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Pragmatism and Judicial Restraint

By Matthew Lewans[*]

This paper examines the tradition and influence of pragmatism and judicial restraint in American legal culture. In order to better understand the intellectual foundation of this tradition, I will examine the jurisprudence of James Bradley Thayer and Oliver Wendell Holmes. I will argue that this discourse has enriched debates about the constitutional relationship between the judiciary and the modern administrative state, and that a deeper understanding of this tradition can help to unravel thorny questions regarding the maintenance of constitutional values in a modern democracy committed to the rule of law.

Introduction

In 2012, the Canadian Supreme Court issued a groundbreaking decision. In *Doré v Barreau du Québec* the Court held that administrative decisions concerning constitutional rights should be reviewed according to a deferential standard of reasonableness instead of the more demanding (and more traditional) standard of correctness.[1] In effect, the Court held that judges are not entitled to intervene merely because they disagree with an administrative interpretation of the Constitution; rather, they can only interfere if an administrative decision is unreasonable. In reaching its conclusion, the authors of the majority opinion employed a "pragmatic and functional" rationale[2]—that administrative decision-makers, by virtue of their experience, contextual sensitivity, and democratic pedigree have a unique and valuable perspective regarding constitutional rights that warrants judicial respect.[3]

Even though the pragmatic and functional rationale for judicial deference has been a fixture of Canadian administrative law for over 25 years, there has been relatively little research regarding its intellectual foundations. In this paper, I aim to redress this deficit by probing the pragmatic rationale for judicial deference articulated by two American jurists, James Bradley Thayer and Oliver Wendell Holmes. Through this engagement, I will attempt to elucidate how a better understanding of pragmatism can and judicial restraint can explain why judicial deference towards administrative interpretations of law should be considered a virtue rather than a vice, even when constitutional rights are at stake.

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[*]Associate Professor, University of Alberta, Canada.

[1]*Doré v Barreau du Québec* [2012] 1 SCR 395.

[2]*UES, Local 298 v Bibeault* [1988] 2 SCR 1048, 1088.

[3]*Doré v Barreau du Québec* [2012] 1 SCR 395, para 48.

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Thayer's Rule of Administration

> This rule recognizes that, having regard to the great, complex, ever-folding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and whatever choice is rational is constitutional.[1]

Given the vaunted status of judicial review in the political history of the United States of America, it might seem odd to turn to American legal culture for a pragmatic theory of judicial restraint. When Marshall CJ laid out the constitutional rationale for judicial review in *Marbury v Madison*, he famously declared that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is",[2] a statement that later generations of lawyers and judges would cite when seeking to bolster the authority of the judiciary. But it is noteworthy that the Supreme Court did not invoke this power again until its infamous decision to strike down the Missouri Compromise in *Dred Scott v Sandford* in 1857,[3] so that the power of judicial review lay dormant for much of the nineteenth century.[4] This might also explain why the subject of constitutional law was a relatively neglected topic of research at the turn of the twentieth century compared to private law subjects like torts, contracts, and property.

James Thayer was one of the first legal scholars to develop a systematic theory of judicial review. When he was an undergraduate law student at Harvard, he received the gold medal for his dissertation entitled "The Right of Eminent Domain"—an essay in which he argued that "the State itself must decide, as the final and only judge" whether to appropriate private property for a public purpose.[5] Nevertheless, he recognized that this power remained subject to constitutional constraints, which the judiciary could enforce if need be. But he argued that the scope of judicial review was limited to situations where the State sought "to appropriate private property […] under cover of a public exigency which clearly has no existence."[6] In all other cases, he argued that "the judiciary may not substitute their discretion for that of the legislature, nor exercise it at all in a matter entrusted to the sole discretion of another department."[7] Years later he echoed this point when he criticized the Supreme Court's decision to strike down the federal *Civil Rights Act*, saying that "the function of the court is not that of fixing the construction of the Constitution

[1]Thayer (1893) 144.
[2]*Marbury v Madison* 5 US 137, 177 (1803).
[3]*Dred Scott v Sandford* 60 US 393 (1857).
[4]White (2003) 1506.
[5]Thayer (1856) 248-249.
[6]Thayer (1856) 249.
[7]Thayer (1856).

which it believes to be the sound one, but that of determining whether another body, charged with an independent function…has discharged its office or exercised its judgment in an unreasonable manner."[1] Thayer's point was that the judiciary was not the sole or primary authority regarding constitutional interpretation. He thought that other legal officials and institutions "charged with an independent function" should be considered partners in the project of sustaining constitutional values.

