for this practice? The reason, I think, is that it already has a brand name—"Dworkinian constitutional theory." From the perspective of court-oriented libertarians, constitutional scholar Ronald Dworkin has the right constitutional theory,[22] but the wrong theory of justice. The difficulty, though, is that Dworkin's name has tarnished the theory, to use a term from trademark law. So, some other name is needed, and "judicial engagement" does the job.

Another possibility, though also within the general area of product differentiation, is that there is a real difference between judicial engagement and Dworkinian libertarianism (an obviously odd phrase, but better than the alternative, "libertarianism set in the framework of Dworkinian constitutional theory"). Here, I think that it is helpful to return to *Lochner v. New York*,[23] which is, in some ways, the point of departure for all modern constitutional theory. Despite the case's familiarity, I must lay out those aspects that bear on my argument. The state defended its maximum hours law on two grounds. First, to use Justice Peckham's term, the state said that the statute was a labor law, "pure and simple," and that labor laws, "pure and simple," were constitutionally permissible.[24] By that, the state meant that the statute was constitutionally permissible simply because it aimed at changing the relative bargaining power of workers and employers—or, equivalently, that it was constitutionally permissible because the Constitution allowed the state to use its regulatory apparatus to redistribute market- (and common law-) based wealth allocations.[25] Second, the state said that the statute was within its police powers to protect the health of workers and consumers.[26]

The Court was divided in its response to these two attempted justifications. Justice Peckham rejected the proposition that the state had the constitutional power to enact labor laws "pure and simple"—that is, to engage in regulatory redistribution.[27] Justice Holmes dissented on this question, saying that the Constitution placed no limits on the economic theories legislatures could adopt: "a constitution is not intended to embody a particular

---

21 One can find the theory articulated sporadically in the pages of the libertarian-leaning academic journal *Social Philosophy and Policy*. *See, e.g.*, Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, 9 SOC. PHIL. & POL'Y 141 (1992).

22 Subject perhaps to a minor qualification, that Dworkin gives too much weight to the criterion of "fit." But, I think, dealing with that qualification is simply a tweak to his overall approach.

23 198 U.S. 45 (1905).

24 *See id.* at 57.

25 *See id.* at 51, 57.

26 *Id.* at 50-51.

27 *Id.* at 57.

economic theory . . . . It is made for people of fundamentally differing views."[28]

Justice Peckham also rejected the proposition that the statute was justified under the police power.[29] The connection between a maximum hours law, and worker and consumer health was far too attenuated to support the statute. Importantly, Justice Peckham engaged in his own analysis of the strength of the evidence, which was offered to show a relation between long working hours and workers and consumer health:

> *In our judgment* it is not possible *in fact* to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature.[30]

Justice Harlan dissented on this question, saying that the Court should defer to minimally plausible legislative judgments on empirical questions about the extent to which a statute actually served a police power end.[31] He stated: "What the precise facts are it may be difficult to say. It is enough for the determination of this case, and *it is enough for this court to know, that the question is one about which there is room for debate* and for an honest difference of opinion."[32]

The project of judicial engagement might take Justice Holmes's side against Justice Peckham, but take Justice Peckham's side against Justice Harlan. In taking Justice Holmes's side, the project would reject Dworkinian libertarianism, taking the position that—as a constitutional matter—legislatures can engage in all sorts of redistributive efforts, including regulatory redistribution. Doing so would build into the project the faintheartedness that Justice Scalia has to impose on originalism. And, from one point of view, that is all for the good. Justice Scalia's faintheartedness is an acknowledgement that a full-hearted devotion to originalism would wreak havoc with the contemporary American state. Wreaking havoc is a bad thing both for Burkean conservative reasons and practical political ones. Similarly, it is a bad thing for a full-hearted Dworkinian libertarianism—in spades. We might not be absolutely sure that all of the modern state would fall were it subjected to originalist scrutiny, but we can be absolutely sure that it would fall when subjected to libertarian scrutiny. So, some version of "fainthearted" libertarianism might be quite attractive.

---

28 *Id.* at 75-76 (Holmes, J., dissenting).

29 *Lochner*, 198 U.S. at 57-61 (majority opinion).

30 *Id.* at 62 (emphases added).

31 *See id.* at 68-70 (Harlan, J., dissenting).

32 *Id.* at 72 (emphasis added).

Taking Peckham's side against Harlan might do the job.[33] The project would have two components. First, it would have to take on the argument about labor laws, "pure and simple." Yet, doing so might not be all that difficult. The project could acknowledge that the Constitution does not—as such—preclude redistributive legislation. So, for example, the Constitution would not make progressive income taxation unconstitutional. But, the argument would have to be that the Constitution allows redistributive legislation only when it actually achieves redistribution. And, often or almost always, regulatory redistribution fails that test. That is, the argument goes, statutes like maximum hours or minimum wage laws rarely shift wealth from the (relatively) rich to the (relatively) poor. They shuffle the deck a bit, but mostly benefit some of the relatively poor at the expense of other relatively poor people. At this point in the argument, the fact that the project takes Peckham's side against Harlan becomes important. From Peckham's position—and, so, from the position I am imputing to the project of judicial engagement—the courts should independently determine whether regulatory redistribution is indeed likely to occur in the circumstances.[34]

The second component of the Peckham strategy is simpler. It addresses the police power justifications asserted in support of regulation, and asks whether, in the courts' eyes, a challenged regulatory statute really does promote consumer or worker health or safety. Much of the Institute of Justice's most effective litigation—effective in the sense of making arguments that are appealing given the cases' facts, if not effective in the sense of winning the cases—focuses on this question. Personally, I don't find this strategy inherently tied to libertarianism—it could be straightforwardly Progressive and technocratic—but it is clear that the strategy has strong libertarian overtones in the twenty-first century. Yet, judicial engagement, understood as Peckham-not-Harlan, would cleanse the statute books of regulation that fails to promote public safety or health, in the name of a certain kind of libertarianism, without raising the specter of a full-hearted Dworkinian libertarianism.

CONCLUSION

These suggestions about both the origins of and some possible paths for the project of judicial engagement might well seem deflationary to the

---

[33] I note that some of the formulations in the Declaration rather strongly suggest that the project is indeed aimed at doing precisely this: "Judges must *meaningfully evaluate* the government's action and the restrictions it imposes on liberty so they can determine, *based on the evidence presented*, the true basis of that action and whether it passes constitutional muster." *CJE Declaration*, *supra* note 16 (emphases added).

[34] I personally take no position on this question, other than to note that it seems reasonably clear that sometimes regulatory redistribution will be effective and sometimes it won't, and that all the interesting analytical work is done in addressing the question in specific contexts.

project's most ardent proponents. Of course, I am not personally engaged in the project. But, looking at it from the outside and attempting to locate its historical roots, I believe that the suggestions that I have made are worth considering, if not by the project's proponents, then by scholars unaffiliated with it.