Judicial Supremacy and the End of Judicial Restraint

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Judge Posner provides a characteristically thought-provoking analysis of judicial restraint. Unfortunately, by attributing the origin of the doctrine to James Bradley Thayer, Posner misunderstands the concept. For Thayer was not making a new argument. He was, rather, reasserting an older, Jeffersonian notion that primary authority to interpret the Constitution lies with the people and not with courts. The replacement of this concept of popular constitutionalism with the modern doctrine of judicial supremacy—a change that took hold only in the 1960s—changed the political debate from one about who should interpret the Constitution to one about how the Constitution should be interpreted. More important, acceptance of judicial supremacy left protecting judicial authority (by not acting so frequently or aggressively as to produce a political backlash) as the only justification for restraint—a justification that, ironically, grows weaker in direct proportion to supremacy's acceptance. Not surprisingly, then, and as Posner notes, judicial restraint today has decayed to the point where it is little more than a rhetorical tool used opportunistically by both sides in constitutional debate. But the culprit for this development is not, as Posner suggests, the development of theories of constitutional interpretation. It is, rather, our embrace of the notion that deciding the ongoing meaning of a democratic Constitution is a task best left entirely to judges.

It is, I suppose, banal to say that Richard Posner has offered an interesting take on something. Of course he has. He has, in fact, offered interesting takes on so many topics over so many years that it is not flattery but simply fact to say that Posner is to the end of the twentieth and beginning of the twenty-first centuries what Oliver Wendell Holmes was to the end of the nineteenth and beginning of the twentieth. Yet, as is typically the case with provocateurs, to

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observe that Judge Posner has said something interesting about a problem is not the same as saying he has gotten it exactly right. For while reexamining the history of judicial self-restraint surely does tell us something about constitutional law today, I fear Judge Posner has misunderstood important historical nuances. I want, therefore, to tell a somewhat different story that points to alternative or added considerations that should also command our attention.

That judicial self-restraint rose but has fallen seems plain enough. The fall in particular becomes increasingly obvious with each passing year—a change in practice that cannot be blamed on either the Left or the Right, except in the sense that whichever side has control at a given time seems determined to outdo what the other just did. The fall of judicial self-restraint has been less a fall than an accelerating slide of many years.

As for the rise of judicial self-restraint, Judge Posner dates it from James Bradley Thayer's famous 1893 article, *The Origin and Scope of the American Doctrine of Constitutional Law*.[1] But that's much too late, and if we want properly to understand the rise and fall of restraint in the sense Judge Posner means—as a doctrine of deference to other, political decision makers—we must go back further (as Thayer himself did), to the time of the Founding and the origins of judicial review.

There is no need to recount in detail how the practice of judicial review first developed. I and others have written on that topic at length.[2] For present purposes, what matters (and is not controversial) is that two distinct justifications for judicial review emerged in the Founding era. The first, which we can call "Republican" or "Jeffersonian" (because it was embraced and advocated by Jefferson's party), emerged in the 1780s. It was premised on the idea that primary authority to *interpret*, as well as to make, constitutional law rested actively in the community—an idea I have elsewhere labeled "popular constitutionalism."[3]

The Constitution, on this view, is law created by the people to regulate and restrain the government—as opposed to what we think of as ordinary law, which is law enacted by the government to regulate and restrain the people. This inversion, in turn, inverted what today we take to be the usual assignment of authority to interpret and enforce. Government officials are the authoritative interpreters of ordinary law. We have (indirect) control over what laws are made by virtue of our ability to elect and remove most lawmakers. But once a

1. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

2. For my version of this story, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–144 (2004). The discussion below is drawn from chapters 1–4. Two other recent accounts are BARRY FRIEDMAN, THE WILL OF THE PEOPLE 19–71 (2009); and PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

3. KRAMER, *supra* note 2, at 8.

law has been enacted, ordinary citizens are subordinate to government officials in ascertaining its meaning and imposing sanctions. We still must decide what we think the law requires or commands—we must, that is, still interpret the law to determine what obligations it enjoins. But our interpretations are guesses, with no formal legal authority. If challenged, they are submitted to designated public officials (administrators, prosecutors, and ultimately judges) who decide if we are right or wrong and impose punishment if the answer is wrong.

