The Politics of Judicial Restraint: A Jurisprudential Analysis of the Fourteenth Amendment of the United States' Constitution's Due Process Clause

Shayan Manzar*

Abstract

Mainstream legal and political discourse operates with certain presumptions regarding statutory interpretation models and their associations to political ideologies. It is suggested that there are two broad camps that seek to govern and explain constitutional interpretation. The interpretational camp, 'judicial activism,' advocates a generous application of judicial review and is generally associated with the left side of the political spectrum. On the other hand, proponents of the practice of 'judicial restraint' approach the question of judicial review with caution and place the emphasis on upholding the separation of powers and the democratic process. This approach is often categorised on the right side of the spectrum. By scrutinising historical evidence and comparing statutory interpretation techniques, it is argued that the contemporary links drawn between restraint-activism and textualism-purposivism to the political spectrum are uncorroborated. Furthermore, it is observed that judicial restraint has historically been used by both conservatives and liberals as a tool for forwarding their respective political motives or of the regimes that instituted them into office. The article compares the various interpretational techniques of those judges who held different political views and were in office during one of the most defining periods of the Supreme Court, the *Lochner* Era. Such an exploration will have far-reaching implications on how the judiciary and its operations ought to be understood. It will further assert that in judicial review cases, the nature of the legislation under review is a more potent determinant of the statutory interpretation techniques that will be employed, than the ostensible political views of the judges conducting the review. The article will also emphasise the importance of the political question doctrine under which the courts avoid judging an issue due to its political nature.

* B.A.LL.B (Honours) Lahore University of Management Sciences (LUMS).

Keywords: Judicial restraint, judicial activism, statutory interpretation, originalism, textualism, evolutionism, substantive due process, right to contract, contract clause, 14th amendment of United States' Constitution

Introduction

"The Constitution is not a living document. It is dead, dead, dead," said Justice Antonin Scalia as he addressed a crowd of fresh law school graduates in Dallas, Texas.[1] By stating that the Constitution was not a living document, Justice Scalia emphasised the idea that constitutional interpretation should be governed strictly by the original meaning of its text. This assertion represented what popular political discourse at that time deemed to be a dying breed in the federal judiciary: the judicial conservatives. On the other hand of the judicial spectrum, an elementary understanding of the statutory interpretation propounded by 'judicial activists,' the notion championed by liberal judges, that the Constitution is alive and can be interpreted as per the changing times.

The dichotomy drawn above is not unique to political, legal, and jurisprudential discourse on statutory interpretation. Judicial activism is generally associated with the left side of the political spectrum. Its advocates, Justice Ruth Bader Ginsburg and former Justice John Paul Stevens to name a few, are often considered to be liberals, humanitarians, and activists. Judicial restraint, on the other hand, is often placed on the right side of the spectrum, and under the garb of conservatism.

This article argues that this understanding of statutory interpretation – that the approach fluctuates according to the political outlook of a judge – is most rudimentary, to say the least. This paper scrutinises historical evidence and compares statutory interpretation methods to argue that contemporary debates pertaining to restraint versus activism and textualism[2] versus purposivism[3] are not just irrelevant, but also the associations they currently

[1] Katie Glueck, 'Scalia: The Constitution is 'dead'' (*Politico*, 29 January 2013) <https://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853> accessed 13 August 2018.

[2] Textualism refers to a legal philosophy of statutory interpretation according to which a law should strictly be construed by considering only the words used in its text, as they are commonly understood.

[3] Purposivism refers to a legal philosophy based on which a statute should be interpreted by keeping in view the purpose for which it was enacted. Scholars are divided in their

hold with ideologies on the political spectrum are fabricated. Furthermore, this article also posits that both conservatives and liberals have historically used judicial restraint as a tool for forwarding their respective political motives or of those regimes that instituted them into office. Hence, judges' generous use of judicial review ought not to have any bearing on their political views or *vice versa*. it is the circumstances that encompass the political *status quo* and its characteristics that have historically determined and continue to establish the tendency of a judge to exercise restraint.

