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The Rise and Fall of Judicial Self-Restraint

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Judicial self-restraint, once a rallying cry for judges and law professors, has fallen on evil days. It is rarely invoked or advocated. This Essay traces the rise and fall of its best-known variant—restraint in invalidating legislative action as unconstitutional—as advocated by the “School of Thayer,” consisting of James Bradley Thayer and the influential judges and law professors who claimed to be his followers. The Essay argues, among other things, that both the strength and the weakness of the School was an acknowledged absence of a theory of how to decide a constitutional case. The rise of constitutional theory created an unbearable tension between Thayer’s claim that judges should uphold a statute unless its invalidity was clear beyond doubt (as it would very rarely be), and constitutional theories that claimed to dispel doubt and yield certifiably right answers in all cases.

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INTRODUCTION

You want the Court to comb through 19th-century history and find a mandate for unfettered capitalism? Vote Republican. You want it to impose welfare rights, with a heavy dose of judicial empathy? Vote Democratic. And hope for well-timed vacancies and long-lived justices who share your policy preferences. Meanwhile, the notion of constitutional rights as immutable principles protecting our liberties from majoritarian tyranny morphs into rule by whichever faction happens to have a one-vote majority on the Supreme Court.¹

I.

DEFINING "JUDICIAL RESTRAINT"

The term "judicial self-restraint" is a chameleon. Of the many meanings commentators have assigned to it,² three are the most serious: (1) judges apply law, they don't make it (call this "legalism"—though "formalism" is the commoner name—or, better, "the law made me do it"); (2) judges defer to a

1. Stuart Taylor, Jr., *Judicial Factions and the Constitution: None of the Nine Justices Has Shown Much Modesty in Finding Support for His or Her Policy Preferences in the Constitution*, NAT'L J., Mar. 6, 2010, at 1, available at http://www.nationaljournal.com/njmagazine/or_20100306_2636.php.

2. See John Daley, *Defining Judicial Restraint*, in JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM 279 (Tom Campbell & Jeffrey Goldsworthy eds., 2000); Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT 385 (Stephen C. Halpern & Charles M. Lamb eds., 1982); STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM (2009).

very great extent to decisions by other officials—appellate judges defer to trial judges and administrative agencies, and all judges to legislative and executive decisions (call this “modesty,” or “institutional competence,” or “process jurisprudence”); (3) judges are *highly* reluctant to declare legislative or executive action unconstitutional—deference is at its zenith when action is challenged as unconstitutional (call this “constitutional restraint”).

Type (3) (constitutional restraint), which is my subject, is a subset of (2) (modesty), but as a rule is differently motivated; (2) is motivated by notions of comparative institutional competence, (3) by respect for the elected branches of government, although that respect is sometimes based on a belief that legislatures do policy better than courts do, which is a form of judicial modesty. Type (3) is also distinct from “judicial minimalism,”³ though overlapping it. Minimalists advocate narrow decisions and the avoidance of ambitious theorizing, and thus are a school of self-declared judicial restraint. But judicial minimalism is not the same as judicial restraint. The minimalist’s declared aim is for judges to avoid mistakes by acknowledging the limitations of their knowledge (so they are to feel their way rather than make bold leaps); it is not to redraw the boundary between the judiciary and the other branches of government. That is the theory, but in practice minimalism is the covert pursuit of an activist judicial agenda.

Types (1) (the law made me do it) and (3) (constitutional restraint) are in sharp conflict. The Constitution is law, and applying it may be inconsistent with a policy of reluctance to declare a statute or executive decision unconstitutional. The more you believe (or pretend to believe) in (1), the less you’ll be moved by (3). But the reverse is also true. The less you believe in (1), the more open you will be to (3). Indeed, rejecting (1) creates an acute need for (3), to discourage judges from spinning completely out of control and becoming just another set of legislators.

Both (2) (modesty) and (3) (constitutional restraint) come with internal contradictions. A judge may face a choice between deferring to one court, agency, or branch of government and refusing to defer to another, and then the restrained course may be unclear, as when there is a clash between presidential and congressional prerogatives in national security cases. Another example: the doctrine that statutes should be interpreted to avoid raising constitutional questions reduces the frequency with which statutes are held unconstitutional, but does so by reducing the scope of legislation and thus the power of legislatures.⁴

3. Summarized—and then savaged—in Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347 (2010).

4. Judge Easterbrook has argued persuasively that it is, on balance, an activist doctrine. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–09 (2002).

II.

THAYER'S THEORY OF JUDICIAL RESTRAINT

The best-known and best-developed version of (3) (constitutional restraint) has a clear beginning and end, and I will organize my discussion around its eighty-one-year history. It begins with an 1893 article by Harvard law professor James Bradley Thayer in which he argued that a statute should be invalidated only if its unconstitutionality is "so clear that it is not open to rational question."⁵ (He seems not to have been concerned with judicial review of executive action; the executive branch was of course much smaller and weaker when he wrote than it is today.) I do not mean that the advocacy of constitutional restraint began in 1893; it is, as Larry Kramer explains in his Essay,⁶ much older. But I shall limit my discussion to one school of constitutional restraint advocates, the School of Thayer (and so my title is overbroad).

The School of Thayer flourished when there were no cogent theories of how to decide a difficult case. It died for a variety of reasons: it rested on false premises about judicial deliberation; it lacked coherence—the Thayerians did not constitute a community of thought; it had no stopping point—once you embraced it, you could not explain why a law would ever be declared unconstitutional; it was vulnerable to the rise of constitutional theories; and it was given its *coup de grâce* by a combination of decisions by the liberal Warren Court and the refusal of the conservative successors to Justices of the Warren Court to accept a ratchet theory of judicial succession, in which liberal Justices depart from precedent in order to expand the constitutional rights favored by liberals and their conservative successors "conserve" those liberal decisions because of a commitment to *stare decisis*. But the School of Thayer left a legacy: procedural devices for ducking constitutional issues, the notion of restraint as a pragmatic tiebreaker, and a checklist of considerations that argue for restraint in particular cases.

Central to Thayer's thinking was the distinction between what is merely incorrect and what is unreasonable or, equivalently, clearly erroneous or an abuse of discretion. The distinction is familiar in a variety of adjudicative contexts. Think of appellate review of trial judges' findings of fact, or of their rulings on objections to the admission of evidence, or of their management

5. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). See Sanford Byron Gabin, *Judicial Review, James Bradley Thayer, and the 'Reasonable Doubt' Test*, 3 HASTINGS CONST. L.Q. 961 (1976) (as slightly amplified in Gabin's short book, SANFORD BYRON GABIN, *JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST* (1980)), for the fullest discussion I've found of Thayer's approach, its antecedents, and its sequelae. Also very good is EVAN TSEN LEE, *JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED* (2011). See also *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

6. Larry Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621 (2012).

decisions, such as deciding whether to limit the number of witnesses at trial. Judges in a number of the cases that Thayer cited in support of his formula (for his originality lay in organizing and rationalizing scattered judicial remarks supportive of type (3) restraint rather than in inventing it) had gone so far as to say a law should be invalidated only if its unconstitutionality was clear "beyond a reasonable doubt,"⁷ which is an even stricter standard than clear error or unreasonableness.

Thayer's test of "not open to rational question" (or in other words, unreasonable as distinct from merely believed to be incorrect), which he had derived from the standard for reversing a judgment entered on a jury verdict,⁸ underscores the tension between types (1) and (3) self-restraint. Judges who thought a statute unconstitutional but were not sure they were right would be required by Thayer's formula to uphold the statute and thus would be upholding a law that they thought, albeit with less than complete confidence, actually was unlawful.⁹ Type (1) (the law made me do it) restraintists, in contrast, would condemn the statute, believing their duty was to apply the law as they understood it, even if they acknowledged to themselves that their understanding might be imperfect. If they allowed doubt to change their decision, they would be allowing something that is not law (at least in a narrow sense of the word) to influence a judicial outcome.

A number of other scholars and judges have been skeptical of the competence of courts (in the sense either of legitimacy or ability) to decide difficult or consequential cases, but have not looked to Thayer for inspiration. Some think legislatures so much better at making policy than courts that judges should leave legislation entirely alone—a posture of total deference that goes beyond Thayer. One provocatively titled piece—it has "Thayerian" in the title, but is not Thayerian in spirit—argues for giving Congress an institutional makeover so that it can perform better, which might obviate the need for any judicial second-guessing.¹⁰ But as the article notes, Thayer himself did not discuss institutional design. Nor did the Thayerians whom I've mentioned; they seemed content with legislatures as they were constituted, though not necessarily with the legislators (a Bickellian departure from Thayer, as we will see).

7. See, for example, references in THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 182 nn.2–3 (1868).

8. Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5 (1993).

9. Thayer was explicit: judges could not invalidate a law "merely because it is concluded that upon a just and true construction the law is unconstitutional." They can do so only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one." Thayer, *supra* note 5, at 144.

10. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001). Professor Vermeule belongs to a sect of heterodox Thayerians discussed in Part V below.

Skeptics of judicial competence often are strict constructionists, in the sense of hewing close to the semantic surface of statutes.¹¹ They are type (1) restraintists, defining their role in a way that enables them to apply the law with confidence (“plain meaning”). That is not the character of the Thayerians either; they were, as we’ll see, loose constructionists. And they were not necessarily modest. Their emphasis was not on the inability of judges to understand difficult cases and devise effective remedies, but on the legislature’s superior competence, in the sense either of legitimacy or of ability, or both, to legislate with a free hand.

Thayer offered several reasons in support of his concept of judicial restraint. First, authorizing courts to invalidate laws enacted by the national legislature was an American innovation with a thin basis in the constitutional text, and was still controversial when he wrote. This argued for prudential restraint; courts must be wary of going head-to-head with the other branches of government.

Second, often a law goes into effect years before the courts hear a case in which its constitutionality is challenged or is ripe for adjudication. Thayer argued that this implied that the legislature had to make an independent constitutional judgment—especially the federal legislature, because federal courts refuse to issue advisory opinions—and so Congress has to decide for itself whether a statute that it wants to enact would be constitutional. (He reinforced this argument by reference to Article VI, Clause 3, of the Constitution, which requires that members of Congress take an oath to support the Constitution.) Congress is thus a kind of constitutional court. The English had gone so far as to deem Parliament the nation’s supreme court—an act of Parliament had the force of a constitutional amendment.¹² Thayer was advocating a modified version of the English approach.