That relationship was reversed when it came to constitutional law. As explained by Republican Judge William Nelson in *Kamper v. Hawkins* in 1793, "[a] *Constitution* . . . is to the *governors*, or rather to the departments of *government*, what a *law* is to individuals."[4] Because the Constitution's object is to regulate public officials, those officials must do their best to interpret and follow the Constitution while going about their daily business—just as we do when it comes to ordinary law. But like our interpretations of ordinary law, their interpretations of the Constitution are not authoritative. They are now the guesses, subject to direct supervision and correction by the superior authority of "the People themselves."[5]

A second theory of judicial review emerged later, in the 1790s, after the Constitution had been ratified. Developed by Federalist leaders, this new theory was but one piece of a larger evolution in their thinking—part of a mix of new ideas and doctrines that coalesced or crystallized for Federalists after the Constitution went into operation and in the wake of the French Revolution. Part of a broad effort to secure "order" in the face of what looked to them like democracy run amok, Federalists reconsidered the nature of judicial power and developed what amounts to the modern theory of judicial supremacy.

Their new thinking, in a nutshell, treated the Constitution as nothing more than a species of ordinary law. As such, its interpretation was an ordinary judicial and legal act, and so *not* one authoritatively delegated to legislative or executive officials, much less to the people at large. The political branches would, of course, still need to interpret the Constitution before acting, but separation of powers meant that primary interpretive authority lay with the courts—which Federalists now claimed had special and final responsibility for determining constitutional meaning and deciding on constitutional lawfulness. As James Kent explained in 1794, because the interpretation or construction of the Constitution "requires the exercise of the same LEGAL DISCRETION as the interpretation or construction of a Law," it is judges who are "the proper and intended Guardians of our limited Constitutions."[6] The Federalist

4. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 24 (1793).

5. There is no need to explain here how this system was put into operation. For a detailed account, see KRAMER, *supra* note 2, at 9–127.

6. James Kent, *An Introductory Lecture to a Course of Law Lectures*, *in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 936, 942–44 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

legislature of Rhode Island stated the point still more baldly when rejecting James Madison's effort to rally popular opposition to the constitutionality of the Alien and Sedition Acts. The Constitution, it said, "vests in the federal courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States."[7]

We should highlight two points about these different approaches to judicial review. First, neither side spent time discussing or arguing about how to interpret the Constitution. Nor did adherents of either view offer or show much interest in developing a "theory" of constitutional interpretation in the sense people think of it today. They had no reason to quarrel about interpretive methodology because there was no real disagreement on the question. Everyone essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling (as applicable, and in a relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion. Sharing views on the general process of interpretation—on *how* to interpret, that is—disagreement came to focus on *who* could interpret, and to what effect. Indeed, the question of *who* had interpretive authority was critical precisely because the accepted process of interpretation was loose and open ended, and different interpreters might plausibly reach different conclusions on the same question.

Second, and more directly relevant to the issue at hand, a concept of judicial self-restraint played a part in both theories of judicial review. That courts should exercise restraint was, in fact, central to both approaches. Contrary to what Judge Posner says, Thayer was drawing on more than "scattered judicial remarks" in his article, and he was not original even in "organizing and rationalizing" them.[8] Thayer was, as I will explain below, trying to push an old and well-developed concept of self-restraint back onto center stage at a time when, like today, the Court and its supporters were inclined to ignore it.

As an aside, I should note that I also disagree with Judge Posner that a precondition to judicial self-restraint is "hav[ing] no theory" of constitutional interpretation and that the death of restraint can be attributed to the rise of interpretive theories that claim to generate "correct" constitutional decisions.[9] My reason for disagreeing here is simple: even theories that claim to generate a single right answer (something, by the way, that eighteenth- and nineteenth-

7. *Answers of the Several State Legislatures—Rhode Island*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532, 533 (Jonathan Elliot ed., 2d ed. 1836).

8. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 523 (2012).

9. *Id.* at 538.

century lawyers also believed of their method) are indeterminate enough in application that reasonable people can disagree reasonably about what that single right answer is—which is all that's necessary to create space for deference or self-restraint. If, that is, one is inclined to be deferential or restrained. For I agree with Judge Posner that courts and commentators today are not much inclined to be either. But, as I will explain below, I think *that* change has sources other than the articulation of new theories of constitutional interpretation. Indeed, the development of such theories is itself a by-product of the same developments that undermined self-restraint.

Be all that as it may—and I'll return to these questions shortly—both Republicans and Federalists expected courts to use restraint in exercising judicial review. They did so, however, for different reasons and with different purposes and justifications in mind—yielding what were, in fact, different concepts of deference. For Republicans, restraint was a device to preserve the primary and superior authority of "the People." Inasmuch as the people had delegated responsibility to enact laws to the legislature, the question whether a law thus enacted was or was not constitutional was—in the first instance—a matter to be resolved between the community and its elected representatives through protests, petitions, elections, and other forms of direct popular action.

For a minority of Republicans, that ended the matter, and judicial review in any form was improper.[10] This was not, however, the orthodox Jeffersonian position, which recognized that courts must sometimes refuse to enforce a statute on the ground that it is unconstitutional. The people had, after all, delegated to courts responsibility to adjudicate cases. If courts ignored questions of constitutionality when adjudicating, they would be violating *their* responsibilities as the people's agents in just the same way legislators did if they failed to consider the constitutionality of a law before enacting it. But, to the extent there was doubt about whether a law was unconstitutional—indeed, to the extent the law was not "unconstitutional beyond dispute"[11]—Republicans said the courts should leave the decision to those who had primary responsibility for deciding: the People themselves.

This is an important point to understand: under the Republican view of judicial review, courts were acting as agents of the people. When they declared legislation void for being unconstitutional, they were acting in a manner they presumed their principal had commanded. Such presumptuousness was not to be indulged lightly, however, and should await conditions of near certainty—

10. *See, e.g.*, 11 ANNALS OF CONG. 178–80 (1802) (statement of Sen. John Breckinridge); *id.* at 661 (statement of Rep. John Randolph).

11. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* GRIFFITH J. MCREE, 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 172, 175 (1857). Thayer collects many of the early cases, *supra* note 1, at 138–42; *see also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455 (2005).

because the principal was capable of acting on its own and retained primary responsibility for doing so at all times.

Federalists, on the other hand, emphatically rejected the idea that the people had primary—or, indeed, any—authority when it came to *interpreting* the Constitution (as opposed to making new constitutional law). As noted above, by the mid-1790s, Federalists had come to embrace a position much like the one most people take today: the Constitution delegates final interpretive authority to courts. Judges were not acting as the community's agents when they interpreted the Constitution. They were, on the contrary, preventing the community—and its legislative and executive agents—from committing (in the words of Gouverneur Morris) "the greatest follies and absurdities."[12] To let the people interpret the Constitution was, he said, to put "an inestimable treasure . . . into the hands of drunkards, madmen, and fools."[13] For this reason, Federalists declared, the Constitution had deliberately "vested in the judges a check"[14] in order, as Morris sneered, "to save the people from their most *dangerous* enemy, to save them from themselves."[15]

It was, even so, important not to withhold enforcement of a law unless its unconstitutionality was clear, and Federalists, too, took pains to emphasize that "in all doubtful cases . . . the Act ought to be supported."[16] But for Federalists this restraint or deference was a matter of prudence and political expediency: something necessary to secure and preserve *judicial* (rather than popular) authority by minimizing the risks of overstepping.