The first part of the article will stipulate and describe the research methodology and sources used to substantiate the claims that have been made. The next will compare the various interpretational techniques of those judges who held different political views and were in office during one of the most defining periods of the Supreme Court, the *Lochner* Era.[4] This era is of particular consequence for this research. Currently, the judges that exercise restraint, Justices Clarence Thomas and Neil Gorsuch, are labelled as conservatives. The latter is considered a replacement of the late Antonin Scalia and is deemed as a textualist – that is, someone who holds the notion that the law should be interpreted as it is written.[5] While, during the *Lochner* Era, when the Supreme Court of the United States of America was laden with judges who struck down progressive state legislation in favour of the freedom to contract, the judges who emphasised and practiced restraint were deemed to be liberal in their political views. This provides evidence for the argument that neither restraint nor activism has permanent or evident roots in any camp within the political spectrum.

For this purpose, notable judgments will be discussed in order to trace the development of the interpretation of the contract clause. The aim is to study the statutory interpretation tools and methods used by the majority and the dissenting judges, and to draw conclusions about such tools and their

---

understanding of what ought to be the source of determining what the purpose of a certain legislation might be. Legislative intent and original intent are two commonly used determining sources.

[4] This refers to a time in American jurisprudential history following the Supreme Court's judgment on *Lochner v New York* [1905] 198 US 45. (Discussed later in the article).

[5] Ramesh Ponnuru, 'Neil Gorsuch: A Worthy Heir to Scalia' *The National Review* (New York, 31 January 2017) <https://www.nationalreview.com/2017/01/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir> accessed 13 August 2018.

associations with ideologies within the political spectrum. The focus will be placed on the roles played by eminent judges, such as Justice Owen Roberts, to suggest that judicial restraint is merely a tool or a means to reach a certain end – that can either be the advancing of conservative ideals or, as it will be discussed, the protection of liberal legislation. Such a finding will provide evidence for the dissociation of the decisions of the judges from their political inclinations and will emphatically have implications on the political and legal discourse on judicial restraint and its practice.

Research Methodology[6]

At this stage, it is imperative to point out that this article does not draw simple conjectures about a justice's political inclinations; instead, it utilises assertions based on multiple factors. The first factor pertains to the regime that instituted a particular judge into office. While it is argued that judges do not always decide along the party lines of the President of the United States and/or the Senate that appoints them, there exists significant evidence[7] to conclude that most appointments to the Supreme Court of the United States are politically made to ensure the protection of legislation made by the administration that institutes them into office. Lee Epstein and Justice Richard A. Posner have argued that some journalists have portrayed judges to be simply "politicians in robes."[8] This idea is supported by the argument that judges appointed by the Republican administrations are more likely, on average, to decide along right-wing, conservative lines than those appointed by Democratic presidents.

Another factor used to identify the political position of judges pertains to the offices held by them, and the political activities they were involved in as lawyers, activists, and advisors, before their appointment to the Supreme Court. Moreover, qualitative evidence is also scrutinised, such as public statements made by justices either in their written judgments, interviews, speeches, lectures, academic writings, or while questioning councils during oral arguments, before and during their time in the Court. Lastly, more

[6] This article relies heavily on the methodology used in a book by Harvard Law School professors, Lee Epstein, William M. Landes and Richard A. Posner, who took it upon themselves to gauge the extent to which the judges vote alongside their party lines. Lee Epstein, William M. Landes and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press 2013).
[7] Ibid, 8.
[8] Ibid, 2.

empirical evidence,[9] such as the deciding patterns of judges on cases relating to social and political importance, is also considered.[10]

This paper will track the development of the Fourteenth Amendment's due process clause of the Constitution of the United States that occurred with the judicial scrutinisation of Franklin Delano Roosevelt's pro-worker 'New Deal' legislations. Several judgments regarding the constitutionality of such legislations will be carefully inspected to study the deciding patterns of United States' Supreme Court judges at the time. The purpose of this exercise is to juxtapose the opinions with the statutory interpretational tools used by the judges to make them, and to see whether or not modern-day conceptions regarding the political associations (i.e., textualism is a device for the conservatives) of such tools are historically valid.

Since the thesis of this article relies heavily on and makes generous use of terms 'liberal' and 'conservative' with regards to the judiciary, it is therefore of paramount importance to determine a method as to what constitutes a 'liberal' judge as opposed to a 'conservative' one. The above-mentioned factors highlight the fact that ascertaining the political views of judges is common in a discourse on statutory interpretation in the American legal system and is a necessary exercise to limit that assumption being made regarding them.

Historical and Comparative Analysis of the Court: Conservative Judicial Activism - An Oxymoron?

