Texas Law Review Online
Volume 103 | 2025

Thayerian Deference and Constitutional Interpretation

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In this essay, I briefly introduce James Bradley Thayer's theory of judicial deference and its place in historical debates over judicial review and constitutional interpretation. I then turn to how Thayer's theory of deference fits into debates over how to interpret the Constitution. I warn against treating mere deference as an alternative to theories like originalism, pragmatism, and common law constitutionalism, as it is better viewed as a theory of adjudication or administration rather than as a theory of interpretation. By clarifying deference's place in the discussion, one might avoid muddling or overclaiming discussions of interpretive theories. Additionally, addressing questions of adjudication and workability brings them the attention they deserve in a literature that tends to overemphasize theoretical coherence while overlooking whether it is workable.

Introduction

James Bradley Thayer may not be the best-known figure in the literature on constitutional interpretation, but his key ideas continue to attract attention and discussion. For over a century, scholars, judges, and Justices have been influenced by Thayer's views of how judges ought to review the constitutionality of legislation.[1] In particular, Thayer's vision that judges should

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1. *See* Katherine H. Blankenship, Note, *The Great Tactician: The Chief Justice, Obamacare, and Walking the Tightrope of Partisan Politics*, 2 BELMONT L. REV. 149, 154 (2015) ("Thayerism attracted some of the judiciary's greatest minds, and although its most extreme application has been replaced with more moderate views of restraint, it is still influential in framing the discourse about policies of deference and restraint.").

generally defer to legislatures and avoid ruling that a law is unconstitutional in all but the clearest of cases pops up frequently in discussions over the judicial role and debates over constitutional interpretation.[2]

This essay discusses Thayer's theory of judicial deference and its continued influence and role in the literature on judicial review and constitutional interpretation. I argue that those who discuss and debate theories of constitutional interpretation should be careful about placing judicial deference on the same theoretical level as theories of interpretation like originalism, common law constitutionalism, and textualism, as it is a theory of adjudication or administration rather than one of interpretation. Clarifying this point dispels potential confusion that may arise in these often-complex disputes.

I. Thayer's Theory of Judicial Deference

James Bradley Thayer began teaching at Harvard Law School in 1874.[3] By some accounts, Thayer's teaching was "uninspiring,"[4] though others note his care for students' wellbeing and that his students eventually recognized the import of his lessons once they entered practice.[5] Through his teaching and

2. *See, e.g.*, Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 701–05 (2000) (discussing Thayer's theory of judicial deference and how it relates to democratic representation and deliberation); Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 89–90 (2000) (describing Thayer's approach to the judicial role as "one end of the . . . spectrum" when determining the proper level of judicial power).

3. William P. LaPiana, *Langdell Laughs*, 17 LAW & HIST. REV. 141, 143 (1999).

4. Jill Lepore, *On Evidence: Proving* Frye *as a Matter of Law, Science, and History*, 124 YALE L.J. 1092, 1109 (2015).

5. ANDREW PORWANCHER, JAKE MAZEITIS, TAYLOR JIPP & AUSTIN COFFEY, THE PROPHET OF HARVARD LAW: JAMES BRADLEY THAYER AND HIS LEGAL LEGACY 23, 25 (2022).

scholarship, Thayer influenced those who would go on to become giants of the legal field, including Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, John Henry Wigmore, Roscoe Pound, and Learned Hand.[6] Beyond his work as a professor, Thayer was active in political movements and social groups.[7]

As a law professor, Thayer produced multiple renowned casebooks and treatises on subjects including evidence and constitutional law.[8] At the time Thayer began teaching, Harvard Law School's dean, C.C. Langdell, had begun to urge the case method for teaching students.[9] Thayer's casebooks reflected this pedagogy. One reviewer remarked that Thayer's approach of including direct selections of cases was preferable to alternate presentations that summarized cases:

> A comparison naturally suggests itself between this collection of cases and parts of cases and the similarly constructed law-books which are called by their authors textbooks and treatises. Here one has the meat of the cases, garnished with much sound sense and comment furnished by the editor; there one has long abstracts from the cases, furnished by a person who in his preface in one breath condemns himself to be dumb, and in the next calls himself the "author." The comparison is decidedly to the advantage of the editor.[10]

6. *See id.* at 83–84, 96–97, 103–04, 108, 118–19, 126. For more on Thayer's influence on Holmes, Brandeis, and Frankfurter's jurisprudence, see generally Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

7. *See* Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 6–7 (1993).

8. PORWANCHER ET AL., *supra* note 5, at 35, 43.

9. Lepore, *supra* note 4.

10. R.W.H., Book Review, 8 HARV. L. REV. 514, 514 (1895) (reviewing JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW (1895)).

