Against “Judicial Engagement”

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Conservatives and libertarians share the goal of limited government, and especially of confining the federal government to its enumerated powers. Where they differ is their conception of the relationship between man and state—the heart of constitutional theory. The death of Supreme Court justice Antonin Scalia last year created an unexpected vacancy on the badly split Supreme Court, which throughout the presidential campaign focused attention on the importance of the Court and the selection of Scalia’s successor. “I feel strongly that the Supreme Court needs to stand on the side of the American people, not on the side of the powerful corporations and the wealthy,” said Hillary Clinton in the final debate. Advocating desirable policy outcomes without even mentioning the Constitution itself, as Clinton did in the debate, is a hallmark of the “living Constitution” philosophy, which has prevailed among liberals since the New Deal.

In contrast, Republican nominee Donald Trump pledged to appoint justices like Judge Neil Gorsuch, who “will interpret the Constitution the way the founders wanted it interpreted,” and specifically cited the importance of enforcing the Second Amendment. This is the conventional “conservative” approach to constitutional law. Conservative and libertarian constitutionalists agree with Trump’s embrace of originalism—interpreting the Constitution based on its original meaning—but disagree sharply over what exactly that original meaning is. The libertarian theory of the Constitution is most often associated with the Cato Institute’s Roger Pilon and Georgetown University law professor Randy Barnett, who has written several influential books on the subject. In his 2013 book *Terms of Engagement*, Institute for Justice senior attorney Clark Neily coined the term “judicial engagement” to describe how libertarian constitutional theory would apply in the real world.

The conservative theory of the Constitution is less unified. In general, however, conservatives believe that in exercising judicial review in the manner contemplated by *Federalist* No. 78, judges should defer to the political branches regarding the wisdom and necessity of laws, and confine themselves to determining—honestly and neutrally—whether challenged laws violate a clear provision of the Constitution. Conservatives frequently use the term “judicial activism” to

describe instances in which courts decide cases based on far-fetched interpretations of the law, especially when "recognizing" rights that are not actually set forth in the Constitution, such as abortion rights (*Roe* v. *Wade*), the right to engage in homosexual sodomy (*Lawrence* v. *Texas*), and the right to same-sex marriage (*Obergefell* v. *Hodges*). Conservatives regard much of the Warren Court legacy—including the "rights revolution" that unleashed the Fourteenth Amendment's equal protection clause to second-guess policy decisions made by the legislatures of the 50 states—as unjustified judicial activism, and advocate a more limited role for judges. Libertarians are equally unhappy with the jurisprudential status quo, albeit for different reasons.

Libertarians trace the current judicial dereliction and mischief to the New Deal, and especially to the seminal decisions in *United States* v. *Carolene Products Co.* (1938), which relegated economic liberties to "second-tier" status with minimal judicial protection, and *Wickard* v. *Filburn* (1942), which granted Congress nearly unlimited power to regulate wholly intrastate activity under the commerce clause. Conservatives also lament *Carolene Products*, but mainly due to its infamous "footnote four," the wellspring for modern equal-protection analysis.

Thus, conservatives and libertarians have identified different "wrong turns" that they believe the Court has taken, which to some extent explains the different "course corrections" that they propose: for the libertarians, greater protection of economic liberties and curtailing Congress's Commerce Clause power; for conservatives, reining in result-oriented judicial decision-making that reflects the justices' personal predilections rather than the text of the Constitution. Conservatives, who are generally more committed than libertarians to following judicial precedent for its own sake (the so-called doctrine of *stare decisis*), also disagree with some of the New Deal decisions that have led to the current federal Leviathan, but sometimes hesitate to advocate reversal out of a sense of "restraint." Which brings us, by way of a long introduction, to the crux of the conservative-libertarian dispute.