In the 1920s and 1930s and onwards, as a product of the Great Depression, the Supreme Court was faced with the task of determining the scope of the contract clause[11] and the extent to which freedom to contract[12] could be restricted. At this time, the United States' Supreme Court was dominated by justices who could be identified as 'conservative'.[13] President Franklin Delano

[9] Joshua B. Fischman and David S. Law, 'What Is Judicial Ideology, and How Should We Measure It?' (2009) 29 *Washington University Journal of Law & Policy* 154.
[10] Michael A. Bailey, 'Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency' (2007) 51 *American Journal of Political Science* 442.
[11] Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve 2018) 31-32.
[12] United States Constitution 1788, Amendment XIV, s 1.
[13] William E. Leuchtenburg, 'The Origins of Franklin D. Roosevelt's "Court-Packing" Plan' (1966) 1966 *The Supreme Court Review* 349.

Roosevelt's administration – in its attempt to revitalise the economy, increase aggregate demand, control inflation, and protect consumers and workers from a similar economic calamity from reoccurring – proposed and instituted a set of legislations termed as 'The New Deal.' The framework not only called for the creation of regulatory bodies, such as the 'Securities and Exchange Commission' to control and oversee the workings of Wall Street to prevent future unforeseen market crashes. It also instituted legislation to enforce policies for the protection of workers and consumers by setting upper limits on prices and working hours. This seemingly pro-worker legislation gave birth to a legal question that was unprecedented for the Supreme Court at the time: to what extent can the state restrict an individual's right to contract, especially considering that working hours and wages are matters that the Constitution has left for employers and employees to agree upon themselves. The politically conservative justices[14] of the time dealt with this dilemma by giving preference to limited state action over restrictions on the contract clause. Since such judges were in a numerical majority, this led to several pro-worker legislations to be struck down and, much to the frustration of President Roosevelt, a continuation of what is now known as the *Lochner* Era of the Supreme Court:[15] a time during which the Court was known for striking down pro-worker government actions. This era is fundamentally significant because the Court was making gratuitous use of judicial review and was striking down all legislation that attempted to limit the contract clause. Plainly, it was the politically conservative interpretation of the clause in question by the majority judges that motivated said judicial activism.

This period stands in stark contrast with contemporary legal and political discourse on the issue, where judicial activism is perceived to be a liberal device. Unlike the modern-day discourse on American constitution law, in the *Lochner* Era, political conservatism and judicial activism were not deemed to be antithetical to each other. It has been suggested by historical evidence that the nature and characteristics of the circumstances that encompassed the Supreme Court at the time required the exercise of judicial activism for the promotion of conservative ideas. That evidence is present in the jurisprudential development of the Fourteenth Amendment's due process

[14] These Justices were referred to as the Four Horsemen and they stood guard against all New Deal legislation. They included Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter.
[15] (n 4).

clause during, and the following the years of Franklin Delano Roosevelt's presidency.

Lochner v New York – An Invention of Rights by the Right

While not the first case involving a question on the state's limitation of the liberty to contract, the decision in *Lochner v New York*[16] is the epitome of politically conservative judicial activism. In an attempt to protect the interests of workers, the State of New York promulgated a statute known as the Bakeshop Act, 1897.[17] The legislation fixed an upper limit on the number of hours bakers could work to sixty per week or ten per day. The petitioner, Joseph Lochner, who was charged with allowing a worker to work more than the stipulated maximum number of hours, challenged the Bakeshop Act as per the Fourteenth Amendment's substantive due process clause, which he argued protected an employee's freedom to contract with an employer, on any given terms.

The question before the Court was whether the impugned state legislation, the Bakeshop Act, 1897,[18] was unconstitutional. In a five-to-four decision, the United States Supreme Court held that the Act was indeed in contravention of the Constitution's due process clause that had been enshrined within the Fourteenth Amendment. The majority, basing their reasoning on the conservative principles of a limited government, were guilty of what Justice Oliver Wendell Holmes Jr. deemed to be an invention of rights.[19] Such reasoning in contemporary legal discourse has only been associated with the liberal justices on the bench.

The significance of this case caused the period from 1897 to 1937 (when *Lochner* was overturned in *West Coast Hotel Co. v Parrish*)[20] to be known as the *Lochner* Era in the American legal-historical discourse. It is most interesting to note that in this judgment, and those dealing with similar questions on the contract clause, the dissent came from the politically liberal side of the bench. The liberal judges exercised judicial restraint, by voting not to strike down progressive legislation such as the Bakeshop Act, 1897. Justice

[16] Ibid.
[17] The Bakeshop Act 1897 N.Y. Laws, Art. 8, ch.415, § 110.
[18] Ibid.
[19](n 4) 75-76.
[20] *West Coast Hotel Co. v Parrish* [1937] 300 U.S. 379.