The most complete exposition of Thayer's views is displayed in a speech delivered at the World's Congress on Jurisprudence and Law Reform in 1893. In that speech, which has since been called "the most influential essay ever written on American constitutional law",[2] Thayer argued that "[n]either the written [Constitution] nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorised to take".[3] He He supported this proposition by referring to salient constitutional facts: the Constitution establishes a separation of powers between the different branches of government, all members of Congress must swear an oath to uphold the Constitution in performing their legislative duties, and the Founders considered—but rejected—a proposal to give the Supreme Court the power to veto the constitutionality of legislation prior to enactment.[4]

Nevertheless, Thayer did not advocate judicial quiescence or abdication. He conceded that the Constitution required some measure of judicial oversight, but that the scope of that oversight was relatively limited. He advanced what he called a "rule of administration", stating that "an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."[5] Thayer advanced two separate rationales rationales for this rule. The first rationale was institutional: he argued that, because other public officials have been given "primary authority" to interpret the Constitution, their decisions "are entitled to a corresponding respect".[6] Thayer noted that institutional respect is not warranted merely on "grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law" which were based upon the democratic ethos which permeates the American Constitution.[7] In emphasizing this point, he again notes that if judges were supposed to be "the chief protection against legislative violation of

[1]Thayer (1884) 314, 315.
[2]Monaghan (1983) 7.
[3]Thayer (1893) 130.
[4]See, e.g. NY Constitution of 1777 art III, which provided that "whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed; Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor" had the power to "revise all bills about to be passed into laws by the legislature".
[5]Thayer (1893) 140, citing Tilghman CJ in *Commonwealth v Smith,* 4 Bin 117.
[6]Thayer (1893) 136.
[7]Thayer (1893).

the constitution" the Founders would have given judges plenary powers to review and revise legislation prior to enactment.[1]

The second rationale Thayer advanced was instrumental: he argued that judges should not assert broad powers of reviewing legislation so as to foster responsible public discourse on matters of social justice. In the closing paragraph of his essay, he notes:[2]

> If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent […]. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.

In this passage, Thayer argues that the rule of administration means that courts should not usurp the legislature's role in mediating public discourse on matters of common concern, including constitutional values. If legislatures and citizens perceive judicial review to be the primary or exclusive means for upholding the Constitution, democratic deliberation would focus merely upon narrow questions of "mere legality, of what the constitution allows" instead of considering broader "questions of justice and right".[3] In one of his last essays, Thayer drives this point home by saying that the power of judicial review is accompanied by "a serious evil", because "the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors."[4]

Thayer's scholarship is a landmark in American constitutional law, because it represents the first comprehensive attempt to reconcile the constitutional authority of the political branches of government with the judicial role in upholding the rule of law.[5] Furthermore, his argument for judicial restraint does not rest on the idea that legislative or executive officials possess relative expertise regarding constitutional interpretation. In this respect, Thayer rejects the idea that *anyone* can claim to have a superior ability to define constitutional values. Rather, he posits that all interpretations of the Constitution are prone to political disagreement. In light of this predicament,

[1]Thayer (1893).
[2]Thayer (1893) 156.
[3]Thayer (1893) 155.
[4]Thayer (1901) 106.
[5]"One Hundred Years of Judicial Review" (1993) 1.

he argues that judges should recognize that they share responsibility for interpreting the Constitution with the other branches of government.[1]