Thayer's scholarly output was relatively modest.[11] Yet the high quality of his output attracted consistent attention from his peers.[12]

Despite Thayer's influence and work in a variety of fields, he tends to fade from modern view—eclipsed by the reputations of his contemporaries and students.[13] To the extent that Thayer's name continues to come up, it typically arises in discussions of his 1893 article, *The Origin and Scope of the American Doctrine of Constitutional Law*.[14] There, Thayer addressed the origins and propriety of judicial review, theorizing on how and when judges and Justices should rule that legislation is unconstitutional.[15] Thayer emphasized the "practical judgment" of legislatures acting within their "vast and not definable range of legislative power and choice" and urged that legislators "be allowed a free foot" when acting within that range.[16] Viewing judges' role as simply "construing two writings and comparing one with another . . . easily results in the wrong kind of disregard of legislative considerations" and leads to "a pedantic and academic treatment of the texts of the constitution and the laws."[17]

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11. PORWANCHER ET AL., *supra* note 5, at 7, 28.

12. *Id.* at 28.

13. *See* Mendelson, *supra* note 6, at 71 (describing Thayer as "almost forgotten"); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 48 (1993) (remarking on the relative lack of "scholarly interest" in Thayer and his work—with his writing on judicial deference standing as a "well-known exception").

14. Carol Weisbrod, *Brahmin Connections: A Note on the Vocation of the Law Professor*, 52 CONN. L. REV. 1653, 1670 & n.113 (2021) ("Thayer is largely remembered today for his 1893 article on judicial review, which argued for judicial restraint as a fundamental principle of American constitutional law.").

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

16. *Id.* at 135.

17. *Id.* at 138.

To ensure proper respect for legislatures' roles and to avoid this overly academic and abstract interpretive methodology, Thayer pointed to a "rule of administration" that courts had employed since the founding era.[18] This rule requires that judges or Justices only deem a statute unconstitutional "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[19] Thayer argued that where judges leave laws in place, they ought not be seen as expressing their own opinions on the law's constitutionality, but rather that they do not find the law "unconstitutional beyond a reasonable doubt."[20]

Thayer's former students and colleagues "championed Thayerian deference on the Court."[21] Justice Felix Frankfurter regarded Thayer's article as "the most important single essay" and a "great guide for judges."[22] To be sure, some of their interpretations overlooked nuances in his theory and drew on distinct political motivations.[23] But these differences led Thayer's former students to apply his theory in novel manners and contexts—bringing Thayer's ideas of deference to a wider range of

18. *Id.* at 138–40.

19. *Id.* at 144.

20. *Id.* at 151.

21. *See* Steven G. Calabresi & Hannah M. Begley, *Justice Oliver Wendell Holmes and Chief Justice John Roberts's Dissent in* Obergefell v. Hodges, 8 ELON L. REV. 1, 5 (2016); PORWANCHER ET AL., *supra* note 5, at 62–70, 83–84 (describing Thayer's relationship with Justice Oliver Wendell Holmes and the influence of Thayer's theory of judicial deference in Holmes's work, including his dissent in *Lochner v. New York*). *But see* Hugh Spitzer, *"Unconstitutional Beyond a Reasonable Doubt" – A Misleading Mantra that Should Be Gone for Good*, 96 WASH. L. REV. ONLINE 1, 9–10 (2021) (arguing that those who advocated Thayer's theory of strong deference failed to live up to its ideals).

22. FELIX FRANKFURTER RECORDED IN TALKS WITH HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 299–301 (1960).

23. *See* Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 889, 892–94 (1995) (book review).

cases, albeit in a sometimes inconsistent and watered-down form.[24]

Thayer's work is often presented as a classic in the genre of interpretation.[25] Those advancing their own worldviews of proper judicial roles and interpretive methods frequently bolster their approach with appeals to deference.[26] In the face of what seems to be endless debate over flawed interpretive theories, judicial deference may take on an almost singular role in constitutional law.[27]

But not everyone is enamored with Thayer's legacy of strong judicial deference. Hugh Spitzer warns that embracing such a deferential approach is out of step with how courts review legislation, leading to risks of disingenuous explanations and confusion in legal communities and the broader public.[28] With a Supreme Court partial to exaggerated claims of constitutional

24. *See, e.g.*, Susan D. Carle, *The Failed Idea of Judicial Restraint: A Brief Intellectual History*, 49 LAW & SOC. INQUIRY 569, 577–78 (2024) (detailing Justices Brandeis's and Holmes's variations on Thayer's teachings).

