Judicial Deference Defrocked

Author : Charles Shanor

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Richard A. Posner, The Rise and Fall of Judicial Self-Restraint, 100 **Calif. L. Rev.** 519 (2012).

Balance between judicial power to invalidate legislative and executive actions on constitutional grounds and judicial deference to democratic decision-making is critical to the success of the American legal system. Too much deference undermines fundamental constitutional norms; too little deference undermines representative government. It's a common refrain of Supreme Court dissents, by both conservative and liberal Justices, that the Court has arrogantly refused to defer—or slavishly deferred—to the other branches of government.

Stepping into this vortex, Judge Richard Posner has written a cogent, circumspect, sometimes quirky article on the historical trajectory of "Thayerian deference" from the 1890s to the 1970s. His history elucidates what constitutional deference encompassed in this period and why that theory of deference met its demise. Posner wisely marries the decline of such deference with the rise of constitutional theory.

Two background bits open Judge Posner's article. First, he deconstructs several types of deference or judicial restraint. Restraint may be based on (1) formalism (judges apply but do not make law); (2) modesty (judges lack factual or institutional expertise); and (3) constitutional restraint (judges only reluctantly declare elected branch actions unconstitutional). This third, admittedly overlapping form of judicial restraint is the article's focus, but Posner acknowledges a tension between types of deference. For example, using the canon of avoiding constitutional questions may end up narrowing a statute's scope in ways that are hardly deferential to Congress.

Second, Posner discusses the academic origins of constitutional deference in an 1893 Harvard Law Review article by James Bradley Thayer, who said judges should invalidate statutes only when unconstitutionality was "so clear that it is not open to rational question." "Clear error" constitutional deference, Posner writes, was an offshoot of the shaky ground for constitutional review generally: from 1804 until 1864, the Court only invalidated two federal statutes (the sublime *Marbury v. Madison* and the reviled *Dred Scott v. Sandford*), and invalidation from 1864 to 1893 was still sparse. Thayer analogized Congressional passage of statutes to English "parliamentary supremacy." He viewed constitutional review as "political" and therefore institutionally non-judicial. Finally, Thayer worried that if courts were too active, Congress would become lazy, leaving the sorting out of unwise laws to the courts.

The core of the article explores the rise and decline of Thayerian deference by the judiciary. The rise was rapid and included Justices Holmes, Brandeis, and Frankfurter. Adroitly, Posner differentiates each acolyte from Thayer. Holmes deferred to legislatures not because they were wise and politically savvy, as Thayer thought, but even if they were stupid and venial. Holmes had a Darwinian conception that politics was rightly the sport of the strongest and that the weak should step aside. Deference remained, but its underpinnings morphed. Brandeis's brand of Thayerism was political: he favored restraint to avoid issues his more conservative colleagues would have decided differently had the merits been reached, deferred to allow states to operate as "policy laboratories," and piled on factual details showing that liberal legislation was reasonable. Frankfurter, the most emotional Thayerian, "shared the Progressive movement's excessive regard for government by experts and Thayer's high regard for legislatures." In addition, his immigrant patriotism led him to defer in First Amendment cases involving anticommunist statutes. The final acolyte, Yale Law Professor Alexander Bickel, had a "patronizing attitude towards legislatures" quite unlike Thayer's idealistic fawning. Bickel asserted at most a cautious "moral leadership" role for the Court.

The fall of Thayer's theory "with Bickel's death in 1974" was precipitous. "Thayer's balloon was punctured," so that

only a vague pejorative meaning to "judicial activism" and an equally vague complimentary meaning to "judicial restraint" remained. What really killed Thayerism, says Posner, is the rise of constitutional theory purporting to show the existence of a *correct* constitutional decision in particular cases. The multiplicity of such theories is noteworthy:

> Modern constitutional theories—whether Bork's or Scalia's originalism, or Easterbrook's textualism, or Ely's representation reinforcement, or Breyer's active liberty, or the Constitution as common law, or the Living Constitution, or libertarianism, or the Constitution in exile, or anything else (including minimalism, despite surface affinities to Thayerism)—are designed to tell judges, particularly Supreme Court Justices, how to decide cases correctly rather than merely sensibly or prudently.