Despite this recognition, Thayer asserts that the legislature and executive remain accountable to the people through the democratic political process and judicial review—two institutional checks which ensure that those decisions are constitutionally acceptable. The upshot of this is that Thayer's rule of administration does not counsel judicial submission in the face of legislative or administrative decisions, but represents a sophisticated attempt to deal with the problems posed by the reality of political disagreement in the context of a democratic polity committed to the rule of law.[2]

The best historical explanation for Thayer's theory situates his scholarship within a much older, Jeffersonian tradition which Larry Kramer calls "popular constitutionalism".[3] The premise of this school of political thought is that "primary authority to *interpret*, as well as to make, constitutional law" resides with the people as opposed to being the exclusive domain of any particular branch of government or caste of public officials.[4] Even though Jeffersonian democrats and their Federalist rivals agreed "that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains", they disagreed about *who* should have primary decision-making responsibility because of the controversial nature of constitutional interpretation.[5] Whereas Federalists argued that judges should have the final word on constitutional interpretation in order to insulate personal and property rights from legislative reform, popular constitutionalists argued that constitutional interpretation should respond to popular will.[6] Thus, popular constitutionalists argue that the different branches of government—legislative, judicial, and executive—share responsibility for making provisional decisions regarding constitutional matters, but that all governmental decisions ultimately remain subject to popular supervision.[7] By the same token, however, they recognize that the judiciary has at least some role to play in facilitating popular supervision. The main point is that judicial review is "at most, a subordinate, secondary check",[8] which means judicial intervention is warranted only when a governmental decision oversteps reasonable or popularly acceptable bounds of the Constitution.[9]

[1]Gabin (1976) 968.
[2]"One Hundred Years of Judicial Review" (1993) 1.
[3]Kramer (2012) 621 and Kramer (2004). See also White (1993/1994) 48; White (2005) 1.
[4]Kramer (2012) 622.
[5]Kramer (2012) 624-625.
[6]Kramer (2012) 627.
[7]Kramer (2012) 623. See also Kramer (2004) 105-114.
[8]Kramer (2012) 628.
[9]ramer (2012) 629.

Pragmatic Constitutionalism

While Thayer died at a relatively young age in 1902, his concerns about judicial review proved to be prescient. The topic of judicial review was hotly contested during the early twentieth century during the emergence of the modern administrative state. During this period, the Supreme Court struck down swaths of legislation at both the federal and state levels, often on the ground that it infringed the due process clauses in the Fifth and Fourteenth Amendments. In doing so, the Court often juxtaposed an expansive reading of constitutional rights to property, liberty, and due process with a narrow understanding of permissible public interest justifications for state regulation of private interests and redistribution of wealth.

This general approach is illustrated by Peckham J's majority opinion in *Lochner v New York*, a case in which the Supreme Court struck down a New York statute establishing maximum work hours for bakery employees.[1] Even though the notion of liberty of contract is not mentioned expressly in the Fourteenth Amendment, Peckham J extrapolated that maxim from the personal right to "liberty", noting that "[t]he general right to make a contract…is part of the liberty of the individual protected by the Fourteenth Amendment".[2] Nevertheless, he conceded that the legislation might be constitutionally justifiable if it could be shown that it might somehow advance "the safety, health, morals and general welfare of the public."[3] However, because he thought the legislative measure would have "no […] direct relation to, and no [...] substantial effect upon, the health of the employee", he concluded that there was "no reasonable foundation" for the statute.[4]

In his famous dissent, Holmes J relied upon ideas which feature prominently in Thayer's theory. He began by questioning Peckham J's interpretive and institutional assumptions, which effectively enabled him to run roughshod over popular will and the legislature's interpretation of its police powers jurisdiction. Thus, he noted that Peckham J`s reasoning relied "upon an economic theory which a large part of the country does not entertain",[5] and underlined this point by saying that a constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[6] According to Holmes J, the judicial role in upholding the Constitution was exhausted once the court was satisfied that a reasonable man could conclude that maximum work hours legislation might advance public health.[7] But while there is strong evidence in his *Lochner* dissent that Holmes J sympathized with Thayer's theory of judicial restraint,

[1] *Lochner v New York* 198 US 45 (1906).
[2] *Lochner v New York* 198 US 45 (1906) 53.
[3] *Lochner v New York* 198 US 45 (1906).
[4] *Lochner v New York* 198 US 45 (1906) 64.
[5] *Lochner v New York* 198 US 45 (1906) 75.
[6] *Lochner v New York* 198 US 45 (1906) 76.
[7] *Lochner v New York* 198 US 45 (1906).

his personal and professional writings reveal a more philosophical rationale for this position.