25. *See, e.g.*, Karen Petroski, *Does it Matter What We Say About Legal Interpretation?*, 43 MCGEORGE L. REV. 359, 378 (2012) (describing Thayer's article as playing a part in "establish[ing] a lasting framework for scholarship on legal interpretation").

26. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 58–59 (2018) (describing appeals to restraint in early versions of originalist theory); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 103 (2020) (discussing similar appeals to restraint by originalists and how they were employed to contrast conservative constitutional goals with the Warren Court's approach).

27. *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 114–16 (2012) (rejecting theories of interpretation in favor of the "highest virtues of . . . self-denial and restraint").

28. Spitzer, *supra* note 21, at 20–21.

absolutism, one can see how exaggerated lip service to strong judicial deference may end up being ineffectual.[29]

II. Is Thayer's Deference a Theory of Constitutional Interpretation?

A. No.

Theories of constitutional interpretation such as originalism, common law constitutionalism, and moral readings provide guidance to interpreters on what the Constitution means.[30] Thayerian deference frequently comes up in discussions of constitutional interpretation—often alongside theories of interpretation like originalism, common law interpretation, and moral readings interpretation.[31] The tendency to include Thayerian

29. *See generally* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667 (2015) (describing and critiquing Supreme Court Justices' tendency toward absolutist rhetoric about the certainty of constitutional meaning).

30. *See, e.g.*, Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 125 (2022) (describing original public meaning originalism and identifying it as the "dominant strain" of originalism); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) 37–45 (explaining and defending a common law approach to interpretation); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7–12 (1996) (introducing and describing a moral readings approach to interpretation).

31. *See, e.g.*, MARK TUSHNET, WHO AM I TO JUDGE? JUDICIAL CRAFT VERSUS CONSTITUTIONAL THEORY 125–34 (2025) (situating Thayerian deference alongside originalism and alternatives to originalism, including moral readings, common law constitutionalism, and representation-reinforcing review); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 535 (2012) (contrasting Thayerian deference with "the rise of constitutional theory of a kind remote from Thayer's theory," which include variations like "Bork 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"); Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 508–09 (2022) ("Representation Reinforcement Thayerianism is in many ways the polar

deference in conversations about theories of constitutional interpretation—or to treat Thayerian deference as its own theory of interpretation—risks confusion and muddling the debate.

Deference alone is not a complete theory for two primary reasons. First, as Cass Sunstein argues, Thayer's deferential approach requires that an interpreter gauge whether a constitutional violation is clear—and that underlying determination of clarity requires a theory of constitutional interpretation.[32] Second, Thayer's view is limited to judicial actions. A theory that courts must refrain from overruling legislation in most circumstances says nothing about how legislatures and the general public might interpret the Constitution. It is therefore more a rule of allocating the interpretive role than it is a theory of interpretation. Even if we end up in a world where judges refrain from disrupting legislatures, someone still needs to interpret the Constitution.

Deference appears to fit best with rules of "adjudication," which set forth how judges and other political actors ought to act when putting law into practice—considerations that may be entirely distinct from questions of interpretation.[33] Indeed, Thayer himself referred to his theory of deference as a "rule of administration."[34] When the topic under discussion is judicial review of legislation, Thayer emphasized that interpretation is not the central concern: "the ultimate question is not what is the true

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opposite of Common Law Constitutionalism; the former theory rejects judicial review, whereas the latter embraces it wholeheartedly.").

32. CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 52–53 (2023); *see also* Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1695 (2018).

33. *See* Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2156 (2017).

34. *See* Thayer, *supra* note 15, at 140.

meaning of the [C]onstitution, but whether legislation is sustainable or not."[35]

B. Why This Matters

Treating deference as a rule of adjudication or administration is important, as confusion may result should it be framed as an alternate theory of interpretation. Portraying deference as an alternative to theories of interpretation like common law constitutionalism or originalism may be tempting.[36] But because deference alone is not a theory of interpretation, treating it as though it is such a theory leaves judges (and other interpreters) in a lurch.[37] The proper role of the judiciary and its deference to other branches is an important issue. But it should not butt in on discussions of interpretive theory, as this risks muddying those arguments and overshadowing effective theories of interpretation with overattention to issues of adjudication. Additionally, keeping deference apart from debates over interpretive theory

35. *Id.* at 150 (emphasis omitted).

36. *See, e.g.*, WILKINSON, *supra* note 27, at 115–16 ("There is nothing remarkable in believing the highest virtues of judging—and of life—are a measure of self-denial and restraint."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2414 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) (suggesting that, when the original meaning of a constitutional provision is indeterminate, courts ought to defer to the legislature); Eric J. Segall, *The Concession that Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33, 46–47 (2020) (arguing that scholars should "avoid the distraction of a spent and unnecessary 'great debate' over interpretive theories that are not materially different from each other" and pay more attention to a need for strong judicial deference—or, in its absence, value judgments courts employ).