Third, questions relating to the power of the different branches of government are inescapably political, and so courts have perforce to use political, rather than just legal, criteria in answering them. Thayer thought that such criteria would generally favor restraint.¹³

Fourth, and most important (and implied by his first two points), if courts enforced constitutional limitations to the hilt, legislators would stop thinking about the constitutionality of proposed legislation and just think about how the courts would react. Legislative deliberations would be bobtailed and legislatures trivialized: “The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. . . . Under no system

11. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 57–59 (2006), which is discussed in RICHARD A. POSNER, *HOW JUDGES THINK* 214–16 (2008).

12. See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 237–54 (2008).

13. Thayer, *supra* note 5, at 135.

can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."¹⁴ Or as he later put it, "The tendency of a common and easy resort to this great function [judicial review of legislation], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is not a light thing to do that."¹⁵ We might compare this to one of the traditional arguments for deferential appellate review of fact findings by trial courts: it encourages trial judges to be more thoughtful. The analogy is imperfect, however, because appellate review of trial-court determinations of pure legal issues is plenary.¹⁶

Thayer had a high opinion of legislative deliberation, provided that courts did not disrespect it by according little weight to the products of that deliberation.¹⁷ These are two separate points: one can think that legislatures do a good job, and so should not be penned in tightly by the courts, without thinking that legislators deliberate in a responsible and creative fashion about the constitutionality of proposed legislation. Thayer believed both things. Both beliefs appear to be false, or at least weakly supported. (More on this later.) So Thayerism got off to a shaky start.

III.

THAYER'S SUCCESSORS

Thayer's immediate and most illustrious successor was Holmes, who had practiced law with Thayer for a time. Then came Brandeis (a former student of Thayer), then Frankfurter (an acolyte of both Holmes and Brandeis and the

14. *Id.* at 156.

15. James Bradley Thayer, *John Marshall*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 3, 86 (1967) [hereinafter THAYER, HOLMES & FRANKFURTER, ON JOHN MARSHALL].

16. There is a good capsule summary of Thayer's theory in Lee's *Judicial Restraint in America*:

Courts were not to substitute their judgment for that of legislatures, which were uniquely equipped to deal with far-ranging matters of policy and the 'great, complex, ever-unfolding exigencies of government.' Moreover, impudent use of judicial review led the citizenry and its elected representatives to become lazy thinkers. Rather than think hard about whether proposed legislation was just or desirable, they would be preoccupied with legality. Worse yet, it made legislatures cynical—they had a free hand to enact unconstitutional laws for demagogic reasons, knowing full well that the courts would strike the laws down. At its core judicial review was necessary, because Congress may not force a coordinate branch of government, the judiciary, to enforce a law that violates the basic charter. . . . But . . . judicial review had to be limited to the most egregious cases.

LEE, *supra* note 5, at 56 (footnotes omitted). Notice that Thayer did not make the argument, which in the hands of Bickel and others became another plank in the restraintist platform, that judicial review of legislation was anomalous because judges unlike legislatures do not reflect the popular will. All other objections to this very bad argument to one side, "the Constitution is compounded of majoritarian and nonmajoritarian elements and provides no hint that any of the institutions it creates are anomalies." David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 457–58 (1994).

17. The "prolegislature" aspect of Thayer's article is emphasized in Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993).

most emphatic expositor of self-restraint in Thayerian terms¹⁸), and then Alexander Bickel (a former law clerk, and an acolyte, of Frankfurter). There are others in this lineage but these are the main figures¹⁹ and the only ones I need to discuss at any length.

A. Holmes (1902–1932)

In private correspondence Holmes claimed that his concept of judicial restraint had been derived from and was identical to Thayer's.²⁰ And it is true that he used Thayer's formula (the reasonableness test) in opinions; I will give an example later. But he didn't buy Thayer's premises. He didn't admire legislatures, or the "liberal" laws they kept churning out, such as the antitrust laws and other regulations of business. He didn't think legislators had the potential to be thoughtful interpreters of the Constitution. Indeed he didn't think that legislators reasoned. Legislation was a litmus paper that revealed the balance of political power in a society. Thayer had thought political considerations inescapable when a court was dealing with constitutional issues, but that those considerations would push judges toward upholding even statutes that they thought probably unconstitutional. That was the opposite of Holmes's thinking; he believed that judges who thought in political terms would be prone to invalidate a challenged law if their political ideology diverged from the legislature's.

Holmes's opinions on the Supreme Judicial Court of Massachusetts upholding the rights of unions,²¹ and his later, more famous opinions for the United States Supreme Court dissenting from decisions that invalidated social-welfare legislation on "liberty of contract" grounds,²² are generally thought to be the apogee of judicial self-restraint because of the derisive comments that he made about such legislation in his private correspondence. He kept saying he was compelled by his conception of the proper judicial role to vote to uphold laws he abhorred. I am skeptical. He was far from uniformly restrained in constitutional cases—think of his free speech and habeas corpus opinions,²³

18. See, e.g., *West Virginia v. Barnette*, 319 U.S. 624, 667–70 (1943) (Frankfurter, J., dissenting).

19. See Luban, *supra* note 16, at 451.

20. See Letter from Oliver W. Holmes to James B. Thayer (Nov. 2, 1893), reprinted in Luban, *supra* note 16, at 462 n.34.

21. See his dissenting opinions in *Plant v. Woods*, 57 N.E. 1011, 1015–16 (Mass. 1900); *Vegeahn v. Gunter*, 44 N.E. 1077, 1079–82 (Mass. 1896), and *Commonwealth v. Perry*, 28 N.E. 1126, 1127–28 (Mass. 1891).

22. See, for example, his dissenting opinions in *Lochner v. New York*, 198 U.S. 45, 75 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525, 568–69 (1923).

23. Regarding free speech, see, for example, his dissenting opinions in *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) and *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925). Regarding habeas corpus, see his majority opinion in *Moore v. Dempsey*, 261 U.S. 86 (1923), and his dissenting opinion in *Frank v. Mangum*, 237 U.S. 309, 345–50 (1915).

and his dissent in the wiretapping case (*Olmstead*).²⁴ Although they are not closely reasoned opinions, they are sharp reactions to government actions that he found abhorrent.

More important, "the law made me do it" protestations that pepper his correspondence obscure the Darwinian streak that is so pronounced in his free-speech dissents²⁵ and in *Buck v. Bell* ("Three generations of imbeciles are enough"²⁶). For Holmes, political struggle was closely analogous to natural selection—even an exemplification of it. The strongest would win. Not that they necessarily *deserved* to win, though he wanted the "imbeciles" to lose by not being allowed to reproduce and though he contemplated the Darwinian character of the social struggle with unmistakable relish.²⁷ Darwinism is a theory of adaptation, not of improvement. Judicial rulings invalidating modern liberal legislation might be wise or foolish but in either case they would merely delay the inevitable. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."²⁸ So judges should get out of the way of the struggle between unions and employers, socialists and capitalists, no matter which side the judges wanted to prevail. (Thayer shared Holmes's disquiet—remarked emphatically in Holmes's essay "The Path of the Law," published four years after Thayer's article—with the tendency of the judges of his time to interpret the Constitution to forbid "socialistic" measures.²⁹) The democratic political process was merely the civilized (because nonviolent) method of registering the relative strength of the competing forces in society—a substitute for civil war in much the same way that settlement is a substitute for trial.

24. See *Olmstead v. United States*, 277 U.S. 438, 470 (1928).

25. See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

26. 274 U.S. 200, 207 (1927).

27. [Holmes] believed that revering dominant social forces, like hurling oneself into duty, is part of the joyful affirmation of life as we actually find it. At bottom, we affirm the dominant inclinations of society because the promptings of vital force require no warrant and we know in our bones that in the end no warrant for them is to be found.

Luban, *supra* note 16, at 507.

28. O.W. HOLMES, JR., *THE COMMON LAW* 41 (1881).

29. See Hook, *supra* note 8, at 7. The tendency received its most extreme expression in a speech by Justice Brewer published the same year as Thayer's article. In it Brewer said:

Magnifying, like the apostle of old, my office, I am firmly persuaded that the salvation of the nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary. To stay the waves of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he hath, demands a tribunal as strong as is consistent with the freedom of human action and as free from all influences and suggestions other than is compassed in the thought of justice, as can be created out of the infirmities of human nature. To that end the courts exist, and for that let all the judges be put beyond the reach of political office and all fear of losing position or compensation during good behavior.

David J. Brewer, *An Independent Judiciary as the Salvation of the Nation*, PROC. N.Y. STATE B. ASS'N 37, 47 (1893).

All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.³⁰

Holmes's Darwinian conception of legislation, remote from Thayer's,³¹ best explains his restrained posture in cases involving the Due Process Clause.

B. Brandeis (1916–1939)

Brandeis, so often bracketed with Holmes, was different from him without being much like Thayer. Like Holmes, he was a legal realist *avant la lettre*; but unlike Holmes, he was political to his fingertips—a Jeffersonian with a Southerner's hostility to strong central government (he was from Kentucky, after all, though he was not your typical Kentuckian) and a marked hostility to finance, chain stores, and big business in general. Many state legislators shared these antipathies, being on the whole more liberal than most federal judges, as was Brandeis. Finding himself on an activist conservative Court, he embraced type (3) (constitutional) restraint, adopting, advocating, and amplifying doctrines—such as standing, ripeness, avoidance of constitutional rulings where possible, refusal to issue advisory opinions, and refusal to decide political questions—that eliminate or at least postpone occasions on which a federal court deems itself authorized to declare a legislative or executive measure unconstitutional. None of these doctrines can be found in the constitutional text or its English antecedents; they are the invention of American judges.³² Some are Brandeis's own inventions.³³

No more than Holmes was Brandeis uniformly restrained. He participated in decisions that invalidated New Deal legislation and that by doing so got the Supreme Court into political trouble in the 1930s. He joined Holmes's opinion in *Buck v. Bell*. His dissent in *Olmstead* was activist in locating a constitutional limitation on wiretapping in a right of privacy nowhere hinted at in the constitutional text.³⁴ He dissented with Holmes in free-speech cases.³⁵

30. Anonymous [Oliver Wendell Holmes, Jr.], *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873).

31. "Holmes, whose views are the most extensively documented among them [the circle of legal thinkers to which both Holmes and Thayer belonged], took a Thayerian position on judicial review without any enthusiasm for Progressivism and with only a relatively submerged and inarticulate attachment to democracy." Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 39 (1993).

32. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1004–15 (2002).

33. See, e.g., *Fairchild v. Hughes*, 258 U.S. 126 (1922); LEE, *supra* note 5, at 39–40, 68–76.

34. *Olmstead v. United States*, 277 U.S. 438, 471–85 (1928).