In the fall of 1864, shortly after he had been discharged from the Union Army, Holmes enrolled at Harvard Law School. Upon graduation, Holmes began his professional career working alongside Thayer at a local law firm. In his spare time, he met with friends and acquaintances like Chauncey Wright (who was a childhood friend of Thayer's), Charles Sanders Pierce, William James, and Nicholas St. John Green to discuss philosophy.[1] Three members of this circle—Wright, Pierce, and James—are acknowledged to be the founders of American pragmatism, a school of thought which sought to separate philosophy from religious epistemology.[2] Holmes is also recognised as playing an important role in the emergence of this philosophical movement.[3] At a very basic level, pragmatism proceeds from the idea that philosophical inquiry should be driven by the scientific method so that even deeply held values, beliefs, and ideas remain subject to scrutiny, critique, and revision through applied practice and reflection in light of experience. In this respect, pragmatism was as revolutionary in philosophical circles as Charles Darwin's *Origin of Species* was in the natural sciences.[4] Whereas Darwin's thesis challenged the orthodox idea that the order of the natural world had been preordained by God, pragmatists challenged the idea that individuals could gain direct access to "an ahistorical, transcendental, or metaphysical theory of truth" through divine revelation or introspection.[5]

In his scholarly writings, Holmes set out to make his mark by developing a modern, pragmatic account of legal reasoning.[6] At the time, American legal culture was riven by two conflicting jurisprudential traditions.[7] The first tradition revolved around the idea that common law doctrine proceeded from natural rights; the second, more recent, perspective was inspired by English positivists like Jeremy Bentham and John Austin and culminated in a movement to codify American law through legislation.[8] Jeremy Bentham criticised the common law for flouting utilitarian ethics and advocated wide-ranging legislative reforms to realign the law with public welfare.[9] Throughout Throughout his career, Holmes sought to stake out a middle ground between these two jurisprudential positions.

Holmes's response to the American codification movement, published in 1870, provides an early outline of his version of pragmatic legal theory.[10] He

[1]Menand (2001) ch. 9; Misak (2013), preface.
[2]Misak (2013) ch. 2.
[3]Misak (2013)77-81.
[4]Misak (2013) ch. 2
[5]Misak (2013) 3.
[6]Kellogg (2007) ch.2; Grey (1989) 787. While Holmes thought William James's version of pragmatism was "an amusing humbug", his legal theory is consistent with the philosophical method employed by Chauncey Wright and Charles Sanders Pierce. See Misak (2013) ch.5.
[7]Horwitz (1992) 112.
[8]Horwitz (1992) ch. 4.
[9]Bentham (1988).
[10]Holmes (1870) 1.

begins by describing the common law method of adjudication as a pragmatic form of social inquiry whose purpose is to resolve recurrent social problems, saying:[1]

> It is the merit of the common law that it decides the case first and determines the principle afterwards. […] [L]awyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the ratio decidendi. […] It is only after a series of determination on the same subject-matter, that it becomes necessary to "reconcile the cases," as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.