The election of 1800 decisively resolved the dispute between these two views of judicial authority in favor of Republicans.[17] Federalism limped along for a few more years before disappearing completely after the War of 1812, while John Marshall conspicuously abandoned the Federalist version of judicial review in *Marbury v. Madison*—crafting an opinion on this issue that Jefferson himself might have authored, and that was, in fact, largely lifted from opinions written by Virginia Republicans Spencer Roane and St. George Tucker in *Kamper v. Hawkins*.[18]

Of course, elections seldom kill ideas, though they may render them unfashionable for a time. And so the Federalist concept of judicial review never disappeared entirely. It survived among some former Federalists (who became first National Republicans and then Whigs), particularly those who were part of the newly professionalizing bench and bar.[19] The idea that courts had special

12. 11 ANNALS OF CONG. 83 (1802) (statement of Sen. Gouverneur Morris).
13. *Id.*
14. *Id.* at 38.
15. *Id.* at 77.
16. Iredell, *supra* note 11, at 175.
17. *See* KRAMER, *supra* note 2, at 137–38.
18. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793); *see* Larry D. Kramer, Marbury *and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 228–29 (2003).
19. *See* KRAMER, *supra* note 2, at 156–64.

authority to interpret the Constitution, superior to that of the people and the other branches, thus remained part of the nation's political and legal discourse—though it was squelched anew each time its proponents pushed hard enough to attract the general public's attention, as during the battle over the Second Bank of the United States or the controversy provoked by *Dred Scott*.[20]

The idea of judicial supremacy then reemerged strongly in the years after Reconstruction. A variety of factors contributed to the turnabout. The weight of *Dred Scott* gradually lifted as time passed and the Court's personnel changed. The Republican Party's ascendancy gave way after 1874 to several decades of divided government, which naturally gave the Justices more freedom to act.[21] Their desire to do so was very much influenced by politics, as the free labor rhetoric of the Civil War era evolved among conservatives into a new libertarian, antiredistributive orthodoxy.[22] Morally committed to a particular notion of property rights and fearful of the labor movement and other seemingly ominous signs of social unrest, the Court set about enlarging its role. In a talk delivered in 1893, Justice Brewer spoke about "[m]agnifying, like the apostle of old, my office" because "the salvation of the nation . . . rests upon the independence and vigor of the judiciary."[23] It was at this time, too, that we begin to hear again old discredited Federalist arguments about how "what is now to be feared and guarded against is the despotism of the many—of the majority" and how through judicial review the "people had effectually protected themselves against themselves."[24]

Gradually, these developments altered the Court's constitutional jurisprudence. Because the change occurred slowly and (at least, initially) affected mainly laws that no longer had strong political support, it took a few years before the Court began to draw fire. By the late 1880s, however, legal commentators and political leaders had begun to take notice. A prolonged struggle began, eventually culminating in the New Deal crisis of the 1930s.[25]

There's no need to review that struggle here. Suffice it to say that lawyers, judges, and legal scholars today too often assume that the Court's supremacy

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20. *See id.* at 183, 211–12; DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 439–43 (1978); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 176–79 (1988); DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 291–93 (1976).

21. *See* ALLAN J. LICHTMAN & KEN DECELL, THE THIRTEEN KEYS TO THE PRESIDENCY 145–81 (1990); Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45 (1992).

22. *See* ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 97–200 (1980); William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767, 786–801.

23. David J. Brewer, *The Nation's Safeguard*, 16 PROC. N.Y. STATE B. ASS'N 37, 47 (1893).

24. John F. Dillon, *Address of the President*, 15 REP. ANN. MEETING A.B.A. 167, 203, 206 (1892).

25. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001).

passed without challenge in this period—a historical blind spot that comes from ingenuously taking the rhetoric in judicial opinions at face value. There was, to be sure, strong conservative support for the Court's ambitious claims. But statements about the judiciary's place in the constitutional system, especially those of the Justices themselves, must be seen for what they were: partisan claims in contested territory. The Progressive era was a time of flux and uncertainty. The Court's role was hardly the central issue, for substantive matters of much greater immediate import were at stake. But courts made themselves a source of controversy by aggressively taking sides in the incipient class conflict, and the propriety of the role they sought to create for themselves became one of the questions up for grabs.

