

JUDICIAL ENGAGEMENT, NEW ORIGINALISM, AND THE FORTIETH ANNIVERSARY OF *GOVERNMENT BY JUDICIARY*

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“We will almost surely never again see a [*Lochner* era] in which the Court takes from liberals, as it now does from conservatives, what they win in the political process by, for example, striking down economic regulation”¹

Last year marked the fortieth anniversary of Professor Raoul Berger’s book *Government by Judiciary*, which became an originalism manifesto.² Berger, the son of Russian immigrants and a New Deal Democrat, criticized many Warren and Burger Courts’ liberal, and in his view illegitimate, judicial decisions. He argued that the Justices employed the same activist methodology used by the U.S. Supreme Court during the so-called *Lochner* era,³ when the Justices overruled progressive economic legislation. His book passionately called for judges to employ judicial restraint by focusing on text and original meaning, not evolving values, as the cornerstone of constitutional interpretation. According to Jonathan O’Neil, the author of a leading book about originalism, “[m]ore than any other single scholar Berger highlighted the issues that separated originalism from legal liberalism and brought them to a wide audience. *Government by Judiciary* attained a level of renown and influence achieved by only a handful of books in the history of American constitutional scholarship.”⁴

Now, four decades later, a new form of originalism has emerged among some conservative and libertarian constitutional scholars led by professors Randy Barnett and Ilya Somin, litigator Clark Neily,⁵ and embraced by right-wing think tanks such as the Cato Institute and The Heritage

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1. Lino A. Graglia, “*Interpreting*” the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019, 1022–23 (1992).

2. RAUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1977).

3. See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a labor law that set maximum work hours for violating freedom of contract protected by the Fourteenth Amendment).

4. JONATHAN O’NEIL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 131 (2005).

5. See, e.g., Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757 (2013); Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARV. J.L. & PUB. POL’Y 185 (2010); Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 651–52 (2012).

Foundation. This influential school of thought, which often goes by the name “Judicial Engagement,”⁶ emphasizes text and original meaning as the essential tools of constitutional interpretation.⁷ However, Judicial Engagement scholars advocate for a completely different view of judicial review than the one Professor Berger thought necessary for originalist constitutional interpretation. While Berger placed an enormously high burden of proof on plaintiffs claiming laws are inconsistent with the Constitution, Judicial Engagement scholars and litigators want to reverse that burden, requiring the government to establish in each case that the law at issue meets constitutional standards.⁸ Whereas Berger’s originalism minimized the judicial role in resolving social and political disputes, the Judicial Engagement school wants judges to aggressively police constitutional boundaries.⁹

Whether one favors Berger’s restraint, Barnett’s and Somin’s judicial aggression, or some moderate theory in-between depends entirely on personal perspectives concerning the role of unelected, life-tenured judges in our constitutional democracy. There are no right or wrong beliefs on that issue. To the extent that Barnett, Somin, and others claim that originalism justifies their calls for judicial engagement, however, they are using a label that does not justify their preferred method of judicial review. Given President Trump’s promise to only appoint originalist judges,¹⁰ and the important role the term “originalism” now plays throughout our current politics, this transformation—or, perhaps, misuse—of the term originalism is a serious matter.

Part I briefly summarizes Berger’s originalist approach. Part II describes how the new Judicial Engagement originalists suggest judges should resolve constitutional cases. Part III explains why text and history do not support their judicially enforceable, libertarian political agendas. Part III does not suggest that this agenda leads to bad results, is harmful, or should not be adopted by today’s judges. But for the sake of governmental and academic transparency, judges, legal scholars, and politicians who embrace Judicial Engagement, should also accept that their theory of judicial review is not supported by either the Constitution’s text or history. Judicial Engagement can only be justified by adopting a “living Constitution” approach to constitutional interpretation.

6. See Center for Judicial Engagement, INST. FOR JUST., <http://ij.org/center-for-judicial-engagement/> [<https://perma.cc/RVW4-HEHS>] (last visited Apr. 27, 2018).