35. See *supra* note 25 and accompanying text.

Both Holmes and Brandeis defended type (3) restraint on the further ground that it would enable the states to function as policy laboratories. States would experiment with different policies, and the experiments, being limited in scope (because confined to individual states), would do little harm even when they produced bad policies; when they produced good ones they would be laying empirical foundations for nationwide social reform. But the two Justices embraced the theory of state experimentation on different grounds—Brandeis because he wanted to generate field evidence about which policies worked and, more important, to protect the liberal policies enacted in many states, Holmes because (I conjecture) he saw an analogy to variation, which is a precondition of evolution.

When avoidance tactics failed and deciding a constitutional question became inescapable, Brandeis sought to demonstrate the reasonableness of challenged legislation he favored by piling on factual details gleaned less from the judicial record than from official investigations and social science research.³⁶ There was an element of futility in this approach. The Court's conservative majority didn't accept the premise that legislation that seemed to violate the Constitution, though reasonable persons might think it did not, should be upheld. Brandeis should have tried to prove not that challenged legislation he favored was reasonable but that it was constitutionally sound. Yet he would not have succeeded: his notions of constitutionally sound legislation, which were liberal, were not shared by a majority of the Justices.

Holmes, in contrast, not having an empirical bent, was usually content just to assert the reasonableness of challenged legislation, albeit with unequaled eloquence, as when he said in his dissent in *Lochner*:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. *It does not need research to show* that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work.³⁷

Whether or not research was needed to establish the reasonableness of the law, Holmes was not going to supply it.

Holmes had come to the U.S. Supreme Court after two decades as a judge of a supreme court in matters of Massachusetts law but a subordinate court in matters of federal law and one occupied most of the time with routine matters.

36. See Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 74–75 (1978).

37. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (emphasis added).

He frequently rode circuit and thus had considerable experience as a trial judge. By the time he was appointed to the U.S. Supreme Court he was a thoroughly professional judge with a first-hand sense of the fluidity of legal doctrine when confronted by the facts of specific cases. He was also familiar with the resulting tendency of judges, unable to decide a case by reference to an authoritative text such as a statute or a binding precedent, to translate their political instincts into legal doctrines. Brandeis had not been a judge before his appointment to the Court.

C. Frankfurter (1939–1962)

Like Brandeis, Frankfurter was political to his fingertips, and, far from being a professional judge, had turned down appointment to the Supreme Judicial Court of Massachusetts despite the example of Holmes. Frankfurter advocated Thayerism with a noisy passion unequaled by any other Thayerian. His emotionality caused him difficulties in getting along with his fellow Justices and overcoming his visceral reactions in many cases. Brilliant but not thoughtful, and certainly not empirical, he innocently deemed legislators to be experts and shared the Progressive movement's excessive regard for government by experts and Thayer's high regard for legislatures. He even thought (absurdly) that legislators could be shamed into reapportioning their legislatures (into reapportioning themselves out of a job, in other words).³⁸ He tacked on to Thayer's formula, and elaborated, Brandeis's procedural restraints, which figured in his dissent in *Baker v. Carr* under the rubric of "political questions."³⁹

Many of Frankfurter's restrained decisions are explicable without reference to his theory of judicial self-restraint, including the most famous of them—his dissent in the second flag-salute case, *West Virginia v. Barnette*.⁴⁰ The American equivalent of a "court Jew" (monarchs of ethnically diverse nations, such as Austria-Hungary, where Frankfurter was born, sometimes valued educated Jews for their cosmopolitanism, that is, their lack of attachment to any of the local tribes), Frankfurter was intensely patriotic. He couldn't understand why any American would refuse to salute the American flag, which has a symbolic significance for Americans that far exceeds that of the national flag in other nations—the Union Jack for example. He seemed undisturbed by the fact that West Virginia's salute was of the raised-arm type, as in Hitler's Germany, with which we were at war when the case was decided.

As a further aspect of his emphatic immigrant's Americanism, Frankfurter was strongly anticommunist (in this respect, however, he was unlike many Jewish immigrants of his era): hence his vote in *Dennis v. United States* to

38. See his dissent in *Baker v. Carr*, 369 U.S. 186, 266–330 (1962).

39. *Id.*

40. See *West Virginia v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

uphold the Smith Act.⁴¹ He displayed no restraint when it came to the Fourth Amendment and the Equal Protection Clause; he was passionate in support of declaring public school segregation unconstitutional.⁴² His Thayerian rhetoric, so much more heated than that of any of the other Thayerians, puts one in mind of Gertrude's remark in *Hamlet* that "[t]he lady doth protest too much, methinks."⁴³

D. Bickel (1956–1974)

Although Alexander Bickel considered himself a Frankfurter avatar and made frequent approving references to Thayer,⁴⁴ his version of judicial self-restraint was really Brandeis's. Bickel had a political program—the kind of mild liberalism one associates with the current liberal members of the Supreme Court—that he thought the Court could put over on society by clever deployment of tactical devices, some original with him. (Judicial minimalism is similar: a stealthy advance, by imperceptible steps, to Nirvana, liberal or conservative depending on the Justice's political ideology.)

Bickel often talked about "principles" but his principles were political ideas—in that respect he was like the nineteenth-century judges whose activism Thayer and Holmes deplored—and he thought the Supreme Court had to move cautiously in imposing them on the nation because other institutions would fight back. For Bickel and his judicial disciple, Guido Calabresi, the Supreme Court is always in a tense political competition with the elected branches of government.⁴⁵ This is the view of political scientists as well, and has merit.

Bickel offered tactical advice to the Court to help it prevail over the other branches. For example, he wanted the Court to avoid giving the imprimatur of constitutionality to "bad" legislation that it did not yet dare to condemn (the Court should deny certiorari in such cases), lest the laity treat a decision upholding a statute's constitutionality as an endorsement. (Bickel thought laypersons incapable of distinguishing between legislation that is constitutional and legislation that is good.) In other cases he wanted the Court to engage legislatures in a coercive "dialogue."⁴⁶ Really bad state legislation would be invalidated, but on narrow grounds that gave the states the illusion that if only

41. 341 U.S. 494, 517–61 (1951) (Frankfurter, J., concurring).

42. These features of Frankfurter's jurisprudence are well described in MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991).

43. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

44. Notably in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 35–46 (1962).

45. See, e.g., *Quill v. Vacco*, 80 F.3d 716, 738–43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring); Guido Calabresi, *The Supreme Court 1990 Term, Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–08 (1991).

46. Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47–58 (1961).

they did a better job of articulating the concerns underlying the legislation, or at least expressed their desire for it more forcefully, it might survive.⁴⁷ It would be a Bickellian Court's hope that the legislators would have their eyes opened by the Court's tutorial, or that efforts at reenactment would founder on the inertia that makes it difficult to enact legislation. Bickel had a higher opinion of legislatures than Holmes, but a lower one than Thayer. He thought legislators merely educable, rather than competent, even without a Bickellian Court's tutorials.

Bickel criticized the Connecticut birth control statute that the Supreme Court invalidated a few years after his criticism, in *Griswold v. Connecticut*.⁴⁸ Nothing in the Constitution or in the Court's previous decisions seemed to bear on such a statute; family and sex law had long been thought prerogatives of the states. But Bickel didn't want the Court to uphold such a bad statute and so advised its invalidation on the narrow ground that because it was not being enforced it should be deemed abandoned.⁴⁹ Such a ruling would allow the state to reenact the statute. But because it is much more difficult to enact a statute than to leave it on the books unenforced (or weakly enforced, as in the case of the Connecticut birth control law), probably the statute would not be reenacted and Bickel's goal would be achieved without the Court's making a frontal assault on state power to regulate contraception.⁵⁰

For Bickel, then, as for the Federalists,⁵¹ restraint was strictly prudential. Bickel, and he hoped the Justices as well, were ahead of public opinion, and so had to maneuver cautiously if their views were to become durable constitutional law. The approach diverges from Thayer's because it rests on a patronizing attitude toward legislatures (and the public at large) and assigns a role of moral leadership to the Supreme Court.

47. *Id.* at 58–64.

48. 381 U.S. 479 (1965).

49. A device to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system, was available to the Court, and it is implicit in the prevailing opinion [in *Poe v. Ullman*, 367 U.S. 497 (1961)]. It is the concept of desuetude.

Bickel, *supra* note 46, at 61. But the Court in *Griswold* invalidated the Connecticut statute not on grounds of desuetude but as an infringement of a constitutional "right of privacy" (an Aesopian term meaning, in Supreme Court discourse; sexual freedom). *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). Actually the statute was enforced, though only against birth control clinics.

50. A variant of Bickel's strategy of "prudential" restraint would have been for the Supreme Court, while declaring the Texas abortion statute unconstitutional in *Roe v. Wade*, to have upheld the recently enacted and more liberal Georgia statute at issue in the companion case of *Doe v. Bolton*. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 126 (2003). This would have accelerated the movement to reform state abortion laws and probably brought us close to where we are today (abortion freely available in liberal states, but very difficult to obtain in conservative ones) without the political turmoil engendered by *Roe*.

51. "[F]or Federalists . . . restraint or deference was a matter of prudence and political expediency: something necessary to secure and preserve *judicial* (rather than popular) authority by minimizing the risks of overstepping." Kramer, *supra* note 6, at 626.

IV.

THE END OF THE THAYERIAN TRADITION AND THE
RISE OF CONSTITUTIONAL THEORY

With Bickel's death in 1974, the main Thayerian tradition comes to an end.⁵² The justiciability doctrines decisively shaped by Brandeis survived, though with lapses, as in *Roe v. Wade*,⁵³ which should have been deemed moot when the pregnant plaintiff delivered the baby before the case could be decided. The proper plaintiff would have been an abortion provider. Traces of judicial restraint remain, as we'll see later, but they are slight and rarely articulated in Thayerian terms.

It might be more accurate to say Thayer's balloon was punctured than that Thayerism died. For had it ever really lived (except in Thayer's mind)? Were its advocates restrained, or did they merely employ a rhetoric of restraint to conceal (not necessarily consciously) a judicial program based on ideology and personal preference rather than on orthodox guides to judicial decision making? Couldn't Bickel's concept of judicial self-restraint be thought the perversion of Thayer's ideas? Haven't I shown that the leading Thayerians didn't share Thayer's premises, however much they admired him?

The terms "judicial restraint" and "judicial self-restraint" survive, but as vague, all-purpose compliments; "judicial activism" survives as a vague, all-purpose pejorative.⁵⁴ Their original meanings have largely been lost. There are few academic Thayerians anymore⁵⁵ and no apostles of restraint on the current Supreme Court.⁵⁶ The last restrained Justice (and imperfectly so, from a Thayerian perspective) was the second Justice Harlan, who retired three years

52. The sharp drop in interest in Bickel's ideas in the decade following his death is remarked in Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

53. 410 U.S. 113 (1973).