It was in the midst of this debate that Thayer wrote his now-famous article. He was, for what it is worth, only one among many making similar arguments.[26] And his particular point was to reassert and so restore the primacy of the Jeffersonian view of judicial authority. Judge Posner badly misunderstands Thayer when he says that Thayer's greatest worry was that "if courts enforced constitutional limitations to the hilt, legislators would stop thinking about the constitutionality of proposed legislation and just think about how the courts would react."[27] Thayer does indeed make this point, but only in passing in the very last paragraph of the article. To see this as Thayer's chief concern is to read him anachronistically. Thayer's main concern—a concern highlighted both by the structure of the article and by the number of times Thayer makes the point—was to reassert that *primary* authority to interpret the Constitution is outside the courts and that judicial authority to declare statutes unconstitutional is, at most, a subordinate, secondary check.[28] Thayer sought to restore the older, historically preeminent Republican idea of judicial authority—including its notions of self-restraint and deference—and to reject the Gilded Age Court's pretensions to constitutional supremacy.

To be sure, Jeffersonian theory is not unchanged in Thayer's hands. Most importantly, the idea of direct popular supervision—assumed and widely accepted in the Early Republic—no longer made sense. Instead, Thayer assumed that the political branches of government, and especially the legislature, offer the best expression of popular views. But the crucial point, and Thayer's chief object, was to repudiate the idea that interpretive authority over the Constitution was delegated to courts in the first instance. The truth, Thayer insisted, is exactly the opposite. And so the legislature's determinations of constitutionality are entitled to respect, and the courts' role is at most the

26. *See id.* at 1406–13; T.W. Brown, *Due Process of Law*, 32 AM. L. REV. 14, 20–21 (1898); W.F. Dodd, *The Growth of Judicial Power*, 24 POL. SCI. Q. 193, 193, 195, 200–01 (1909); Wm. M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 190–202 (1885).

27. Posner, *supra* note 8, at 524.

28. *See* Thayer, *supra* note 1, at 136, 144, 148, 150, 152.

minimal one of stepping in when the legislature has plainly gone beyond the limits of what reasonable people could say is permitted.

One final point on Thayer: Judge Posner dismisses Thayer's faith in the legislature as reflecting a naive conception of the capacity and incentives of American legislators to take constitutional questions seriously. This opens a large topic that could be the subject of a whole separate comment. So while I cannot do that topic justice here, I want to flag a couple of reservations.

First, the assumption that legislatures are incapable of taking the Constitution seriously is, as Judge Posner's treatment illustrates, even more taken for granted and less examined by legal scholars today than judicial supremacy. It needs and deserves more serious treatment. High-level floor debate may be a thing of the past, but (as a substantial political science literature attests) serious deliberations are carried on in committees and caucuses, between individuals, by email, through staff, and so on.[29] In fact, staff and committees devote hundreds of hours to understanding, debating, and resolving constitutional issues—spending much more time, with more and better information than the Court, which dedicates an hour to oral argument and much less than this to conferencing, with little actual deliberation among the Justices and most of the work done by a single clerk with no experience and only partisan briefs for assistance.

Nor, as this same literature shows, can the product of this work be dismissed by assuming that legislators will do what they need to reach the politically desirable outcome. For while politics obviously plays a preeminent role, much more is involved in congressional deliberations.[30] Nor do I think the typical Supreme Court Justice less likely to manipulate results than the typical member of Congress, and I'm not sure why catering to ideology (which clearly drives the Justices' decision making) should be considered less worrisome than catering to politics. These days, I'm not even sure they are different.