7. See *Supreme Court at a Crossroads: Judicial Engagement vs. Judicial Restraint: What Should Conservatives Prefer?*, INST. FOR JUST., <http://ij.org/event/supreme-court-crossroads-judicial-engagement-vs-judicial-restraint-conservatives-prefer/> [<https://perma.cc/F6VX-QPGQ>] (last visited Apr. 27, 2018).

8. See, e.g., *Terms of Engagement: More Constitution, Less Government*, INST. FOR JUST., <http://ij.org/center-for-judicial-engagement/cje-research/terms-of-engagement-more-constitution-less-government/> [<https://perma.cc/YZ9X-J28Y>] (last visited Apr. 27, 2018).

9. See *id.*

10. Ariane de Vogue, *Trump’s Originalist, Neil Gorsuch, Finds His Place*, CNN (Apr. 7, 2018, 8:15 AM), <https://www.cnn.com/2018/04/07/politics/neil-gorsuch-supreme-court-one-year-anniversary/index.html> [<https://perma.cc/Z6NQ-TBCW>] (“‘We are appointing judges who will interpret the Constitution as written,’ the President said.”).

I. BERGER AND ORIGINALISM

Berger's originalist views formed at a young age. In 1942, after he witnessed the end of the judicial aggression of the *Lochner* era,¹¹ Berger criticized the recently decided *Bridges v. California*,¹² which held that the First Amendment prohibits state courts from issuing contempt citations for out-of-court statements pertaining to a pending case absent a "clear and present danger."¹³ Berger believed that the First Amendment's history demonstrated that the Constitution did not reach such cases. For example, he felt that the evidence supporting that proposition was so clear that he compared *Bridges* to what he called the inappropriate judicial review of the *Lochner* Court.¹⁴ He asked rhetorically whether

liberals, after steadily criticizing the tendency of the [*Lochner* era] court to read laissez-faire into the Constitution, [can] afford to sanctify by their own example an interpretive approach which for a generation was employed to block social legislation and may once again be turned against themselves?

That approach, it is trite to remark, purported to give effect to inexorable constitutional mandates, while in fact the prejudices of the justices had become the Procrustean test of overdue social adjustment.¹⁵

Thirty years later, Berger played an important role during the Watergate scandal arguing that there was no historical evidence supporting a presidential executive privilege to withhold papers and tapes relevant to either a criminal or congressional investigation.¹⁶ In making these arguments and others, Berger never wavered from his strong views that judicial restraint and original intent or meaning were the twin pillars of legitimate constitutional interpretation. He believed that James Bradley Thayer's rule of "clear mistake"—that judges should only overturn laws when their constitutionality was not open to "rational question"—was the proper stance for the judiciary.¹⁷ It is therefore not surprising that, when faced with the aggressive and anti-historical judicial review practiced by the Warren Court, Berger argued strenuously against the Court's decisions.

In 1977, Berger wrote *Government by Judiciary*.¹⁸ The book's essential thesis, and one that would be repeated by many originalist scholars, such as

11. See Ian Millhiser, *The Radical Ideology of this Trump Nominee Makes Even the Most Conservative SCOTUS Justices Uneasy*, THINK PROGRESS (Oct. 10, 2017, 8:00 AM), <https://thinkprogress.org/trumps-most-radical-nominee-since-neil-gorsuch-02d1bcabc8e0/> [https://perma.cc/EH4M-VKSS].

12. *Bridges v. California*, 314 U.S. 252 (1941).

13. *Id.* at 295–97.

14. Raoul Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 604 (1942).

15. *Id.* at 604–05.

16. Raoul Berger, *Originalism and the Bill of Rights, Part Three - Nixon, with Berger and Fries*, GLIBERTARIANS (Apr. 3, 2017), <https://glibertarians.com/2017/04/raoul-berger-originalism-and-the-bill-of-rights-part-three-nixon-with-berger-and-fries/> [https://perma.cc/VXL9-NFD8].