Thus, instead of arguing that judges deduce the law from an autonomous body of rules rooted in natural law precepts or legislative commands, Holmes advocated a "bottom-up" theory of law whereby law "grows in a fallible way, where doubt, conflict, and disputes about what the law is are resolved under the force of experience."[2] Only when a "series of successive approximations" has been provided by jury verdicts or trial court decisions can lawyers identify salient trends that can be restated as general legal propositions.[3] The important point is that the judicial role in Holmes's legal theory is secondary—the primary task of establishing the parameters of civil or criminal liability is performed by connoisseurs of community standards.[4] For Holmes, the fact that the common law synthesises the perspectives of 'many minds' constitutes distinct advantage, because it is more likely to generate a stable or "well settled legal doctrine" than attempts to stipulate the law through legislative reform or *a priori* analysis.[5]

After he was appointed to the Massachusetts Supreme Court in 1882, Holmes approached constitutional law in the same fashion. While constitutional challenges were a relatively rare occurrence at the time, his general attitude was "consistently deferential."[6] In *Commonwealth v Perry*¸ Holmes wrote a dissenting opinion in support of state legislation which prohibited employers in the weaving industry from deducting employees' wages for product imperfections. While he recognized that "the power to make reasonable laws impliedly prohibits the making of unreasonable ones", he declared "I should not be willing or think myself authorised to overturn

[1]Holmes (1870) 1.
[2]Misak (2013) 78. Kellogg (2007) ch. 3.
[3]Holmes (1870) 2.
[4]Kellogg (2007) 122-125.
[5]Kellogg (2007) 33-34; White (1993b) 115. In this respect, Holmes's legal theory is remarkably similar to Pierce's version of pragmatism. See Misak (2013) ch. 3.
[6]White (1993a) 281.

legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so."[1] Two years later, when Thayer sent Holmes a copy of his *Harvard Law Review* article, Holmes replied "I agree with it heartily and it makes explicit the point of view from which implicitly I have approached the Constitutional questions upon which I have differed from some of the other judges."[2]

When Holmes was elevated to the Supreme Court of the United States in 1902, he found more opportunities to address judicial review of legislation. In one of the first cases he heard as an Associate Justice, *Otis v Parker*, Holmes wrote a majority opinion upholding California legislation which prohibited share transfers on margin. He justified his decision by stating:[3]

> It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals is not conclusive upon the courts […].But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.

In this passage Holmes expresses views which are essentially similar to Thayer's. While judges are entitled to scrutinise legislation to ensure its reasonableness, Holmes argues that judges are not entitled to strike it down merely because they disagree the balance struck by the legislature between constitutional rights and social policy objectives. Like Thayer, Holmes argues that judges should respect the perspectives of other public officials and members of the community regarding matters of constitutional interpretation.

Conclusion

The pragmatic jurisprudence of judicial restraint of Thayer and Holmes is significant from both an historical and contemporary perspective. As an

[1] *Commonwealth v Perry* 155 Mass 117, 124 (1891).
[2] Letter from Holmes to James Thayer 2 November 1893 in Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr, 1858-1968.*
[3] *Otis v Parker* 187 US 606, 608-609 (1902).

historical artifact, it marks a turning point in common law constitutionalism. Instead of conceiving constitutional values or standards as being fixed by some "brooding omnipresence in the sky"[1] or original intent, Thayer and Holmes pursue a thoroughly modern account in which the content of inherited constitutional standards are constantly being tested and reconstructed through democratic deliberation and dialogue amongst equals. According to this view, judicial review is not justified on the ground that a particular class of officials is more likely to arrive at the right answer—in fact, it remains agnostic about whether there are right answers to be had in matters of constitutional interpretation. Instead, it explores the notion that judicial review is a subsidiary component in the larger democratic venture to govern in accordance with constitutional values. Moreover, it asserts that judges can facilitate this venture by requiring legislatures and executive officials to provide public justifications for their decisions, and pricking the public's conscience when those justifications seem out of step with a polity's legal traditions and values.

More importantly, this pragmatic account of judicial review remains highly relevant to contemporary debates in administrative law practice and theory. Among other things, it helps to explain why a posture of judicial deference in cases like *Doré* should not be confused with an abdication of constitutional responsibility. If properly implemented, in the sense that it takes the burden of public justification seriously, it outlines a conception of judicial review which combines a sense of modesty with a desire to facilitate intelligent public discourse on important matters of public concern.

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