"Judicial engagement" entails several features that are anathema to conservatives, especially recognition of "unenumerated" constitutional rights, which courts (in particular unelected, life-tenured federal judges) will enforce by striking down state and federal laws if the government is unable to justify them as necessary and appropriate. In some iterations of "judicial engagement," the government has the burden of proof in constitutional challenges (that is, laws are presumed to be unconstitutional, in order to vindicate a "presumption of liberty" that libertarians believe is inherent in the Constitution), and the deferential "rational basis" standard of review would be replaced—across the board—with a more rigorous standard resembling the "strict scrutiny" currently reserved for laws impinging on fundamental rights and suspect classifications. Conservatives will never support a constitutional theory that condones *Roe* v. *Wade*, yet most libertarians are, at best, ambivalent about *Roe*—and actually agree with *Obergefell*.

I have criticized elsewhere the judicial-engagement model and will not repeat those points here. Libertarians contend that judicial engagement is the only way meaningfully to protect individual liberty, and that courts are better equipped than the "majoritarian" branches to make sound decisions. Libertarians also contend that many past travesties—such as *Dred Scott*, *Buck* v. *Bell*, and *Korematsu*—could have been avoided had the Supreme Court demonstrated "engagement" rather than "restraint" in those cases. I find such reasoning to be unconvincing, even utopian. The ideal of an omniscient, all-wise, and incorruptible decision-maker, while certainly appealing, is

unrealistic. As the famed jurist Learned Hand noted in his 1958 Holmes Lectures at Harvard Law School, published in book form as *The Bill of Rights*, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

The Framers were not utopians. They were deeply distrustful of human nature, and—recalling the abuses the colonists suffered under King George III—in particular feared the tyrannical potential of concentrated power. In *Federalist* No. 51, James Madison explained that the best guaranty of individual liberty is a republican form of government: diluted popular rule tempered by the separation of powers and constrained by a system of checks and balances. "It may be a reflection on human nature that such devices should be necessary to control the abuses of government," Madison said:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Alas, judges are not angels. Our Constitution is not perfect, but it can be—and has been—amended as circumstances (and public opinion) warrant. Mistakes, as judged by history, are inevitable. Humankind is flawed, but capable of progress. This is the story of civilization.

In the economic field, Friedrich Hayek scorned the conceit of central planners who presumed to make better decisions than individuals in the marketplace. Libertarians who would presume to substitute the judgment of federal judges for the polity as a whole display a similar conceit.

Clark Neily responds

Mark Pulliam deploys strawmen against judicial engagement while turning a blind eye to the glaring problems that render his preferred approach—judicial restraint—unworkable. Pulliam's version of judicial restraint is internally inconsistent, irreconcilable with constitutional text, and demonstrably inferior to the truth-seeking alternative of judicial engagement.

Like many conservatives, Pulliam argues that properly restrained judges should strike down only laws that "violate a clear provision of the Constitution." But that position can't be reconciled with his belief that the Constitution protects various economic liberties, including occupational freedom, that appear nowhere in the text of the document and that Pulliam himself grounds in the controversial doctrine of "substantive due process." Pulliam is at once confident that the Constitution protects the unenumerated right to economic liberty and disdainful of those who believe that the Constitution might protect other unenumerated rights—such as not having one's reproductive organs ripped out by state-sponsored eugenicists—as well. His attempts to resolve the tension between these views have so far been unpersuasive.

The late Judge Robert Bork, perhaps the leading modern exponent of judicial restraint, likened both the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause to inkblots that defy understanding or enforcement. But selectively ignoring constitutional text is

precisely the sin for which conservatives properly castigate the Left's "living constitutionalists." And while Pulliam himself has been coy about the significance of the Ninth Amendment's command not to "deny or disparage" unenumerated rights and the Fourteenth Amendment's prohibition against state laws that abridge the "privileges or immunities of citizens of the United States," both the existence and the history of those provisions impose a heavy burden on those who would render them functionally meaningless.

Perhaps the most fundamental difference between restraint and engagement has to do with the conception of the judge's truth-seeking role in constitutional litigation. Proponents of restraint believe that judges should require an honest explanation for the government's restriction of liberty only in a small minority of cases—such as those involving speech and religion—while granting government action an effectively irrebuttable presumption of legitimacy in the vast majority of cases, just as the Supreme Court does when applying the comically misnamed "rational basis test." Judicial engagement, by contrast, calls for an honest judicial inquiry in *all* cases, shunning judicial restraint's embrace of government-favoring speculation and conjecture.