17. O'NEIL, *supra* note 4, at 114.

18. See generally BERGER, *supra* note 2.

Judge Robert Bork and Lino Graglia,¹⁹ was that only a theory of interpretation based on the “original intention[s]” of the founders could negate the “judicial power to revise the Constitution.”²⁰

Although much of Berger’s book tried to demonstrate that the Supreme Court’s interpretations of the Fourteenth Amendment ignored and/or distorted the original meaning of that Amendment, he also discussed the broader question of how the Justices should engage in constitutional interpretation.²¹ He argued that the Justices who transformed vague constitutional text into open-ended repositories of rights “usurped the [sovereign] power” of elected institutions to make laws adapting to social change.²² He suggested that the founding fathers, although expecting judicial review, never intended the Court to go beyond the clear commands of the Constitution’s text and history.²³

Thirty-five years after his first law review article on the topic, Berger had still not given up trying to convince liberals that, if judges departed from text and history whenever they deemed it important enough, judicial review will inevitably reflect the subjective value choices of the judiciary, which at times may well be quite conservative. One reviewer of his book summed up this argument as follows: “If judges are not limited by some historically ascertainable legislative intent, they will have nothing to guide them but their own preferences. This result is inconsistent with democratic values and frequently leads, as during the *Lochner* era, to substantively undesirable decisions.”²⁴

II. JUDICIAL ENGAGEMENT AND ORIGINALISM

Professor Barnett self-identifies as an originalist. He has written “I call myself an originalist (of the original public meaning variety). Period.”²⁵ He has written numerous books and articles arguing that the text and history of the Constitution, including the Ninth Amendment and the Privileges or Immunities Clause, justify not only judicial enforcement of unenumerated rights (in the sense that such rights are not specifically spelled out by other constitutional text), but also a presumption of liberty that requires the federal government to bear the burden of proof whenever someone claims

19. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); Lino Graglia, *Originalism and the Constitution: Does Originalism Always Provide The Answer?*, 34 HARV. J.L. & PUB. POL’Y 73 (2011).

20. BERGER, *supra* note 2, at 403.

21. See generally *id.*

22. Gerald Lynch, Book Review, 63 CORNELL L. REV. 1091, 1091 (1978) (reviewing RAUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1977)).

23. *Id.*

24. *Id.* at 1096.

25. Randy Barnett, *Off to a Bad Start: Originalism and the Good Constitution*, WASH. POST: THE VOLOKH CONSPIRACY (Feb. 23, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/23/off-to-a-bad-start-originalism-and-the-good-constitution/> [https://perma.cc/8ZCH-HTVH].

their freedom is abridged by a federal law.²⁶ Rather than summarize Barnett's views myself, here is an accurate description of his philosophy by a sympathetic New Originalist:

Barnett seeks to impose strict limits on democratic majorities in order to protect individuals as sovereigns.

[This] theory of individual sovereignty implies strong judicial protection for a wide range of individual freedoms, *both economic and non-economic* While modern judicial orthodoxy emphasizes the need to protect "personal" liberties such as freedom of speech and privacy, Barnett emphasizes that economic freedom is often just as important to individual liberty and just as threatened by unconstrained majoritarianism Barnett is right to argue that "judicial restraint," often defined as deference to democratic legislatures, was a major element in the conservative critique of the "judicial activist" left. But, from early on, many conservatives also argued for strong judicial enforcement of the *original meaning* of the Constitution, even in cases where doing so meant invalidating a variety of democratically enacted laws

The theory of individual sovereignty advanced by Barnett offers an *alternative potential justification for originalism*: given the many liberty-enhancing aspects of the original Constitution, as amended after the Civil War, adhering to the *original meaning* offers a greater likelihood of effectively protecting individual sovereignty than any other realistically available option.²⁷