In any event, what happened to this original concept of judicial review, with its concern for restraint to preserve active and ongoing popular control of the Constitution? The renewed struggle between its proponents and the supporters of judicial supremacy continued into the early decades of the

29. *See* KRAMER, *supra* note 2, at 238–39; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 819–22 (2002); see also reconstructions of such deliberations in SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 40–48, 65–108 (1992); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 163–330 (1966).

30. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 65–66 (1999); R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 64–87 (1990); JEFFREY M. BERRY, THE NEW LIBERALISM 87–119 (1999); RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 141–57 (1978); RICHARD L. HALL, PARTICIPATION IN CONGRESS (1996); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 47–54 (3d ed. 1989); JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS AND INFLUENCE (1996); Richard A. Smith, *Advocacy, Interpretation, and Influence in the U.S. Congress*, 78 AM. POL. SCI. REV. 44 (1984).

twentieth century in a close, if prolonged, replay of the Republican/Federalist conflict of the 1790s. Thayer and other Progressives (including, most notably though too seldom noted, Theodore Roosevelt[31]) were generally successful in opposing the Court's conservative majority—which sometimes spoke boldly and occasionally acted on its rhetoric, but which, for the most part, acquiesced to the steady growth of new regulation at both the state and national levels. The Court became somewhat bolder in the 1920s, but even the high-water mark of the *Lochner* era is best described as a time of grudging acceptance by the Court of new forms of state intervention and regulation.[32] And when, in a panicky reaction to FDR's New Deal, the Court did try, too late, to draw a line in the sand, it was confronted, threatened, and forced to back down. "The Constitution of the United States," Roosevelt insisted, is "a layman's document, not a lawyer's contract," and its meaning and application are supposed to be determined and settled not by lawyers and judges, but by "the people and the Congress."[33] Roosevelt was able quickly to consolidate his victory through the appointment power, remaking the Court into a body once again prepared to defer to the political branches on all the questions that had, until then at least, been important.

The turning point began—no surprise here—with *Brown v. Board of Education*. In the years after *Brown*, the idea of judicial supremacy seemed, at long last, gradually to find wide public acceptance. The Court's decisions were still often controversial, but beginning in the 1960s, resistance and noncompliance turned into a form of protest rather than a claim of interpretive equality, much less superiority. By the 1980s, most protests that touched on constitutional matters were being directed *to* rather than *against* the Court, and acceptance of judicial supremacy became the norm.[34] Witness the dramatic change in attention paid to Supreme Court nominations,[35] a thoroughly

31. *See* Theodore Roosevelt, A Charter of Democracy, Address Before the Ohio Constitutional Convention at Columbus, Ohio (Feb. 21, 1912), *in* THEODORE ROOSEVELT, SOCIAL JUSTICE AND POPULAR RULE: ESSAYS, ADDRESSES, AND PUBLIC STATEMENTS RELATING TO THE PROGRESSIVE MOVEMENT 163, 184–85 (1926); Theodore Roosevelt, The Right of the People to Rule, Address at Carnegie Hall (Mar. 20, 1912), *in* ROOSEVELT, *supra*, at 200, 203–04; Theodore Roosevelt, The Recall of Judicial Decisions, Address at Phila., Pa. (Apr. 10, 1912), *in* ROOSEVELT, *supra*, at 255; Theodore Roosevelt, *Introduction* to WILLIAM L. RANSOM, MAJORITY RULE AND THE JUDICIARY: AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION 3 (1912).

32. *See* Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 131–34 (1998); David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

33. Franklin D. Roosevelt, President, Address on Constitution Day, Wash., D.C. (Sept. 17, 1937), *in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 362–63, 365 (Samuel I. Rosenman ed., 1941).

34. *See* KRAMER, *supra* note 2, at 228.

35. *See, e.g.*, AMY STEIGERWALT, BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS 5–9 (2010); BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 37–85 (2006); David R. Stras, *Understanding*

predictable development in a world in which appointments have become the only practical way to reshape constitutional law in the face of judicial decisions.