54. See Easterbrook, *supra* note 4, at 1401-03. Between 1950 and 2009 these three terms appear in Supreme Court opinions (mainly dissents) a total of 132 times, though, surprisingly, only fifteen times in opinions issued between 1950 and 1969. Although the peak decade was the 1980s, with thirty-nine, compared to twenty-seven and twenty-nine in the two decades since, the total number of opinions issued annually by the Supreme Court has fallen by roughly 50 percent since the late 1980s; thus the relative frequency with which Supreme Court opinions use the terms is actually increasing.

I use "activism" in this paper to denote rejection of type (3) restraint. On the history of the term, see the interesting discussion in Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1196 (2009).

55. Two, Mark Tushnet and Robin West, are cited in RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 142 n.41 (2001). See also ERIC SEGALL, WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (forthcoming). Fallon himself, however, rejects it. FALLON, *supra*, at 9-10. Tushnet and West are well to the left in the political spectrum, and one wonders whether they would be Thayerians if the Supreme Court had a liberal majority. Another neo-Thayerian, however, Adrian Vermeule, is well to the right. See VERMEULE, *supra* note 11, at 230-88.

56. David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL'Y 1, 7-10 (2009); Easterbrook, *supra* note 4, at 1409.

before Bickel's death. (I could have added Harlan to my list of advocates of type (3) restraint but have not done so because although a very fine Justice he did not contribute to the theory.) The "rational basis" criterion of constitutionality, a legacy of Thayer, has dropped away, becoming another Aesopian formula, this one standing for the Court's lack of interest in applying constitutional norms to statutes restricting property rights, though interest in doing that may be reviving as the Court moves to the right.

A. Two Current Judicial Thayerians

Thayer still has at least two epigones on the federal courts of appeals, though neither is an orthodox Thayerian (there are no orthodox Thayerians). One is Judge Clifford Wallace of the Ninth Circuit, the author of a thoughtful article somewhat Thayerian in character, though imperfectly so, and in which he doesn't mention Thayer.⁵⁷ Wallace defends judicial restraint by reference to democracy, which he argues requires that judges give the widest possible latitude to legislative choice. But by pitching his defense of judicial restraint on democracy he unwittingly plays into the hands of John Hart Ely, who famously defended the activist decisions of the Warren Court on the ground that they made American government more democratic.⁵⁸ To Ely's way of thinking, judicial activism in defense of democracy trumped judicial restraint grounded in respect for democracy.

Wallace's article offers a refreshingly precise formula for restrained judicial decision making. When a case is in doubt, he says, the judge should:

1. Clarify only as much of the statute as is necessary to decide the case before the court.
2. Clarify the statute in the fashion that the legislature probably would have, had the ambiguity been brought to its attention.
3. Follow common-law principles of statutory construction.
4. Clarify the statute in a manner that innovates the least against the background of prior law—especially in regard to extending causes of action.⁵⁹

But these are not Thayerian precepts. They are techniques for interpreting statutes narrowly. Narrow interpretation curtails the scope of legislation. That is very un-Thayerian.

The second disciple of Thayer, and the most restrained of well-known current judges, is J. Harvie Wilkinson III⁶⁰ of the Fourth Circuit, who is notable

57. J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981).

58. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73-74 (1980).

59. Wallace, *supra* note 57, at 9.

60. Rated the most restrained of the 142 current federal court of appeals judges for which the author had sufficient data to warrant a confident conclusion, in Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 51-54

for opposing not only *Roe v. Wade*, abhorred by conservatives, but also *District of Columbia v. Heller*, abhorred by liberals.⁶¹ His opposition to those decisions, although consistent with Thayerism because neither decision satisfies Thayer's standard for invalidating legislation, is not Thayerian in spirit. He does not adopt Thayer's formula. And apart from his emphasis on the deleterious effect on state experimentation of the *Roe* and *Heller* decisions (assuming, as he correctly did, that the Supreme Court would extend its ruling in *Heller* to the states),⁶² his criticisms, like Judge Wallace's, are based on a preference for democratic decision making over judicial,⁶³ which is not the same thing as Thayer's belief that aggressive judicial review of legislation infantilizes legislators. Wilkinson doesn't appear to think that judicial self-restraint would make legislators responsible deliberators on constitutional questions.

B. The Rise of Constitutional Theory

The evanescence of type (3) restraint, both generally and in its Thayerian form, is related to the rise of constitutional theory of a kind remote from Thayer's theory—a rise stimulated to a significant degree by *Roe v. Wade* and, more broadly, by the conservative backlash against the Warren Court and the follow-on rulings of the Burger Court, such as *Roe* itself. Modern constitutional theories—whether Bork's 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, or the moral reading of the Constitution, or libertarianism, or the Constitution in exile, or anything else (including minimalism, despite surface affinities to Thayerism)—are designed to tell judges, particularly Supreme Court Justices, how to decide cases correctly rather than merely sensibly or prudently.

The pretensions of constitutional theory are summarized in Ronald Dworkin's insistence that even the most difficult—the most indeterminate—

(2011). Yung's concept of activism, however, goes much further than just rejection of restraint in invalidating statutes; his measure of a judge's activism is the ratio of reversals based on a plenary standard of appellate review to reversals based on a deferential standard. *Id.* The idea is that the former type of reversal suggests a lack of deference.

61. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

62. See *id.* at 307–09, 318–20.

63. As when he says, rejecting constitutional theory, that convinced that they possess pre-articulated frameworks that dictate unassailable results, theory-driven judges and scholars have forgotten that wisdom lies simply in knowing the limits of one's knowledge, that good sense is more often displayed in collective and diverse settings than in a rarefied appellate atmosphere, and that the language, structure, and history of law serve best as mediums of restraint rather than excuses for intrusion.

J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 107 (2012) (published in the book series INALIENABLE RIGHTS, edited by Geoffrey R. Stone).

seeming—legal questions have “right answers.”⁶⁴ He acknowledges that the right answer may not always be ascertainable with sufficient confidence to still doubts. But judges, if not told what to do when they can’t find the right answer to a question that a case presents to them, will be reluctant to acknowledge an inability to find it. Judge Easterbrook, though no Dworkinian, has said that “the power to countermand the decisions of other governmental actors and punish those who disagree *depends* on a theory of meaning that supposes the possibility of right answers.”⁶⁵ Easterbrook thinks the correct theory is textualism.⁶⁶ It was textualism’s cousin, originalism, that emboldened Justice Scalia and his colleagues to render the notably activist decision in *District of Columbia v. Heller*.⁶⁷

If there is a demonstrably right answer to even the most difficult constitutional question, it is natural to think it’s the answer the judge *must* give, that any other answer would be lawless. As I said at the outset, the stronger one’s belief in type (1) judicial restraint (judges apply, they do not make, law), the less one can embrace type (3) restraint, which, as in Thayer’s formulation, directs judges to uphold a law even if they think it unconstitutional, provided they’re not certain that it is, or at least almost certain. Modern constitutional theory gives the theorists the required certitude, emboldening them to ignore Holmes’s dictum that certitude is not the test of certainty. So “Scalia and Thomas insist that the apparent tension between their sharp demands for restraint in some areas and their sweeping exercise of activism in others is resolved by the written Constitution itself.”⁶⁸ Their motto should be: the Constitution made me do it. They make prudence seem a cop-out; one is put in mind of William Blake’s definition of prudence: “a rich ugly old maid courted by Incapacity.”⁶⁹

As Judge Wilkinson puts it, modern constitutional theories “have given rise to nothing less than competing schools of liberal and conservative judicial activism, schools which have little in common other than a desire to seek theoretical cover for prescribed and often partisan results,” and which have “done real damage . . . to the ideals of restraint that the greatest judges in our

64. RONALD DWORKIN, A MATTER OF PRINCIPLE 119 (1985) (Chapter Five: *Is There Really No Right Answer in Hard Cases?*).

65. Frank H. Easterbrook, *Authority and Abstraction*, 59 U. CHI. L. REV. 349, 380 (1992) (emphasis added).

66. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1126 (1998).

67. 554 U.S. 570 (2008). For explicit rejection of Thayerism by a leading conservative constitutional theorist, see Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 NW. U. L. REV. 269, 275–77 (1993).

68. Thomas M. Keck, *Activism and Restraint on the Rehnquist Court: Timing, Sequence and Conjecture in Constitutional Development*, 35 POLICY 121, 139 (2002).

69. WILLIAM BLAKE, THE MARRIAGE OF HEAVEN AND HELL 31 (Dover Publications, Inc. 1994) (1794).

country once embraced.”⁷⁰ The first part of this quotation is right on; but which great American judges practiced judicial restraint consistently?

Not that modern constitutional theorizing is *inherently* incompatible with type (3) restraint. Originalists, textualists, living-Constitution buffs, etc., might acknowledge a class of constitutional questions to which their theories gave no clear answer. Maybe, for example, the original meaning of some constitutional provision just couldn't be determined with any confidence; that would be a case in which originalist Justices would need a tiebreaker, and they might decide that ties should go to the legislature. But Justices are reluctant to acknowledge the limited reach of their constitutional theories. And deferring to legislatures merely in cases of uncertainty is not Thayerism. Thayer wanted judges to place a thumb on the scale, so that even if they were originalists and thought that the original meaning of some constitutional provision pointed to invalidating a statute, the statute would have to be upheld unless no reasonable person could doubt its invalidity.

No originalist, or any other judge committed to a constitutional theory (other than, of course, Thayer's theory, or some variant of it), would be likely to embrace such a position. No such judge would say “I think the original meaning of the Second Amendment is that people have a right to own guns for self-defense, and the challenged statute or ordinance doesn't permit that, but reasonable persons might disagree with my reading of history, so I'll vote to uphold the enactment.” That approach would have resulted in upholding the District of Columbia gun ordinance invalidated in the *Heller* decision, because the dissenting Justices' interpretation of the amendment's original meaning, whether correct or not, was at least reasonable. There are no Thayerian originalists on the Supreme Court—no Thayerians on the Court, period.

This is not to say that Supreme Court Justices are unconstrained by precedent and clear statutory text and the other orthodox materials of judicial decision making; lower-court judges pay even greater heed to these things. But there is nothing Thayerian about deference; it's thumb-on-the-scale deference to legislative judgments that is the hallmark of Thayerism.