How should judges enforce this strong form of judicial review? Barnett has joined other New Originalists such as Professors Keith Whittington, Jack Balkin, and Lawrence Solum, to advocate a judicial method centered around the distinction between constitutional interpretation and constitutional construction.²⁸ The process of interpretation involves ascertaining what was the semantic (non-legal) original public meaning of the Constitution at the time of enactment.²⁹ This meaning does not change, but it may not resolve future legal claims surrounding its application. Constitutional construction is the process whereby legal actors, usually judges, apply that semantic meaning to new problems.³⁰ In Barnett's words,

originalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment. The text of the Constitution may say a lot, but it does not say everything

26. See generally Randy E. Barnett, *Foreword: The Continuing Relevance of the Original Meaning of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 1 (2017); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

27. Ilya Somin, Book Review, 17 FED. SOC. REV. 64, 64–67 (2016) (emphasis added) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (1st ed. 2016)).

28. See generally Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013).

29. See generally Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. UNIV. L. REV. 703 (2009).

30. *Id.* at 707–08.

one needs to know to resolve all possible cases and controversies. Originalism is not a theory of what to do when original meaning runs out. This is not a bug; it is a feature. Were a constitution too specific, its original meaning probably would become outdated . . .³¹

New Originalists are candid that, at the point of construction, judges must employ normative judgments to resolve constitutional cases.³² Such judgments cannot be inconsistent with original meaning, but they will also not be deducible from that original meaning.³³ For Barnett, and other scholars who believe in Judicial Engagement, constitutional construction should emphasize a “‘presumption of liberty’ that places the burden on the government to justify its restrictions on liberty as necessary and proper.”³⁴ This presumption applies to all cases regardless of whether the right at issue is or is not specifically enumerated in the Constitution, or whether the judges deem the right to be economic or non-economic in nature.³⁵

The placement of the burden of proof on the government in all cases implicating liberty and freedom is far removed from the originalism of Berger, as well as Judge Bork and other originalists writing in the 1970s and 1980s, who believed the Warren and early Burger Courts exercised illegitimate judicial review. Yet both schools of thought claim their approaches are justified by the text and original meaning of the Constitution. Strictly as a matter of interpretation of text and history, they cannot both be right.

III. THE ABSENCE OF TEXT AND HISTORY IN JUDICIAL ENGAGEMENT

Not all New Originalists agree that constitutional construction should embrace a strong presumption of liberty that applies to both enumerated and non-enumerated rights. It is possible to adopt the interpretation-construction framework and argue for strong judicial deference to state and federal laws.³⁶ For those like Barnett, Somin, and other scholars who advocate for Judicial Engagement,³⁷ however, there are major obstacles to their argument that judges should exercise strong judicial review.

First, there is not a single word in the Constitution authorizing judges to invalidate state or federal laws, much less suggesting that the founding fathers expected to place upon government the burden of proving in court the validity of any statute that infringes liberty. Moreover, at the time of the founding, no country in history had ever expressly or even implicitly

31. Randy Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 69–70 (2011).

32. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 436 (2013).

33. Barnett, *supra* note 31, at 70.

34. *Id.*

35. *See generally id.*

36. *See* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 152 (2011).

37. *See, e.g.,* Somin, *supra* note 5, at 665–67.

granted judges that authority. This lack of textual support suggests that *strong* judicial review was not contemplated by the founding fathers.³⁸ Despite this absence of textual support, however, there is substantial consensus among historians and legal scholars, including myself, that the men who wrote and ratified the Constitution expected judges to possess the power to invalidate laws inconsistent with the Constitution.³⁹ For example, Alexander Hamilton wrote the most important pre-Constitution defense of judicial review in *The Federalist Papers*, which were a group of essays written by Hamilton, James Madison, and John Jay to persuade the people of New York to adopt the new Constitution.⁴⁰ In *Federalist No. 78*, Hamilton explained why judicial review was a necessary component of the new constitutional structure and why the power to veto laws did not make the judicial branch too powerful.⁴¹