Explaining this rather extraordinary development is not easy and is, in any event, yet another topic beyond the scope of this Essay. One obviously important source was the curious fact of the Warren Court itself—a liberal activist Court that, for the first time in American history, gave progressives reason to see the judiciary as a friend rather than a foe. At first, liberals had a difficult time deciding how to respond to the Warren Court.[36] On the one hand, liberal intellectuals strongly supported what the Court was doing substantively. On the other hand, their teachers and heroes had led the fight against *Lochner*, and many of them had devoted their own professional lives to the idea that courts acted inappropriately when they interfered with the will of the people. *Brown* and other judicial innovations that soon followed were thus a wrenching test of the traditional liberal commitment to judicial restraint.[37]

As Warren Court activism crested in the mid-1960s, however, a new generation of liberal scholars discarded opposition to courts and turned the liberal tradition on its head by embracing a philosophy of broad judicial authority. Though familiar with the history of *Lochner*, these younger scholars had not lived through it, and, to them, what was now called "the countermajoritarian difficulty" just did not seem so difficult. So they put aside misgivings about accountability, conceded that judicial review might be in tension with democracy, and justified any trade-off on the ground that courts could advance the more important cause of social justice.

Conservatives, for their part, had no problem with judicial supremacy. It was an idea they had always embraced, going all the way back to the Federalist era, and they continued to do so after Chief Justice Warren took over. For them, the problem with the Warren Court was simply that its decisions were wrong, and their protests were directed at the substantive interpretations of the liberal Justices, whom they saw falsely using the Constitution as cover to deal with matters that constitutional law did not in fact reach or address. Beginning with

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the New Politics of Judicial Appointments, 86 TEX. L. REV. 1033, 1033, 1056–78 (2008) (reviewing JAN CRAWFORD GREENBURG, SUPREME CONFLICT (2007) and WITTES, *supra*).

36. *See* LEARNED HAND, THE BILL OF RIGHTS 1–30 (1958); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 185–202 (2002); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959).

37. See sources cited *supra* note 36; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 247–72 (1992); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 1–131 (1996); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973); Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 602 (1979).

Robert Bork's 1968 attack on the Court in *Fortune* magazine,[38] many conservatives started using the traditionally liberal rhetoric of democracy and restraint. They were not, however, arguing that the Supreme Court should defer to political bodies about what was or was not constitutional, for they supported judicial supremacy over the Constitution as they understood and interpreted it. Conservatives continued to insist, for example, that the New Deal Court had been wrong to abandon judicial enforcement of limits on federal power.[39] And they were, and have been, perfectly willing to strike down laws they view as inconsistent with original understandings on such matters as property rights or guns.[40] They saw the scope of the Constitution differently, however—as more limited in its scope—and they objected to liberal Justices using the Constitution to make policy in arenas they deemed unaddressed by the Constitution one way or the other and for that reason properly left to ordinary politics. The upshot, in any event, was that for the first time in American history conservatives and liberals found themselves in agreement on the principle of judicial supremacy. Liberals and conservatives alike now took for granted that it was judges who should do the interpreting and that the judges' interpretations should be final and binding.

What they now disagreed about was *how* to interpret. Until this time, as I noted at the beginning, there were no special theories of constitutional interpretation. There was, rather, an unexamined consensus that the Constitution could and should be interpreted like other sources of law, using well-tested methods of legal argument familiar to lawyers from other contexts, with at most minor variations. But, as noted before, because this system was (and is) relatively open ended—because, in other words, different interpreters could easily reach different conclusions using the same general method—it mattered very much *who* had interpretive authority. Hence, the controversy had always been over the extent to which judges were or should be subordinate to other interpreters—legislators, executives, the community at large.

But now, with the argument over *who* had interpretive authority settled in favor of judges, the question *how* to interpret gained new significance—giving rise for the first time to an active focus on interpretive methodology, and explaining the sudden development of new theories about how the Constitution should be construed. Not surprisingly, judges and scholars on both the left and the right suddenly discovered that the Constitution needed to be interpreted according to unique and special rules. And, again not surprisingly, the rules that

38. Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 140.