With these "pretensions of constitutional theory" to provide correct answers to cases, judges lost the need to defer, for their correct answers could, in their eyes, legitimately trump actions of other institutions. The judicial motto then became "The Constitution made me do it" and deference seemed a "cop-out." Occasional or tie-breaking deference, which rarely occurs, is much weaker than Thayer's deference to statutes "unless no reasonable person could doubt its invalidity."

How would Thayerian deference play in the hands of legal pragmatists, agnostic about constitutional theory and "derided in the legal academy" for their lack of rigor? Are pragmatists Thayerian? Not really, says Posner. He sets forth eight principles of legal pragmatism: duty to decide, expansively conceived legal materials, interstitial legislating, lack of master constitutional theory, long-term consequentialism, tie-breaking tools to deal with uncertainty, adherence to "rule of law," and a duty of candor. All these tools limit pure Thayerian deference, and in legally indeterminate cases, pragmatists are as likely to turn to emotional reactions as tie-breakers rather than deference. Applying the "theory beats deference" insight, Posner then examines Warren Court liberal activism to textualism and originalism on the Court today. Insightfully, Posner says Justice Stevens' dissent in *DC v. Heller* fails because it does not counter Justice Scalia's originalist theory.

Finally, Posner takes a look at empirical analyses of judicial restraint, especially that of Professors Lindquist and Cross, who used five axes of restraint to model all of the Supreme Court justices from 1953 to 2004. None of this empiricism does a very good job, he concludes, of mapping onto pure Thayerian deference, though it is clear that particular Justices, both liberals and conservatives, accord more weight to self-restraint "that is more than a mask for ideological voting" than do other Justices. Posner quotes Judge Henry Friendly: "A great constitutional decision is not often compelled in the sense that a contrary one would lie beyond the area of rationality." The bottom line is that some judges defer, but little or no deference is rooted in Thayer's framework.

The main point of Posner's historical excursion is that judicial deference is inextricably intertwined with constitutional theory. This insight has legs elsewhere, such as in decision-avoidance through standing doctrine and "rational basis" review. Standing doctrine, popular with the conservative wing of the Supreme Court, rests primarily on a formalist separation of powers theory. If that theory declines, standing would less regularly bar plaintiff suits in federal courts. Likewise, "rational basis" review, as in the equal protection arena, is premised on the unavoidability of legislative categorization. The Court may flyspeck categories for equal protection concerns or deferentially permit legislative flexibility. When will it flyspeck and when defer? That depends on constitutional theory. Does the Fourteenth Amendment focus upon careful oversight of racial categories alone, or does it extend to close scrutiny of sex (or sexual orientation) categories? Even within racial categories, constitutional theory drives whether, when, or how to defer to affirmative action by government as compared to invidious racial discrimination by government. Is the theory colorblind constitutionalism or anti-subordination theory? Those theories, not deference, will determine outcomes.

Thayerism was an empty vessel of judicial abnegation, a vague and poorly justified set of reasons for assigning responsibilities elsewhere than to the judicial branch. Because constitutional theory has made determination of cases essential, even in hard cases and even where reasonable people may disagree, it is not likely to rise from the ashes. Pragmatists, not blinded by untenable and insufficient theories of constitutional decision-making, will take account,

according to Posner the pragmatist judge, of some of the considerations underlying Thayerism, but only to the extent of using a "weak presumption in favor of upholding state and federal statutes when challenged for violation of the federal Constitution." Such a weak presumption is far removed from Thayer's lodestar that invalidation should occur only when unconstitutionality is "so clear that it is not open to rational question." Thayerian deference is not relevant to today's world where, under some constitutional theory or another, almost any judicial decision would be at least minimally rational.

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