Hamilton justified judicial review by observing that the Constitution had become the supreme law of the new country. It logically followed that

no legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.⁴²

After arguing that legislators cannot be the judges of their own powers, Hamilton wrote the following important paragraph about courts and their responsibility to enforce the Constitution:

[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. *If there should happen to be an irreconcilable variance between the two*, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.⁴³

This quotation sets forth the essential rationale for allowing judges to set aside laws that are inconsistent with the Constitution. Hamilton assumes that the Constitution is supreme law, that the job of judges is to interpret

38. See Irving R. Kaufman, *What Did the Founding Fathers Intend?*, N.Y. TIMES MAG. (Feb. 23, 1986), <https://www.nytimes.com/1986/02/23/magazine/what-did-the-founding-fathers-intend.html> [<https://perma.cc/G3FK-TL6B>].

39. See *infra* notes 50–53 and accompanying text.

40. See *The Federalist Papers*, LIBR. OF CONG., <http://www.loc.gov/rr/program/bib/ourdocs/federalist.html> [<https://perma.cc/JU8K-2RQQ>] (last visited Apr. 27, 2018).

41. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

42. THE FEDERALIST NO. 78, at 43 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

43. *Id.* at 404 (emphasis added).

that law and that, if there is an “irreconcilable variance” between a law and the Constitution, judges must enforce the Constitution instead of the law.⁴⁴ Hamilton also said that judges must not enforce laws that are inconsistent with the “manifest tenor” of the Constitution.⁴⁵ The concepts of “irreconcilable variance” and “manifest tenor” are much more consistent with the idea of strong judicial deference than the New Originalists’ idea of strong judicial review where the government has the burden of proof whenever someone alleges an infringement of liberty.

There were also a few early state and federal cases where judges considered striking down laws as inconsistent with either a state constitution or the U.S. Constitution prior to the 1803 landmark decision in *Marbury v. Madison*,⁴⁶ where the Court first explicitly adopted and defended the doctrine of judicial review. Many scholars—including Larry Kramer, Sylvia Snowiss, Gordon Wood, James Bradley Thayer, and Dean Michael Treanor—have reviewed these early cases.⁴⁷ Although there are some disagreements among these academics over what these early cases say about the appropriate level of deference to be given to state and federal laws, there is a strong consensus that—outside of laws relating directly to judicial power or jury questions—the people of the founding era believed in either extremely strong judicial deference or moderate deference to other political decision-makers.⁴⁸ There is no evidence that the founding fathers thought judges would exercise aggressive judicial review by placing the burden of proof of establishing the validity of all laws which infringe what Barnett calls the “Presumption of Liberty” on the government.⁴⁹

Larry Kramer, the former Dean of Stanford Law School, canvassed the relevant cases and concluded that judicial review was infrequently exercised and only exercised where the law clearly violated the Constitution.⁵⁰ Professor Snowiss reviewed the same cases and other materials and argued that judges at the time thought judicial review would be limited to “concededly unconstitutional act[s].”⁵¹ Wood, a leading historian of the founding era, found that judicial review was “invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution.”⁵² In addition, Thayer, the scholar most associated with the view that the Supreme Court should be highly deferential to acts of Congress, justified his conclusions with significant historical evidence from the founding period.⁵³ Even Dean Treanor, who takes a slightly different

44. *Id.*

45. *Id.*

46. 5 U.S. 137 (1803).

47. See *infra* notes 50–54 and accompanying text.

48. See *infra* notes 50–54 and accompanying text.

49. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 5 (2004).

50. See generally LARRY KRAMER, *THE PEOPLE THEMSELVES* (2004).

51. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 60 (1990).

52. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 798–99 (1999).