39. *See, e.g.*, RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 14–110 (2006); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 49–54, 82–85 (1987); JIM POWELL, FDR'S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE GREAT DEPRESSION 207–20 (2003).

40. Kelo v. City of New London, 545 U.S. 469, 505–23 (2005) (Thomas, J., dissenting); District of Columbia v. Heller, 554 U.S. 570 (2008).

each side produced seemed inexorably to lead directly to the outcomes that side preferred.

And what about the idea of deference and judicial self-restraint? At first, it remained an element in the constitutional theories of both liberals and conservatives. For liberals, the lesson of the *Lochner* era continued to call for limited review—except *Lochner*'s lesson was now substantively limited to economic regulation and other laws outside the Left's concern for civil rights, the rights of minorities, and equal protection; in those areas, in fact, aggressive judicial review became a constitutional duty.[41] For conservatives, exactly the opposite was true: restraint emerged, as just noted, as an argument to limit the liberal activism of the Warren and early Burger Courts, even as conservatives criticized those Courts for leaving the "true" Constitution in "exile" by abandoning responsibility to police the powers of Congress and protect certain other rights favored by conservatives.[42]

On both sides, however, the same change that had impelled the development of new theories of constitutional interpretation—namely, acceptance that final interpretive authority rests with the judiciary—also undercut the foundation for an enduring doctrine of judicial deference or self-restraint. The basis for a robust doctrine of deference, after all, is that there is someone to defer to, and for a good reason. But acceptance of judicial supremacy eliminated the original Jeffersonian basis for deference, which had been to respect and preserve the primary interpretive authority of the American people, as well as its Thayerian successor, which transferred this authority to the political branches deemed most responsive to that people.

This left only the prudential basis: to make judicial authority secure by not acting so frequently or aggressively as to produce a political backlash. Why should the Court defer, after all, if it is, by constitutional design, *supposed* to be the final, authoritative interpreter? There is no reason beyond doing what is necessary to protect the Court's ability to play its institutional role. In a world of judicial supremacy, then, deference is simply a matter of expediency: of how far the Court can, as a practical matter, go without sacrificing too much of its political capital. Seen this way, it's hardly surprising that both the Left and the Right called for courts to defer, but only in areas where the outcomes of the political process were either something they favored or did not care deeply about.

Equally unsurprising, as acceptance of judicial supremacy has seeped more and more deeply into the nation's political culture, the perceived need to

41. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131–50 (1977); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974).

42. Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83, 84; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

defer has receded. Think of it this way: whatever its legal justification, judicial review has political consequences—consequences that may be important and that may rub people the wrong way. There is, in any system that allows judicial review—even one that embraces supremacy—an equilibrium point beyond which the Court cannot go without undermining its institutional authority and capacity to act. But people's reactions to judicial review are not solely a product of whether they agree or disagree with the Court's results. They are also affected by people's sense of how much authority the Court is *supposed* to have. People will defer to a superior with whom they disagree more than a subordinate; the faculty lets me do things as dean that they will not accept from members of the staff. And so it is with the Court: people will let the Justices go further and do more things they dislike *if* they believe it is the Court, and not they or their representatives, that is supposed to have final authority to decide. Judicial supremacy is an ideology, and its whole purpose and effect is to shift the equilibrium point of public and political acceptance in favor of judicial authority.

As that has happened, as judicial supremacy has become taken for granted throughout our political system, the ability of the Court to act without worrying about its authority has naturally grown. And as *that* has happened, judicial deference has, just as naturally, played a smaller and smaller role—until it has become, as Judge Posner notes, little more than a rhetorical tool used opportunistically by pretty much all of the Justices. If that's bad, and I for one think it is, the culprit is not interpretive theory or the idea that there are right answers to constitutional questions. It is our embrace of the strange and counterintuitive notion that determining these answers, and so deciding the ongoing meaning of a democratic Constitution, is best left to life-tenured judges whose chief qualification is technical legal training.