What is a little more Thayerian is the principle that findings of fact by a trial judge may (with certain exceptions) be rejected by the appellate court only if they are determined to be *clearly* erroneous. In practice this usually means that a finding of fact will be upheld unless the appellate judges have a strong conviction that it's erroneous, and that approach is similar (probably identical, despite the terminological difference) to applying Thayer's test of reasonableness. But deferential review of findings of fact rests on technical grounds and has limited consequences. The trier of fact is assumed to have a comparative advantage in fact-finding over the appellate court, if only because the trier of fact (judge or jury) spends more time on the case. And because the

70. WILKINSON, *supra* note 63, at 1.

principal function of an appellate court is to maintain doctrinal coherence, it doesn't matter terribly to appellate judges how accurate the factual determinations are in particular cases. But it does matter terribly whether a statute is upheld or invalidated, and a legislature does not have a comparative advantage over a court in resolving constitutional issues. So deferential review of trial court decisions does not extend to decisions on pure issues of law,⁷¹ including decisions on the scope and meaning of a constitutional provision.

What deference to trial-court fact-findings has in common with Thayer's theory is that both can be defended as encouraging responsible behavior by the first-line decision makers, whether legislatures or courts. They can't slack off in the belief that any mistake they make will be corrected upstairs—that their decisions are just dress rehearsals.

V.

PRINCIPLES OF LEGAL PRAGMATISM

The precondition to a judge's embrace of Thayer's standard, it should be clear by now, is to have no theory of how to decide whether a statute or an executive action violates the Constitution. Thayer's "conception of judicial self-restraint has nothing to do with the virtue of fidelity to law. Indeed, since Thayerism requires judges to defer to legislative judgments of constitutionality that they in fact disbelieve, a strict policy of fidelity to law actually seems inconsistent with Thayerism."⁷² Today, with constitutional debate awash with theory, judges may feel a certain nakedness in having none. And if to clothe their nakedness they adopt a theory yet fail to apply it, they'll feel that they're being lawless, and they won't be able to take refuge in the analogy to reviewing a trial judge's fact-findings for clear error.

I don't think that any of the Thayerians had any idea how legal analysis would yield an answer to a question arising under one of the many vague or archaic provisions of the Constitution. Larry Kramer puts it well, albeit with reference to an earlier era: "Everyone essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshaling (as applicable, and in a relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion."⁷³ In contrast to so loosey-goosey an approach, strict construction of the Constitution is an example of a decision theory that generally tends to limit the invalidation of statutes. But the Thayerians were loose

71. *Chevron* is an exception, unless one buys into the fiction that *Chevron* deference is bestowed on administrative interpretations of statutory language when Congress has delegated the interpretive function to the agency, so that the agency's interpretation is the equivalent of a statute. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

72. Luban, *supra* note 16, at 459.

73. Kramer, *supra* note 6, at 624.

constructionists,⁷⁴ including Thayer himself.⁷⁵ And loose construction, when applied to a provision of the Constitution, is not a theory, but rather a license to read into the provision a judge's views of sound policy responsive to modern problems. It is when judges have such a license that there is pressure for a doctrine of judicial self-restraint.

Thayerians see loose construction of the Constitution as not only more natural than strict construction but also as enlarging rather than diminishing legislative power, since the inherent limitations of legislators' foresight make strict construction a form of "gotcha" jurisprudence. It is different when one is speaking of loose construction of statutes. That generally means being guided by the apparent purpose of the statute rather than by its literal language, when the two sources of meaning clash. But the antiquity and vagueness of the most frequently litigated constitutional provisions make "purposive" interpretation of them a fiction. There is no objective method for matching up what the framers were driving at with modern problems of which they could have had no inkling.

But can judges decide a case without a theory of how to decide it correctly? They can—in fact they must, because when faced with a case that is indeterminate from the standpoint of conventional legal reasoning they cannot throw up their hands and say, "I can't decide this case because I don't know what the right answer to the question presented by it is." They have to decide it, using whatever tools are at hand.

Judges who don't insist that a legalistic algorithm will decide every case are what I call "pragmatists," not in some pretentious philosophical sense but in the sense of an approach to decision making that emphasizes consequences over doctrine. Stated otherwise, pragmatists fit doctrine around consequences. Thayer, Holmes, Brandeis, and Bickel were pragmatists. (I don't know how to

74. See, e.g., Thayer, *supra* note 15, ch. 4; Oliver Wendell Holmes, *Some Remarks on John Marshall*, in THAYER, HOLMES & FRANKFURTER, ON JOHN MARSHALL, *supra* note 15, at 129, 131 (remarking that the appointment of Marshall as Chief Justice "gave it to a Federalist and loose constructionist to start the working of the Constitution"); Felix Frankfurter, *John Marshall and the Judicial Function*, in THAYER, HOLMES & FRANKFURTER, ON JOHN MARSHALL, *supra* note 15, at 135, 145 (remarking the "decisive influence" on Marshall's work on the Supreme Court of his "experience at Valley Forge").

75. See THAYER, *supra* note 5, at 138; BICKEL, *supra* note 44, at 36, 43–44. Here, by the way, is Bickel's stab at a theory of constitutional decision making:

The function of the Justices—and there is no question but what this accords with the great authoritative body of opinion on the subject—is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition.

BICKEL, *supra* note 44, at 236. The phrase "fundamental presuppositions" is from a similarly ethereal passage by Frankfurter. See *Sweezy v. New Hampshire*, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring). The number of Justices and judges who would have passed Hand's high-culture immersion test was small when he wrote; in today's busy, philistine culture it is minuscule.

characterize Frankfurter.) Though nowadays judicial pragmatism is derided in the legal academy as lacking theoretical rigor, many of the judges and Justices who are most admired by the legal profession and the judiciary were pragmatists—including John Marshall, Holmes, Brandeis, Cardozo, Robert Jackson, Learned Hand, Roger Traynor,⁷⁶ and Henry Friendly.⁷⁷ Ben Field has a nice summary of Traynor's method:

Traynor's landmark decisions diverged from legal convention not only in their results, but in their method. Unlike earlier judicial activists who couched their innovations in conventional language, Traynor announced explicitly that he was making public policy. His innovative decisions relied little on precedent. They consisted mainly of policy analysis, and they often drew criticism in the dissents of other [California] Supreme Court justices for that reason. Traynor's innovative opinions often referred to untraditional sources, such as academic writings and policy-oriented studies. He believed that modern times demanded judicial creativity and that modern advances in the social sciences would assist the judge in this task.⁷⁸

I need to say more about pragmatism to make the claim in the preceding paragraphs even remotely plausible to an audience of lawyers and law professors (judges will catch on faster, but may be reluctant to acknowledge such heresy). I offer the following eight principles of legal pragmatism:⁷⁹

1. The duty to decide is the judge's primary duty. The judge can't refuse to decide a case just because there is no guidance in an authoritative text, such as a legislative or constitutional provision or a binding judicial precedent.
2. Law is not limited to the body of orthodox legal materials, and so the judicial function cannot be limited to deciding cases in accordance with those materials. This follows from the first point.
3. In cases in which the orthodox materials do not yield an answer to the legal question presented, or in which the answer they yield is unsatisfactory, the judge's role is legislative: to create new law that decides this case and governs similar future ones.
4. No master theories are available to guide judges in performing their lawmaking role in a constitutional case, for there are no logical or empirical methods of choosing one constitutional theory (originalism, textualism, "living Constitution," etc. *ad nauseam*) over another. In default of cogent theory, judges performing their

76. See BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* (2003).

77. See DANIEL L. BREEN, *HENRY J. FRIENDLY AND THE PRAGMATIC TRADITION IN AMERICAN LAW: A DISSERTATION* (2002).

78. FIELD, *supra* note 76, at 121.

79. There is a fuller exposition in my book *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 50, at 59–85.

legislative role should be guided primarily by their prediction of the consequences of deciding the particular case one way or another—consequences for the parties to the case, for persons similarly situated, and for the system as a whole. The pragmatist does not agree with Justice Scalia that indifference to hundreds of deaths that might result from embracing a broad interpretation of the Second Amendment is the sign of a good judge, or with Breyer that it's the sign of a bad one. For pragmatists, if deaths are a consequence of deciding a case one way rather than another, that's something for the judge to consider; what weight to give it will inevitably depend on considerations influenced by the judge's temperament, experience, ideology, and other factors remote from orthodox legal materials.

5. The pragmatist must bear in mind not only the consequences of a decision for the parties, but also its effects on such systemic values as continuity, predictability, and stability of legal rules and decisions. Concern with systemic consequences—consequences for the practical operation of the legal system, such as effect on caseload—requires emphasis because of Ronald Dworkin's canard that legal pragmatists care only for what is the best outcome in the particular case and not for the effect on the broader legal system, and thus that pragmatism generates inconsistent doctrine.⁸⁰ A sensible pragmatist is alert to the effect on legislators' thought processes if judges ignore clearly written statutes without having a compelling reason to do so (for then legislators won't know what they're legislating—they'll merely be producing putty for the judges to shape), and on lawyers and litigants if judges ignore statutory text and judicial precedent without compelling reasons, thus making law inscrutable. Short-sighted justice is not pragmatic; it has bad overall consequences.
6. And if the consequences of deciding a case one way or another are unknowable, at least by the methods of litigation, as often they will be? The decisions that have made American law what it is—decisions interpreting statutes and constitutions, and decisions creating and modifying common law doctrines—were, most of them anyway, made under conditions of radical uncertainty; they were stabs in the dark. Judges need rules for dealing with uncertainty (burden of proof is the obvious example of such a rule). Thayer's rule of reasonableness remains an attractive candidate to be this second-order rule in uncertain constitutional cases, though as I noted earlier its use as a mere tiebreaker was not what he had in mind.
7. The judge is to treat the parties to the case as *representative* parties, that is, she is to ignore their relative social standing, personal

80. RONALD DWORKIN, *LAW'S EMPIRE* 148–52 (1986).

merits, and political influence. This is the core notion of the "rule of law"—what Aristotle called "corrective justice."⁸¹ It clears the ground for focusing on consequences, since the consequences of a decision will be felt by persons similarly situated to the parties (and often by others as well) rather than just by the parties.

8. A judicial opinion should state the true grounds of the judge's decision. This duty of candor is necessary for informed criticism of judges. It is also a corollary of principles four and five, as it is designed to prevent judges from basing their decisions on consequences that society does not accept as legitimate grounds for judicial decisions. For a rare exception to the duty of candor, see the discussion of *Brown v. Board of Education* below.