37. *See* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 905 (2009) ("Although scholars have the luxury of equivocation, the truth is judges decide cases and they need reasons to justify their choices.").

may foreclose theorists' attempts to smuggle notions of deference into the theories they espouse.[38]

Keeping discussions of deference distinct from debates over interpretation doesn't just clarify debates over interpretation. It gives adjudication its own place in the broader landscape of constitutional law literature—a spot it deserves in light of a literature that tends to fixate on theories of interpretation at the expense of workability and adjudication considerations.[39] However

38. *See* BALKIN, *supra* note 26, at 102–08 (describing how early originalists emphasized the restraining role of their interpretive theory—while modern originalists have strayed from this conception and urge more active intervention by the Court in legislation that contradicts their views of original meaning).

39. *See* Michael L. Smith, *Disingenuous Interpretation*, 93 MISS. L.J. 349, 375–82 (2023) (describing theorists' tendency to dodge questions of implementation and adjudication); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 735–36 (2011) (describing originalists' view that "originalism can be understood as a purely interpretive theory"). Originalists may respond by claiming that they distinguish interpretation from construction, and the task of construction—which involves determining how the linguistic meaning of a constitutional provision ought to be applied to answer a particular legal question—accounts for adjudication questions. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013) (defining "constitutional construction" as "the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text"). Construction fails to properly account for questions of adjudication. First, rules of construction may themselves raise concerns over implementation should these rules be unworkable or overly abstract. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 35–37 (2018) (proposing a theory of interpretation and construction that may require a good-faith effort to determine the "spirit" of the constitutional provision at issue, and maintaining fidelity to that spirit once it is uncovered, all while acknowledging that even this approach to construction may result in diverging interpretations). Second, once a judge engages in interpretation and construction, questions of adjudication remain—such as whether the judge is sufficiently confident in the outcome of the interpretive process to overrule a contrary legislative enactment. *See* Thayer, *supra* note 15,

interesting one's theories of interpretation might be, if they are ever to be of use to judges and practitioners, there must be some account of how these interpretive theories translate into judicial rulings and constitutional arguments.[40]

Failure to provide accounts of adjudication and implementation risks "conceptual overreach," in which theories of interpretation are used to label Justices, courts, and cases without accounting for the gulf between the precisions of theory and the messiness of practice.[41] Discussions that acknowledge the

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at 151 (calling for a judicial confidence level of "beyond a reasonable doubt").

40. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1318 (2006). Fallon argues:

> If constitutional theories fix the meaning of the Constitution, but stipulate that implementing doctrines sometimes permissibly diverge from it, then such theories are less complete and thus less practically significant than their proponents suggest. Occasional pretensions to the contrary notwithstanding, they are not necessarily theories of how constitutional cases ought ultimately to be decided once the permissibility of gaps between constitutional meaning and implementing doctrine is acknowledged.

Id. See also Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 856–59 (1985) (arguing that, for most lay readers and officials carrying out their duties, historical practice "has provided authoritative constructions of most of the provisions relating to the structure of government," resulting in an interpretive "muddle," which permits day-to-day operations that generally avoid disputes over constitutionality); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 710–12 (2010) (discussing challenges that arise due to a lack of a theory of adjudication for single-subject rules in state constitutions).

41. *See* John Tasioulas, *The Inflation of Concepts*, AEON (Jan. 29, 2021) https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason [https://perma.cc/5HFS-F2QK] (defining "conceptual overreach" as "when a particular concept undergoes a

existence and importance of adjudication alongside interpretation are more likely to be of use to those unfortunate souls who spend their time arguing cases and reaching decisions, rather than building theoretical castles in the sky.[42]

Conclusion

Thayerian deference is an important component in ongoing discussions and debates over judicial review and constitutional interpretation. But one must be sure to acknowledge how it fits in with broader debates over interpretive theory. Conflating deference alone with theories of interpretation is inconsistent with Thayer's own vision and overlooks the role that non-judicial interpreters play in determining the Constitution's meaning.

process of expansion or inflation in which it absorbs ideas and demands that are foreign to it," and warning against "the degradation of the core ideas mobili[z]ed in exercises of public reason, not least in the utterances of elite actors," including lawyers and politicians).

42. *See* Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515, 1550–52 (2019) (urging the rejection of "most extant constitutional theories" in favor of a multifaceted approach involving normative considerations, the interpreter's social role, relevant social facts, and the options available to the interpreter).