Holmes, in the dissent, opined that the conservative majority on the bench had decided *Lochner* based on their entrenched political beliefs in the economic philosophy of *laissez faire*,[21] the theory of the free market that has historically remained at the heart of American capitalist economics. In his scathing dissent, he reasoned that the United States Constitution does not intend to embody a particular economic theory,[22] let alone the principles of capitalism. It is interesting to note that during this era, the philosophies of originalism and intent viewpoints that are currently associated with judicial conservatism,[23] were being practiced by the liberal justices. This provides further evidence for the argument above, that it would be a misguidance to brand 'restraint' and 'originalism' as ideas of the right or the politically conservative. The most that can be inferred from this era is that these ideas are merely means to achieve such ends that may lie on any position on the political spectrum.

Nebbia v New York – A Triumph for Liberal Judicial Restraint

Roughly twenty-nine years later, the Supreme Court was faced with a similar question pertaining to the liberty to contract. However, the Court now existed in a form that was fundamentally different from what was found when it decided *Lochner*. The judges who decided *Lochner* were no longer in office, due to which it may be argued that the political inclinations of the Supreme Court had also fundamentally transformed.

Perhaps this is what can be inferred from the Court's decision in *Nebbia v New York*,[24] when after a series of tumultuous protests, the question of the constitutionality of a law that sought to regulate the sale of milk (Milk Control Law) in 1933, enacted as a part of the New Deal, was brought forth for litigation. The law in question sought to protect dairy farmers in the State of New York who were economically crippled as a result of a decline in the farm prices during the Great Depression. The law sought to achieve this aim by committing what is considered to be an egregious wrong in conservative

[21] Refers to an economic system that has minimal government intervention, i.e. tariffs, subsidies, upper and lower limits on prices, minimum wages, to name a few.
[22] (n 4) 75.
[23] Abbe R. Gluck & Richard A. Posner, 'Statutory Interpretation on the Bench: A Survey of Forty-Two Judges of the Federal Courts of Appeals' (2018) 131 (1298) *Harvard Law Review* 1322-1324.
[24] *Nebbia v New York* [1934] 291 U.S. 502.

politics - mandating state-regulated minimum and maximum retail prices of milk and other dairy products.

Leo Nebbia, the petitioner, owned a grocery store and violated the Milk Control Law by selling dairy products at a lower price than that was set by the state statute. Nebbia was found guilty by the state courts, which then compelled him to challenge the law under the substantive due process clause of the Fourteenth Amendment. His argument remained the same as the one employed by *Lochner* twenty-nine years ago: that the state cannot regulate prices or dictate the buyer-seller relationship as the right to contract that is arguably protected under the Constitution.

The Supreme Court, in a five-to-four judgment, decided that the law in question did not violate the Fourteenth Amendment's due process clause. This fundamental shift from the Court's position established in *Lochner* can be fathomed by the fact that the Court now housed more politically liberal justices than it did when *Lochner* was decided. However, what is more interesting is the approaches adopted by both the majority and the dissent, to justify their opinions - writing for the majority, Justice Owen J. Roberts, while upholding the politically liberal legislation, subscribed to methodologies that were not far from those practiced by the contemporary left previously. The Justice examined the original purpose of the statute and juxtaposed it with the original intent of the Fifth and the Fourteenth Amendments. He reasoned that neither of the two Amendments that ensured due process originally intended to prohibit governmental regulation mandated for public welfare. Justice Roberts berated previous judgments on the issue and accused them of fabricating rights that did not exist when the Amendments in question were drafted and promulgated.

Justice Robert's decision is of particular significance for two reasons: firstly, he prioritised the original intent of both the state statute and the Amendments against which the statute was being tested. Such an exercise is seldom associated with liberal justices who seek to uphold progressive legislation. In fact, in contemporary legal and political discourse, original intent is considered to be the artillery of the conservative judiciary. Secondly, the Justice rebuked the 'right to contract' as a fabrication, therefore, asserting that it was not guaranteed under the U.S. Constitution. The 'concoction of rights' is often used as a conservative critique against the liberal interpretation

of the law in contemporary discourses.[25] Justice Robert's commentary provides further evidence for the argument that judicial restraint and the reasons for exercising such restraint cannot be strictly labelled as 'liberal' machinery.