The first sentence of the fourth principle—no master theories are available to guide judges in performing their lawmaking role in a constitutional case—is the key from a Thayerian standpoint; it creates the room for his formula to operate. It does this because pragmatism, as I have explained it, rather than being a theory of judicial decision making or constitutional interpretation that might yield definitive answers in novel cases, embraces and responds to law's frequent indeterminacy, becoming the default position of judges who do not have a theory of how to decide cases. Pragmatic adjudication is what judges in our system do when the orthodox legal materials do not provide a secure bridge to decision and the judge lacks an overarching theory to plug the gap. Many of the most highly regarded judges and Justices in American legal history have, as I said, been pragmatists.⁸²

Lacking a theoretical machinery for generating "right answers" to constitutional questions (Holmes especially was derisive about the possibility of certainty in legal decision making), Thayerians both needed a doctrine that would cabin judicial discretion and were unembarrassed to vote to uphold a statute they thought unconstitutional; their thoughts would always be tentative for want of an intellectually rigorous method of answering constitutional questions. Learned Hand, another pragmatist, thought most of the provisions in the Bill of Rights nonjusticiable because of their vagueness.⁸³ We might call him a hyper-Thayerian, because the original Thayerians, unlike Hand (and such present-day academics as Mark Tushnet, Jeremy Waldron, and Adrian Vermeule⁸⁴), regarded the Bill of Rights as justiciable.⁸⁵ They thought it and

81. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 4 (Davis Ross trans., rev. ed. 1980); see also Richard A. Posner, *Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 189-91 (1981).

82. See *supra* note 78. This point is overlooked in Judge Wilkinson's article, *supra* note 61. He regards legal pragmatism as an activist theory, while describing famous pragmatists like Holmes as apostles of restraint.

83. See LEARNED HAND, *THE BILL OF RIGHTS* (1958).

84. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154-76 (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* 212 (1999) ("[T]here is no necessary inference from a right-based position in moral or political philosophy to a commitment to a Bill of

the Due Process and Equal Protection Clauses so nebulous, and so many of the precedents that these clauses—and indeed the Constitution as a whole—had accreted over the years so antiquated, political, and out of step with current needs and beliefs, that judges couldn't apply the Constitution legalistically. But they could still apply it—they had to—even if “it” was not the collection of texts that had been ratified in 1787, 1789, 1868, and other years, but rather the protean creation of judges, reflected in case reports. It was easier for Thayer to say that a law should not be invalidated unless no reasonable person could think it constitutional than to show that “liberty of contract” was an unsound gloss on the word “liberty” in the Due Process Clauses of the Fifth and Fourteenth Amendments.

Holmes was famously skeptical about legal reasoning outside the common law, especially legal reasoning in constitutional cases, where the orthodox materials of decision quickly run out and judges' ideologies and emotions are deeply engaged and often decisive in shaping their votes. Holmes had no more means than Thayer of demonstrating a legal error in a constitutional decision. The discussion of constitutional methodology in his opinions is remarkably casual compared to current Supreme Court opinions, which fairly pant with erudition. His opinions are almost barren of references to constitutional text, the framers' understanding of it, or overarching principles of interpretation. The dissent in *Lochner* consists of Thayer's standard of reasonableness (asserted, not defended) plus brief invocations of a handful of cases in which the Supreme Court had—in conflict with *Lochner* itself, it seemed—limited the scope of substantive due process. Holmes cited these cases to refute any claim that “a rational and fair man would admit that [the maximum-hours statute at issue in *Lochner*] would infringe fundamental principles as they have been understood by the traditions of our people and our law.”⁸⁶ He conducted no analysis of the statute's actual or probable effects (“It does not need research to show . . .”),⁸⁷ though one might think them highly relevant to its reasonableness.

Holmes's activist dissent in *Abrams*⁸⁸ combined the pragmatic epistemology of Charles Sanders Peirce (a friend) and Darwinism (a pervasive influence on Holmes, who reached adulthood in the same year that *The Origin*

Rights as a political institution along with an American-style practice of judicial review.”). Professor Vermeule, like Learned Hand, thinks that Thayer's approach “in effect makes most of the vague, ambiguous, and aspirational pronouncements of the Bill of Rights nonjusticiable; it restricts courts to enforcing, for the most part, the more specific structural and coordinating provisions of Articles I–VII of the Constitution,” that is, the Constitution of 1787, before the Bill of Rights was added to it. VERMEULE, *supra* note 11, at 233. The thin ice in this passage is “in effect”: I don't see the evidence that Thayer would have gone that far, and none of the Thayerians would have.

85. In the case of Thayer, it would be more accurate to say that I'm not aware of any evidence that he did not. The Bill of Rights was not much litigated in his day, and I am not aware of his views on its provisions, or those of the Fourteenth Amendment.

86. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

87. *Id.*

88. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

of *Species* was published): "truth" is the body of ideas that has thus far survived the competitive struggle in the intellectual marketplace. ("Thus far" is important; in Peirce's epistemology there are no absolute or, in all likelihood, permanent truths.) Holmes's activist dissent in *Olmstead* rested on a baldly stated claim that the government's collecting evidence of criminal guilt illegally is worse from a moral (and maybe an aesthetic) standpoint than excluding the evidence that lets the criminal escape the law's clutches.⁸⁹ There is very little conventional legal reasoning in these opinions (none in the *Olmstead* dissent), or (I believe) in Holmes's other constitutional opinions.

Not in Holmes, nor in Thayer, Brandeis, Frankfurter, or Bickel, can one find a theory of how to decide whether a statute is unconstitutional. Holmes, in private correspondence, described his approach to constitutional decision making as based on an unwillingness to invalidate a statute unless it made him want to puke.⁹⁰ He didn't repeat the formula in an opinion or article, but it's as good a description as any of his approach. It's also evidence that he was not an orthodox Thayerian, despite his appropriation of Thayer's reasonableness test in opinions such as *Lochner*, and his generous (albeit private) acknowledgment of Thayer's influence. As I have said elsewhere, "Thayer's is a one-way approach, Holmes's a two-way. Thayer's approach limits—it never expands—judicial review. Holmes's approach allows judges to stretch the constitutional text when necessary to avoid extreme injustice. Holmes's Constitution has no gaps—it is noteworthy how rarely his constitutional opinions quote the constitutional text."⁹¹ Thus:

a[n orthodox] Thayerian would disapprove of [*Griswold v. Connecticut*] because the [Connecticut birth control statute] was not unconstitutional beyond a reasonable doubt; indeed, it is difficult to find a provision of the Constitution on which to hang one's hat in a case about contraception. A Holmesian might find the statute so appalling (not only because of its theocratic cast, but also because its only practical effect was, by preventing birth control clinics from

89. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

Olmstead v. United States, 277 U.S. 438, 470 (1928).

90. 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 888 (Mark De Wolfe Howe ed., 1953).

91. POSNER, *supra* note 11, at 288.

operating,^{92]} to deny poor married couples access to contraceptive devices other than condoms) that he would vote to invalidate it despite the difficulty of grounding his vote in the constitutional text.⁹³

Brandeis liked to pile up facts to show that a challenged statute passed Thayer's test of reasonableness. But this is to say that, for Brandeis, constitutional law devolved into policy analysis. The idea that he shared with Holmes of the states as laboratories in which to conduct policy experiments was sensible, but was weakened by the fact that a federal statute might end experimentation yet restraint require that the Justices defer to it.

Frankfurter's opinions are long and learned, but the best illustration of his judicial approach is his assertion that police must not use a stomach pump to obtain evidence of crime because that is "conduct that shocks the conscience"⁹⁴ and thus violates

the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'⁹⁵

Apparently despairing of finding a guide to deciding constitutional questions other than "a sense of justice," Frankfurter hoped that punctilious observance of procedural formalities, coupled with unlimited deliberation, would somehow generate sound decisions.⁹⁶ That is wrong. Procedural nitpicking can reduce the occasions on which the Supreme Court considers itself free to decide the constitutionality of a statute, but it cannot give content to empty phrases, such as "a sense of justice," offered as constitutional doctrine. And judicial deliberation is overrated as a means of bringing about agreement on issues that divide judges deeply, as constitutional issues so often do.⁹⁷

For the most part, type (3) restraint let judges—even Holmes, the least politically engaged, professors such as Bickel, and professor-judge Frankfurter—adjust law to their extralegal beliefs and their emotions (such as Frankfurter's super-patriotism) with scant reference to the constitutional text. The only real Thayerian was Thayer—unless, like Holmes, he was primarily

92. RICHARD A. POSNER, *SEX AND REASON* 205 (1992); Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 24–26 (2007).

93. POSNER, *supra* note 11, at 288–89.

94. *Rochin v. California*, 342 U.S. 165, 172 (1952).

95. *Id.* at 173.

96. See also Henry M. Hart, Jr., *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

97. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* ch. 7 (forthcoming); POSNER, *supra* note 11, at 302 (while collective deliberation may help in "enabling conclusions to be derived from common premises," in the context of constitutional disputes "the disputants are not arguing from common premises"); *id.* at 382 (index references to "Deliberation").

reacting to the hyper-aggressive jurisprudence exemplified by Justice Brewer's contemporaneous ode to the salvific role of the Supreme Court.⁹⁸

VI.

EXPLAINING THE DEATH OF THAYERISM

I have tried to explain the vulnerability of Thayerian theory (it might better be called a rhetoric than a theory), but I have not explained its death. It died on two fronts: in the academy (except for the handful of hyper-Thayerians), and in the courts. Its academic death is attributable in part to its incoherence, but more to the rise of the constitutional theories that I mentioned earlier, which claim to show how "correct" constitutional decisions can be generated confidently. They highlight the weakest part of Thayer's theory: that it tells judges to uphold statutes that they consider unconstitutional. If they *knew* a statute was unconstitutional they'd have to strike it down even in Thayer's account; and the modern theorists have proved (though only to their own satisfaction) that they can tell judges which outcomes in constitutional cases are correct and which incorrect. The rise in academics' confidence that they have the keys to unlocking the Constitution's secrets is related to the vastly increased number of professors specializing in constitutional law (because the reach of that law expanded significantly during the 1960s and has continued to expand) and to the rising intellectual ambition of legal academics as they draw further and further apart from legal practice.⁹⁹

Thayerism's judicial demise preceded and was independent of, though it contributed to, its academic demise. Its judicial demise is attributable to the exuberant activism of the Warren Court, which in the 1950s and 1960s powered a major, left-leaning expansion of constitutional law. Its best-known decision, *Brown v. Board of Education*, quickly became an icon despite the opinion's analytical weaknesses. One is still permitted to criticize the opinion, but if you doubt publicly that the case was *decided* correctly you'll be hurled into the outer darkness. The doctrine of "incorporation," pushed very hard by the liberal Justices (led in this domain by Justice Black), was the antithesis of judicial self-restraint because it imposed uniform rules on the states and could not be thought compelled by the Constitution. It not only preempted state legislative decisions but ended experimentation by the states in the preempted areas.