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

view on this subject than other scholars, concluded that people who thought about judicial review in the founding era believed in “general deference to a coequal legislature’s substantive constitutional decision making [even though the courts also exercised] close scrutiny of that body’s decision making *where it affected the judiciary*.”⁵⁴

Neither the text of the Constitution nor its history suggest that judges should play a strong or aggressive role in striking down state or federal laws that do not implicate the power of the courts. Instead, the popular conception was that only legislative acts that clearly transcended constitutional limits would be null and void.⁵⁵ Yet the Center for Judicial Engagement says the following about its vision:

Government actions are not entitled to “deference” simply because they result from a political process involving elected representatives. To the contrary, the Framers were acutely aware of and deeply concerned about the dangers of interest group politics and overweening government, and the structure of the Constitution rejects reflexive deference to the other branches. It is the courts’ job to check forbidden political impulses, not ratify them under the banner of majoritarian democracy.⁵⁶

As part of its statement of principles, the Center for Judicial Engagement also says the following:

Just as the words in the Constitution do not change over time, neither does their meaning. Though some parts of the Constitution may speak more precisely than others, for the Constitution to mean anything at all, judges must strive to understand the *entire* document and apply its restrictions and values to all situations, including new ones. Judges’ interpretations and applications of the Constitution must not be influenced by their personal preferences—including preferences for majoritarianism or judicial minimalism.⁵⁷

These calls for strong judicial review of economic and non-economic legislation are simply not supported by text or history. To the contrary, evidence from the early period indicates that the framers thought judges would apply either moderate or strong deference when reviewing state and federal laws.⁵⁸ Rather than relying on judicial exercise of strong judicial review, the founding fathers believed that the main check on governmental tyranny would be the structural requirements in the Tenth Amendment limiting Congress’ powers to those enumerated in the Constitution and the

54. Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 561 (2005) (emphasis added).

55. See *supra* notes 50–53 and accompanying text.

56. *Declaration of the Center for Judicial Engagement*, CTR. JUDICIAL ENGAGEMENT, <http://ij.org/center-for-judicial-engagement/programs/declaration-of-the-center-for-judicial-engagement/> [https://perma.cc/3FG3-QUDZ] (last visited Apr. 27, 2018).

57. *Principles of Judicial Engagement*, CTR. JUDICIAL ENGAGEMENT, <http://ij.org/center-for-judicial-engagement/programs/principles-of-judicial-engagement/> [https://perma.cc/583D-N58E] (last visited Apr. 27, 2018).

58. See *supra* note 44 and accompanying text.

numerous provisions in the Constitution setting forth the separation of powers between and among the three branches of the federal government.⁵⁹

Professor Berger believed the main purpose of the Constitution was to prevent tyranny and maximize individual freedom.⁶⁰ But Professor Berger was also adamant that judges could play, at most, a limited role in protecting against that tyranny.⁶¹ In his words, the Constitution was:

a text that was designed to limit and hobble the exercise of power by the delegates of the people. That is the starting point from which we have to proceed and to evaluate what the delegates were seeking. . . . [A] remarkable North Carolinian, Thomas Burke, emphasized that it was necessary to guard against the greediness of power. On top of that, the founders had a profound distrust of judicial discretion. Even a Tory judge, Thomas Hutchison of Massachusetts, said, “. . . the *Judge* should never be the *Legislator* . . . this tends to a State of Slavery.” It was for this reason that Chancellor Kent referred to the judges’ “dangerous discretion . . . and [the dangers when judges] roam at large in the trackless field of their own imaginations.”⁶²

Judge Bork expressed similar views when defending his originalist approach to constitutional interpretation. Judge Bork objected to judges closely reviewing economic legislation, because “when employed as a formula for the general review of all restrictions on human freedom without guidance from the historical Constitution, the court is cut loose from any external moorings and required to perform tasks that are not only beyond its competence, but beyond any conceivable judicial function.”⁶³