West Coast Hotel Co. v Parrish – A (Political) Switch in Time That Saved Nine

Nebbia, however, was not the final nail in the coffin for the precedent set by *Lochner*. That came around three years later in 1937 when the Supreme Court decided *West Coast Hotel Co. v Parrish*. For the first time in President Roosevelt's presidency, the Supreme Court was consistent of the view that 'liberty to contract' was a fabrication resulting from a grossly construed interpretation of the Fourteenth Amendment's due process clause. However, it is essential to realise that there was no tangible statutory development that led to this change in interpretation – that is to say that there was no amendment to the constitutional provision in question that brought about this change. In fact, it was a blatantly political move made by Justice Owen Roberts through his swing vote. This move was a response to an open threat of court packing by the President, which led to this decision.

The State of Washington had instituted a law that established a minimum wage for workers after consultation with the Office of Supervisor of Women in Industry and the Industrial Welfare Committee, both of which were created as a result of the same state legislation. This legislation was also one of the several that were passed as a part of the President's New Deal. Elsie Parrish, a chambermaid working at a hotel owned by the petitioner, West Coast Hotel Company in the State of Washington, sued the plaintiff after she was paid an amount that was below the newly instituted minimum wage. The case after multiple appeals found its way to the Supreme Court, which was once again faced with a question that seemed all too familiar - was the

[25] Justice Scalia often criticized his liberal colleagues for inventing rights that were not provided by the constitution. An example of such criticism is of the same-sex marriage case *Obergefell v Hodges* 2015 U.S. LEXIS 4250, (Scalia, J., dissenting), where he stated in his dissent that "The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention." He has also accused liberal justices for the same act in his book: Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1998).

minimum wage law, instituted by the State of Washington, in conflict with the Fourteenth Amendment's due process clause.[26]

The facts of the case, however, are insufficient to understand the significance of this judgment with regards to the conclusions that can be made about the Court's politically motivated statutory interpretation techniques. The ruling came soon after President Roosevelt's landslide victory in the 1936 Presidential elections. The newly inaugurated second-time President was, however, frustrated at the sight of his prized New Deal getting gradually chipped away by the Supreme Court. As a reaction stemming from this frustration, the President proposed the Judicial Procedures Reform Bill of 1937, which is also known as the Court Packing Plan.[27] The Bill aimed to increase the number of judges in the Supreme Court from nine to fifteen,[28] allowing President Roosevelt to appoint more judges who were more likely to be conducive to his liberal, pro-worker legislation. Interestingly, the Bill was proposed on 5 February 1937, a day after the first conference vote on the *Parrish* case by the Court and roughly a month before its final judgment. It was argued that the President's main aim of this legislation was not to provide a judicial overhaul but in fact to bend the Court into submission. The message was sent loud and clear – if the conservatives on the bench, who continued to oppose the New Deal, decide similarly in the *Parrish* case, the Court will be permanently defaced.

Suddenly, Justice Owen Roberts, who had historically sided with the conservative judges (known as the Four Horsemen) in striking down New Deal legislations, and was the only swing vote in this case,[29] displayed a shift in his Fourteenth Amendment jurisprudence. He not only voted alongside the liberal justices (known as the Three Musketeers) in *Parrish*, but also in all cases on the New Deal statutes that followed. As mentioned before, this sudden and sustained jurisprudential shift is argued to have been a direct result

[26] (n 14).
[27] Judicial Procedures Reform Bill, 1937.
[28] The ostensible aim was to have more young justices in the Court by having one judge for every incumbent judge who was above the age of seventy years and six months. This translated to a total of fifteen judges at that time.
[29] The Court at this time consisted of four conservative justices, three liberal justices, and two swing voters: Hughes and Roberts. Chief Justice Hughes had decided to vote alongside the liberals in *Parrish* and hence it was on Justice Roberts to decide the fate of the state legislation.

of the legislative threat made by the President.[30] To protect the Court and its position in the trichotomy of powers from getting desecrated, Justice Roberts arguably switched his vote and gave birth to what is now known as the 'switch in time that saved nine.'[31]