Professor Vermeule argues that *Brown v. Board of Education* flunks Thayer's test and was therefore wrongly decided.¹⁰⁰ If Vermeule is right, he's driven the last nail into Thayer's coffin. In evaluating his argument we need to

98. See Brewer, *supra* note 29.

99. See Richard A. Posner, *The Judiciary and the Academy: A Fraught Relationship*, 29 U. QUEENSLAND L.J. 13 (2010).

100. VERMEULE, *supra* note 11, at 280. This is also Gabin's view. See GABIN, *supra* note 5, at 86.

distinguish between a decision (or doctrine) and the reasons given in a judicial opinion to justify it. The opinion in *Brown* is weak because the Court was unwilling, for compelling political reasons,¹⁰¹ to be frank about racial segregation of public schools: that it was part of a system of apartheid and was meant, like separate public drinking fountains and swimming pools for whites and blacks and laws against miscegenation, to brand blacks as racial inferiors of whites. Whether a “reasonable” dissent could have been written to a majority opinion that stated the Justices’ views candidly may be doubted (a dissent that said: this is a loathsome system but fifty-seven years ago we said that racial segregation in trains is okay and that gave Jim Crow a green light and the South built its social system in reliance on our ruling and so we must not disturb it), but also reminds us that the line between incorrect and unreasonable, like the line between erroneous and clearly erroneous, is indistinct.

The conservative successors to the liberal Justices of the Warren Court were not about to embrace the ratchet theory of judicial restraint (urged, naturally, by liberals) that I mentioned earlier: unrestrained liberals expand constitutional rights; restrained conservatives preserve those rights by complying scrupulously with precedent in order to limit their own judicial discretion. One can imagine judicial self-restraint as an equilibrium (a stable point, from which a departure will occur only if there is an external shock), and judicial activism as another equilibrium; but it’s hard to imagine alternation, in which periods of activism and periods of restraint succeed one another, as an equilibrium.¹⁰² Alternation would require a degree of self-abnegation that could not realistically be expected of Supreme Court Justices. It’s no fun to be the conservator of a constitutional tradition one abhors, especially when the overruling of activist decisions can be defended as restoring a true judicial restraint,¹⁰³ rather than a misnamed restraint that gives controlling weight to activist precedents. Increasingly after President Ronald Reagan’s appointments to the Supreme Court, conservative Justices rolled back many of the initiatives of the Warren Court, and having done so—and with the bit thus between their teeth—kept moving rightward (with a boost from appointments by the two Presidents Bush), as in the recent gun ownership¹⁰⁴ and campaign finance¹⁰⁵ decisions. What one can expect, however, as shown in Lee Epstein and William Landes’s Essay, is a transition period between successive waves of activism. The optimal strategy for a new majority may be an initial period of restraint,

101. Dennis J. Hutchinson, *Perspective on Brown*, 8 GREEN BAG 2D 43, 46 (2004) (“[T]he justices who decided *Brown* . . . were anything but unselfconscious politically. Every feature of the opinion in *Brown* . . . was calculated to win popular support . . .”).

102. Professor Huq’s Essay provides historical evidence for this conjecture. Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012).

103. As argued in Wallace, *supra* note 57, at 15. On *Heller* as “payback” for *Roe v. Wade*, see Wilkinson, *supra* note 61, at 274.

104. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

105. *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876 (2010).

intended to bolster claims that the old majority was recklessly activist, followed by a period of activism intended to erase and then replace the activist jurisprudence of the old majority.

One might have expected that the rightward turn, which began in the 1980s and has accelerated since the appointment to the Court of John Roberts and Samuel Alito, would give rise to a robust liberal revival of the doctrine of judicial self-restraint—as in the era of conservative judicial activism that lasted from Thayer's day to its abrupt end in 1937 when the Supreme Court, frightened by President Franklin D. Roosevelt, threw in the towel. But there has been no such revival, because that would imply a repudiation of the doctrine of incorporation and the Supreme Court's landmark Warren-era decisions. In liberal quarters the search was on for a theory of judicial review that would legitimate those decisions while delegitimizing the growing conservative activism of the modern Court. The search has failed. The liberal academic theories of constitutional decision making, widely derided as mush, have little appeal even to liberal Justices, who have been unable to project a coherent vision of a liberal constitutional jurisprudence, while the right has gotten away with garbing its activism in legalistic rhetoric. Judicial self-restraint has ceased to be a contender.

Although, as Aziz Huq shows in his Essay,¹⁰⁶ the history of Supreme Court activism stretches back at least as far as the post-Civil War period, the activism of the Warren Court was unique in several ways. It spread across numerous fields of law, touching areas of immense political sensitivity (such as obscenity, contraception, interracial marriage, states' rights, the rights of criminal suspects and defendants, reapportionment, and prisoner rights). It was concentrated in a brief period—1962 to 1969—though several important activist decisions, such as *Brown v. Board of Education*, came earlier. And it coincided with and because of its left-wing character became identified with the left-wing turmoil and soaring crime rates of the 1960s. It was bound to provoke a backlash when the political winds shifted.

The increase in the quality and quantity of the Supreme Court's staff (mainly law clerks) in recent decades, combined with the appointment to the Court mainly of former judges, and the steep reduction in the number of cases that the Court hears, has enabled the modern Court to produce opinions that have a glossier patina of legal scholarship than the opinions of their predecessors. This trend has played into the hands of conservative activists. Think of the broad reading of the Second Amendment in the *Heller* case. Could Justice John Paul Stevens's dissent have gotten away with saying, in a paraphrase of Holmes, that "a reasonable man might think [the District of Columbia's strict gun-control law] a proper measure on the score of [public

106. Huq, *supra* note 102, at 586–87.

safety]”?¹⁰⁷ He could not have, and instead felt it necessary to duel with the majority over the opacities of eighteenth-century history, though the paraphrase would be true and the Second Amendment is no clearer than the Due Process Clause, on which the majority relied in *Lochner*. But the Court’s current majority has a “theory” of how to decide difficult constitutional cases and the majority in *Lochner* did not. The liberal minority does not have such a theory, as is shown by Justice Stevens deciding to play on his opponents’ turf in *Heller*. By delving into the eighteenth-century historical materials he implicitly conceded the legitimacy of the conservative Justices’ “originalist” approach. He threw in the theoretical towel. He may well have the better of the historical case, but who will notice? It is only by challenging originalism that one clears the deck for Thayerism, as Judge Wilkinson did (without, however, embracing Thayer’s premises) by challenging originalism in his criticism of the *Heller* decision (and more fully in his forthcoming book), a decision that is a conservative rejection of Thayer.

The majority opinion in *Lochner* is easily forgettable yet well worth rereading in this connection. I quote a typical paragraph:

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employé (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.¹⁰⁸

This is naked policy analysis; nothing in the Constitution, or in precedents that commanded respect, suggests that states can’t be allowed to place a ceiling on hours worked unless justified by a concern with workers’ health. The opinion, which I am tempted to quote in full, is so shallow that Holmes’s one-page dissent says everything that needs to be said to unmask any pretense that the majority was engaged in something that might be called legal analysis. But if five Richard Epsteins were Supreme Court Justices they would produce a majority opinion in *Lochner* that embodied a formidable theory of constitutional interpretation, and a Thayerian response would fall flat. There’s a saying (which happens to be wrong, but let that pass) that you can’t beat a theory without a competing theory. Since the majority opinion in *Lochner* was

107. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

108. *Id.* at 64 (majority opinion).

theory-free, Holmes had no need (and also no taste) to adumbrate a competing theory.

Advocates of type (3) restraint could not marshal effective resistance in *Heller* or *Citizens United* because it has no advocates on the Supreme Court anymore. For, as we have seen, it was never quite "for real." It was for the most part a mask for outcomes reached on other grounds. Adherence to it was opportunistic. Today the liberals on the Supreme Court are waiting to take their turn to recast the Constitution in their image.

Brown v. Board of Education illustrates the Warren Court's activism, but it illustrates something else as well—the empirical unreality of Thayerism. Think of how a Thayerian (Frankfurter, for example, an enthusiastic supporter of *Brown*) might defend the decision. He could argue that the legislatures that had enacted public school segregation and other racist legislation in the southern and border states could not be considered authentic popular bodies because the large black populations in those states had been effectively disfranchised. A similar argument could be made, in defense of *Baker v. Carr*, about malapportioned legislatures: malapportionment entrenches electoral minorities. But once one begins questioning Thayer's sunny view of legislatures, there is no stopping point. The U.S. Senate is malapportioned. The American political process at all levels is corrupted by money, interest groups, public ignorance and apathy, and inherent limitations of representative democracy, in which the people vote for persons rather than for policies. Holmes was a realist in the tradition of Thrasymachus, who famously declared that "everywhere justice is the same thing, the advantage of the stronger."¹⁰⁹ In a democracy, as in any other form of government, might ultimately prevails, although the identity of the mighty differs in a democracy. In America today the mighty are not oligarchs, aristocrats, or securities; they are the old people, the ubiquitous "seniors" with their subsidized public pensions and health care and propensity for single-issue voting. Judges, Holmes argued, had best get out of the juggernaut's path, though on occasion a piece of legislation might be so revolting that they must take a stand. Holmes's view of the legislative process is overdramatized, but comes closer to the truth than Thayer's view of legislators as constitutional deliberators who if only left alone by judges would legislate as statesmen. Frankfurter had, like Thayer, an exaggerated view of legislators' ability and high-mindedness; Bickel thought them at least educable by Justices who shared his values.

109. PLATO, THE REPUBLIC OF PLATO 16 (Allan Bloom trans., 1991) (bk. 1, 1.339a of the Greek text).

VII.

JUDICIAL RESTRAINT ANALYZED EMPIRICALLY

Despite having pronounced the doom of Thayerism, I don't doubt that votes of Justices can be ranked along a spectrum that runs from activist to restrained, since Thayerism is only one version of type (3) judicial restraint. Professors Stefanie Lindquist and Frank Cross have done such a ranking.¹¹⁰ They identify five axes of activism and restraint: (1) judicial review of the constitutionality of federal statutes; (2) judicial review of state statutes; (3) judicial review of decisions by federal executive branch officials and federal agencies, including the so-called "independent" agencies such as the Federal Trade Commission and the National Labor Relations Board; (4) judicial attitudes toward doctrines of justiciability (the doctrines that limit access to the courts and therefore the occasions on which a statute might be invalidated); and (5) the propensity of Supreme Court Justices to overrule Supreme Court precedents. Together the five axes can be combined into one (as Lindquist and Cross eventually do), which might be called the axis of boldness versus timidity.