Professor Richard Epstein advocates for strong judicial review of economic legislation that is even stronger than what was exercised by the Court in *Lochner*.⁶⁴ In response, Justice Scalia was aghast and responded that “‘our system already suffers from relatively recent constitutionalizing, and thus judicializing, of social judgments that ought better be left to the democratic process.’” He warned that a ‘reversal of a half-century of judicial restraint in the economic realm’ represented a ‘threat to constitutional democracy.’”⁶⁵

When it comes to maximizing social goods, the reluctance of old school originalists to approve strong judicial review of economic legislation may—

59. *The Constitution in One Sentence: Understanding the Tenth Amendment*, HERITAGE FOUND. (Jan. 10, 2011), <https://www.heritage.org/the-constitution/report/the-constitution-one-sentence-understanding-the-tenth-amendment> [<https://perma.cc/YS2N-F785>].

60. See generally BERGER, *supra* note 2.

61. See generally *id.*

62. Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350 (1988).

63. Thomas Colby & Peter Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 565. (2015) (quoting Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829–830 (1986)).

64. See generally Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985).

65. Colby & Smith, *supra* note 63, at 566 (quoting Antonin Scalia, *Economic Affairs as Human Affairs*, in SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM 4 (Cato Inst. 1985)).

or may not—be the best posture for today’s judges. If the scholars and pundits who favor Judicial Engagement want to make that argument, we should listen. But just like many of the liberal decisions of the Warren and early Burger Courts, as well as the same-sex marriage decisions of today, such strong judicial review is not supported by the Constitution’s original meaning.

The difference between the aggressive liberal decisions, often criticized by conservatives, and the calls for Judicial Engagement by today’s conservative scholars is that the authors of the liberal decisions did not pretend that text and originalism supported their results. Some cases, like *Lawrence v. Texas*,⁶⁶ explicitly adopted an anti-originalist, living Constitution approach to constitutional interpretation.⁶⁷ Justice Kennedy said that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁶⁸

Other cases simply ignored text and history by incorporating bare recitals of the text in question. Justice Douglas’ opinion in *Griswold v. Connecticut*,⁶⁹ finding a constitutional right to privacy that would later be used by the Court in *Roe v. Wade*,⁷⁰ is only six pages long. Even though Justice Douglas relied on six different constitutional amendments—each without any mention of the word “privacy”—to support his holding, he does not mention the original meaning of the constitutional text in the entire opinion.⁷¹ Furthermore, the Court’s opinion in *Brandenburg v. Ohio*,⁷² which articulated the fundamental test for determining whether inflammatory speech (such as virulent racist epithets) is constitutionally protected, is five pages long and does not address the historical meaning of the First Amendment.⁷³

These cases can be persuasively criticized on many different grounds, but they cannot be criticized for a lack of transparency or honesty. At their core, these cases were judicial fiats announcing fundamental values. The same would be true if the Court ever adopts the Judicial Engagement model advocated by Barnett, Somin, and the various think tanks pushing for Judicial Engagement.⁷⁴ Such a system of judicial review might be right,

66. 539 U.S. 558 (2003).

67. *Id.* at 579.

68. *Id.*

69. 381 U.S. 479 (1965).

70. 410 U.S. 113 (1973).

71. *See generally id.*

72. 395 U.S. 444 (1969).

73. *See generally id.*

74. *See generally* Randy Barnett, “Judicial Engagement” Is Not the Same As “Judicial Activism,” WASH. POST (Jan. 28, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/28/judicial-engagement-is-not-the-same-as-judicial-activism/?utm_term=.402a5291f2a0 [<https://perma.cc/T5AD-UW7D>]; Ilya Somin, *Defending Judicial Supremacy*, WASH. POST (June 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/defending-judicial-supremacy/?utm_term=.62402e22857c [<https://perma.cc/M9D3-GBYC>].

wrong, desirable, or harmful but one thing is clear: it would not be based on either the text or history of the original Constitution. Instead, the theory of Judicial Engagement is a classic example, for better or for worse, of a living constitutionalism approach to constitutional interpretation. Those who advocate for such a system should at least embrace, not reject, living constitutionalism.