This monumental event in the Supreme Court's history suggests that if need be, interpretation by the judges can be influenced to engineer a decision that is more conducive to the needs of the *status quo*. It was a political decision, not a legal one, that guided the statutory interpretation of the Court in *Parrish*.[32] A further, more in-depth scrutiny of the judgment provides more evidence for the thesis presented. Chief Justice Hughes, writing for the majority, adopted a textualist approach in his reading of the law when he stated that the "Constitution does not speak of freedom of contract."[33] His textualist interpretation of the Fourteenth Amendment is of particular consequence, as this approach in contemporary discourse is understood to be a conservative tool. Justice Antonin Scalia has gone as far as defining it as a sub-set of *originalism*, to entrench it profoundly and wholly in conservative jurisprudence. Hence, employing this approach to uphold a liberal legislation further dissociates restraint from the political right.

Chief Justice Hughes further explored the notion of the limitation of rights with regard to the liberty to contract. He opined that even if the Court assumes that there exists a right to contract, it cannot exist without being subject to the same limitations that restrict all constitutional rights. Justice Hughes reasoned that "liberty under the Constitution is…necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process".[34] Restricting rights within constitutional boundaries is an exercise that is, in the contemporary jurisprudential discourse, understood as a politically conservative exercise. For instance, in modern jurisprudence, politically conservative justices have voted against expanding the right to privacy to include the right to have an abortion for women, as established by

[30] William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford University Press 1995) 350.
[31] (n 11), 169.
[32] (n 24).
[33] Ibid, 391.
[34] Ibid, 300.

Roe v Wade,[35] and *Planned Parenthood of Southeastern Pennsylvania v Casey.*[36]

Furthermore, Chief Justice Hughes, in an attempt to establish freedom to contract as a qualified right as opposed to an absolute right, sought refuge in established precedent. In his opinion, he quoted *Chicago, Burlington & Quincy R. Co. v McGuire*[37] that "there is no absolute freedom to do as one wills or to contract as one chooses."[38] He reasoned that since there is judicial precedent regarding the limitation on the liberty to contract, the Court would be remiss in disseminating it as a right that is absolute and unrestrained. Strict judicial deference, as displayed by the Chief Justice in this instance, is one that is practiced in contemporary jurisprudence by judges on the right end of the political spectrum. Liberal justices in recent times, conversely, have been quick to diverge and defy the doctrine of *stare decisis*.[39] Chief Justice Hughes, in this judgment, upheld a pro-worker and liberal legislation by the use of judicial devices that are commonly associated with the political right. Hence, statutory interpretational tools ought not to be associated with camps on the political spectrum.

Conclusion

While marking the end of the infamous *Lochner* Era, *Parrish* made it vividly clear that the Court was not as apolitical as it purports to be. With broader ramifications on the trichotomy of powers aside, this understanding of the Court's operations has far-reaching implications on how the methodological and statutory interpretation tools used by the Court are studied. This article, by using case law along with historical and statutory evidence, argued that devices such as judicial restraint and judicial activism are merely methods of practicing judicial review. Therefore, they cannot be strictly categorised as being exercised by a 'conservative' or 'liberal' judge. This article has argued that the most that can be gathered about either restraint or activism is that they are mere devices that can be and have been exercised by judges to advance

[35] *Roe v Wade* 410 US 113 (1973).
[36] *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992).
[37] *Chicago, Burlington & Quincy R. Co. v McGuire* 219 US 549 (1911).
[38] Ibid, 219.
[39] Stare Decisis refers to the legal principle of deferring to judicial precedent set by previous judgments.

either the political motives prioritised by themselves, or the regime that instituted them into office.

The most apparent implication of such a finding rests within the conception of what is often deemed to be the primary goal of the Court: the dissemination of justice. The article, however, holds that this understanding cannot be further from reality, and after scrutinising historical evidence, holds that dissemination of justice may not be what the law purports to ensure. Injustice may merely be the failure to apply the letter of the law as per the scripture of the code. Justice, conversely, may be understood as the uniform application of the code, without the abstract invention of rights, responsibilities, or restrictions. Perhaps Justice Felix Frankfurter's[40] statement, made as a response to *Parrish*,[41] is most relevant in this debate, "Now ... even a blind man ought to see that the Court is in politics."[42]

[40] Justice Frankfurter was not a Supreme Court Justice at that point in time. He worked as an advisor to the President.
[41] (n 24).
[42] Max Freedman, *Roosevelt and Frankfurter: Their Correspondence 1928-1945* (Little, Brown & Co. 1967) 392.