The authors count the votes of all the Justices in the 1953 through 2004 terms, which is to say from the beginning of Warren's chief justiceship to the end of Rehnquist's, though omitting Justices who served only briefly during the period covered by the study. With those omissions the study covers twenty-two Justices. The first four categories measure constitutional restraint, though with the important qualification that upholding a federal statute can invalidate, by preempting, state statutes and thus confusingly be at once restrained and activist.

The overlaps in classification of Justices in each category¹¹¹ enable one to identify Rehnquist, Frankfurter, Burger, and Scalia as the most restrained Justices in the half century covered by the study and Douglas, Brennan, Black, and Marshall as the most activist. Those four were of course prominent members of the Warren Court, and mark it as highly activist. The Roberts Court, too new to be included in the study, bids fair to exemplify conservative activism.

But how much do these data really tell us about Justices' commitment to Thayerian principles? Those Warren Court activists—why not just call them liberals? As for the champion restraintists, why not just call them conservatives (though this must be qualified in the case of Frankfurter¹¹²) and thus largely

110. LINDQUIST & CROSS, *supra* note 2; cf. Yung, *supra* note 60.

111. See *id.* at 56 fig.6, 77 fig.11, 116 fig.16.

112. He certainly was not uniformly conservative, but he was more conservative than he pretended to be. See Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality?*, 8 MIDWEST J. POL. SCI. 22 (1964).

content with existing federal and state legislation and with the executive actions of conservative presidents?¹¹³

Lindquist and Cross attempt to determine the incidence of ideologically skewed activism—a tendency to vote to invalidate federal or state statutes that are not ideologically congenial to the Justice.¹¹⁴ They call this “ideological activism” and contrast it with “institutional activism,” which means voting to invalidate a statute whether or not the Justice finds it ideologically uncongenial. Warren, Black, Douglas, Brennan, Marshall, and Thomas are the highest scorers on both axes.¹¹⁵ They are quick to vote to invalidate federal and state statutes, but usually only those contrary to their ideological inclinations. Other Justices in Lindquist and Cross’s sample, such as Rehnquist, Clark, Scalia, Ginsburg, and Souter, are not so quick to vote to invalidate a statute, though when they do so it’s almost always one contrary to their presumed ideological inclinations. Yet to the extent that Justices differ in their propensity to vote to invalidate statutes independently of their ideological inclinations, there is *something* to judicial self-restraint as a tendency of some Justices that is more than a mask for ideological voting.

But could any of these be called followers of Thayer? I am doubtful. Even Henry Friendly, the greatest judge of the last half century and accused by no one of being an “activist” in the pejorative sense of that abused term—on the contrary, he was a trenchant critic of the activist excesses of the Warren Court—was not a Thayerian. For consider this passage from one of his notable essays:

A great constitutional decision is not often compelled in the sense that a contrary one would lie beyond the area of rationality. I shall not insist that *Erie* was the rare exception. But it provided a far better fit with the scheme of the Constitution as that had developed over the years than do the assertions that the “necessary and proper” clause empowers Congress to establish substantive law for the federal courts in fields otherwise reserved to the states, or that federal courts themselves may do so—thereby not merely permitting but insuring unequal justice under law.¹¹⁶

The first two sentences in this passage, if spoken by a Thayerian, would compel the conclusion that the Court should have upheld the constitutionality of Congress’s prescribing rules of decision for federal diversity cases. Instead, Friendly goes on to defend the *Erie* decision (written by Brandeis, who based it partly on earlier dissents by Holmes), which held the contrary—in the process wiping out a host of precedents. Another (one is tempted to say the other) great

113. A Republican was President in thirty-one of the fifty-one years between 1953 and 2004.

114. See LINDQUIST & CROSS, *supra* note 2, at 57–64, 78–82.

115. *Id.* at 136 fig.19.

116. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 398 (1964).

federal court of appeals judge, Learned Hand, was an outspoken advocate of judicial restraint; the difference between him and Friendly in this regard may largely be generational, but it is also temperamental because Hand was assailed by doubt to a degree unusual among judges.

Two further limitations of the Lindquist and Cross study, so far as it bears on my subject, are that its measure of “institutional activism” lumps all five of their activist categories into one, though only three of them relate to the concept that I am using. Furthermore, the authors do not indicate whether there is ideological bias in the third category—commitment to the limitations, based on notions of justiciability, on entertaining constitutional challenges. Moreover, another study by Professor Lori Ringhand, though limited to the 1994 through 2004 terms, finds no significant difference across Justices in institutional activism: liberal Justices vote to invalidate conservative statutes (these are mainly state statutes), and conservative Justices to invalidate liberal statutes (these are mainly federal statutes)—and both groups do so avidly.¹¹⁷

CONCLUSION

With all its limitations, and with due regard for the contrary findings in Ringhand’s study, Lindquist and Cross provide some evidence that judicial restraint remains an element, distinct from ideology, in the behavior, if no longer the theoretical commitments, of the Supreme Court. I hope that’s true, even if it’s just a trace element, because there are positive things to be said on behalf of such restraint. Thayerism is dead, but it has left a legacy.

Most of the premises of the Thayerians, though not of Thayer himself, have enduring value: limitations on justiciability; Brandeis’s desire to study the real-world impact of challenged legislation; and the desirability of preserving opportunities for state-level experimentation—well illustrated by the Supreme Court’s decision refusing to invalidate school vouchers for parochial schools¹¹⁸ and notably absent from the majority and dissenting opinions in the Court’s decision nationalizing *Heller*’s interpretation of the Second Amendment.¹¹⁹ Additionally supportive of judicial restraint in an approximately Thayerian sense are the arguments for judicial timidity in constitutional adjudication in general: Justices usually are competent lawyers, but rarely more; judicial decisions can be rich in unintended consequences; the scope of the Constitution is vast and the Justices operate on limited information; because there are no sensible algorithmic methods of deciding difficult cases, most constitutional decisions have only weak claims to objective validity; the parts of the Constitution that generate litigation at the Supreme Court level are too old and

117. Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Court*, 24 CONST. COMMENT. 43, 45 (2007).

118. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

119. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

general to be directive; the issues presented in constitutional cases tend to be both emotional and momentous and the decisions resolving them inescapably reflect the Justices' personal values, psychology, background, peer pressures, political anxieties, professional experiences, ideological inclinations, and other non-legalistic factors, often operating unconsciously; unrestrained courts produce unrestrained backlash (so compare the Warren and Roberts Courts); and courts have limited tools and as a result their "legislative" efforts can often be undone by the other branches. An example of the last point is how Congress and many states reacted to the Warren Court's liberalization of criminal procedure by raising minimum and maximum prison sentences, so that, as far as anyone knows, while probably fewer innocent people are convicted nowadays, those who are serve longer terms. Courts are subject to the law of unintended consequences.

These considerations might be thought to make the case for at least a weak presumption in favor of upholding federal and state statutes when challenged as violations of the federal Constitution. I should give some examples of how such a presumption might be rebutted. Preemption is the obvious example, but it is too simple, as is any case in which a statute is inconsistent with a *clear* constitutional provision. I cannot give many examples of federal statutes that I would be inclined to declare unconstitutional, though I could give plenty of examples of state statutes. In a list I recently found of the thirty-one major federal statutes (out of 161 in total) that the Supreme Court has held unconstitutional since *Marbury* (a number to which *Heller* must now be added), only one strikes me as a compelling candidate for invalidation, and that was the law segregating the public schools in the District of Columbia, invalidated in *Bolling v. Sharpe*¹²⁰ despite the absence of an Equal Protection Clause anywhere in the Bill of Rights. Formalists think the decision wrong, and indeed strong arguments can be mounted against it. But the anomaly of the Court invalidating public school segregation everywhere except in the Court's own town—more broadly of the Court's ruling that the federal government is free to practice racial discrimination because the Equal Protection Clause of the Fourteenth Amendment is not applicable to the federal government—would have made such a decision a triumph of mindless technicality.

But I would prefer to avoid presumptions and suggest simply that the considerations I have listed in favor of restraint are considerations that a sensible, pragmatic judge should take account of, along with the other considerations that bear on decisions in tough cases. Thayerians were pragmatists, but pragmatists are not necessarily Thayerians; think of the distinguished pragmatic activist Roger Traynor. Legalists like Justice Scalia plow new constitutional ground in the belief that they have the key to understanding what the Constitution "really" means. Pragmatists don't deceive

120. 347 U.S. 497, 499 (1954).

themselves in that manner, but on occasion, and sometimes rather frequently, they plow new constitutional ground anyway, by acknowledging and embracing the role of occasional legislator. In such pragmatists as John Marshall, Holmes, Brandeis, Cardozo, Robert Jackson, and Henry Friendly, restrained and activist strains are mixed.

The problem with judicial pragmatism is that it requires a taste for facts—and rhetorical skills—that nowadays few judges have. Although one thinks of pragmatism, in the nonphilosophical sense in which I use the word in describing judicial behavior, as down to earth, it is difficult for judges to write in a down-to-earth manner without seeming unprofessional. Holmes's ability, in cases like *Lochner* and *Olmstead*, to get away with writing judicial opinions that are admired although they contain little or nothing in the way of "legal reasoning" as ordinarily understood reflects a literary culture that is virtually dead among lawyers. These opinions, and those of the other great Justices and judges of American history, are rhetorical *tours de force*, and rhetoric is no longer either cultivated or admired. But that is a story for another day.

The argument for constitutional restraint that Thayer himself put greatest weight on—the debilitating effect of aggressive judicial review on the responsible (including constitutionally attuned) exercise of the legislative power by legislators—reflects a naive conception of the capacity and incentives of American legislators, in his time as in ours. Thayer might have replied to such an accusation by arguing that it was precisely the neglect of his standard that had debilitated Congress's exercise of its function of constitutional interpretation. But such a reply would be implausible. Nothing in the character, motivations, or experience of people who become legislators suggests that were it not for judicial activism they would be responsible interpreters of constitutional provisions and guardians of constitutional values.

It is true that invocations of the Constitution are part of the rhetoric of legislative deliberations, but are they more? In the earliest period, when key members of Congress had been personally involved in the drafting and ratification of the Constitution and there were as yet few judicial decisions construing it, their constitutional arguments were more than rhetoric.¹²¹ But changes in the nation's political culture, and the increasing output of constitutional rulings by an increasingly professionalized judiciary, wrote *finis* to serious congressional participation in constitutional interpretation. It would be quixotic to try to reverse the trend, as Thayer hoped could be done if only judges would review the constitutionality of statutes with a lighter touch. The lighter touch would not improve the intelligence or character of legislators, enlighten the public, dissolve Arrow's impossibility theorem, or weaken

121. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 3 (1997).

interest groups; and anyway the Supreme Court is not about to relinquish power to other branches of government.

But you knew that.

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