FOLLOWING THAYER: THE MANY FACES OF JUDICIAL RESTRAINT

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ABSTRACT

The concept of judicial restraint continues to generate both fierce fidelity and criticism. This paper argues judicial restraint does not embody a single theory of jurisprudence, as is often assumed, but consists of discrete yet interrelated models governing proper judicial conduct. These models pivot around judges' "reasonable doubt test," or to what external standard judges should appeal when determining if a piece of legislation is clearly unconstitutional. These models have varied significantly, from Oliver Wendell Holmes's "reasonable man" test to J. Harvie Wilkinson's textual-based restraintism. Each model contains discrete strengths and weaknesses, the recognition of which leads to a more consistent, coherent, and potentially satisfying overall theory of judicial restraint.

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I. INTRODUCTION**

Judicial restraint, or the notion that judges should defer to legislative or executive measures unless they are clearly unconstitutional, has a long political and academic pedigree. Judicial nominees continually praise the notion of restraint,[1] and both the liberal and conservative press trumpet its virtues.[2] For such an often-invoked ideal, however, judicial restraint has frequently gone unrealized in practice. Indeed, from *Roe v. Wade*,[3] to *Citizens United v. Federal Election Commission*,[4] many of the Supreme Court's most influential cases have run roughshod over legislative decrees. As Wallace Mendelson summarized,[5] considering a Supreme Court that throughout the last fifty years has reapportioned legislatures, regulated employment practices, overseen and redirected numerous welfare programs, outlawed and restored capital punishment, and even managed prison and mental institutions, pledges of restraint have seemingly done little to govern or direct the nation's highest judicial body.

The prevalence of judicial restraint's opposite, judicial activism, has also been widely discussed.[6] While some have argued judges are purely political, practicing restraint in laws they support,[7] others have located the problem within the notion of judicial restraint itself.[8] According to the latter critics, any

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[1] *See, e.g.*, Damon W. Root, *Elena Kagan on Free Speech, Executive Power, and Judicial Restraint*, REASON.COM (May 13, 2010), http://reason.com/archives/2010/05/13/elena-kagan-on-free-speech-exe; John Eggerton, *Legal Scholars Tout Sotomayor's 'Restraint'*, BROADCASTINGCABLE.COM (May 27, 2009, 3:50 PM), http://www.broadcastingcable.com/article/277110-Legal_Scholars_Tout_Sotomayor_s_Restraint.php.

[2] *See, e.g.*, Andrew C. McCarthy, *Judicial Restraint*, NATIONAL REVIEW ONLINE (November 2, 2004, 11:43 AM), http://www.nationalreview.com/articles/212787/judicial-restraint/andrew-c-mccarthy; Matthew Sheffield, *Liberals Find a New Love: 'Judicial Restraint'*, THE WASHINGTON EXAMINER (July 7, 2010, 3:00 AM), http://washingtonexaminer.com/blogs/beltway-confidential/liberals-find-new-love-judicial-restraint.

[3] Roe v. Wade, 410 U.S. 113 (1973).

[4] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[5] *See* Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 85 (1978).

[6] *See generally* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS (2006); MARK I. SUTHERLAND, JUDICIAL TYRANNY: THE NEW KINGS OF AMERICA (2005); PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM (2003).

[7] *See, e.g.*, MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005).

[8] *See generally* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002); Richard R. Posner, *The Rise and Fall of Judicial Restraint*, CALIF. L. REV. (forthcoming 2012); Bruce Ackerman, *The Perils of Judicial Restraint*, SLATE.COM (Apr. 5, 2006, 2:39 PM), http://www.slate.com/id/2139372/.

theory of restraint is both foundationally and methodologically hollow,[9] and scholars should abandon it as fully and decisively as many of their judicial brethren.

While this criticism contains some merit, this paper argues that many methodological critiques have failed to realize judicial restraint does not embody a single theory of jurisprudence, but consists of discrete yet interrelated models governing proper judicial conduct.[10] These models pivot around judges' "reasonable doubt test," or to what external standard judges should appeal when determining if a piece of legislation is clearly unconstitutional.[11] Understanding each standard is integral for any proponent or critic of restraint. Further, recognizing each model's strengths and weaknesses leads to a more consistent, coherent, and potentially satisfying overall theory.

Rather than offer any novel justification for judicial restraint, this article surveys restraint's leading advocates, analyzing and critiquing their respective "reasonable doubt tests." I argue that such tests must ultimately adhere to either text or precedent, yet restraintists have failed to reconcile these often competing principles. I outline possible criteria for achieving such a balance, and conclude that while a methodologically consistent theory of judicial restraint is possible to construct, a number of foundational concerns remain unresolved.

II. JUDICIAL RESTRAINT "DEFINED"

Although there exist numerous forms of restraint (as explored below), all adhere to the underlying principle that legislative acts should only be overturned if they are clearly unconstitutional. According to Judge Richard Posner, regardless of political or personal preference, advocates of restraint are "*highly* reluctant to declare legislative or executive action unconstitutional," and such deference is "at its zenith when action is challenged as unconstitutional."[12]

This notion was originally formulated by James B. Thayer in his influential "The Origin and Scope of the American Doctrine of Constitutional Law,"[13] and

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[9] *See* CARL L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 203 (1960); PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS 312 (1968); EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 39, 179 (1962).

[10] This article will not focus on judicial restraint and statutory interpretation, which involves the additional issue of legislative history and intent.

[11] *See* Sanford Byron Gabin, *Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test*, 3 HASTINGS CONST. L. Q. 961, 962 (1975-1976) (for an early conceptualization of this test).

[12] *See* Posner, *supra* note 8, at 2.

[13] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 152 (1893); *also see* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 171 (2010). While Thayer laid down the first comprehensive theory of restraint, the principle itself has been invoked throughout the histo-

the view of courts as political safeguards. According to Thayer,

> To set aside the acts of such a body, representing in its own field, which is the highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act . . . The judiciary, today, in dealing with the acts of their coordinate legislators, owe to the country no greater duty than that of keeping their hands off these acts whenever it is possible to do so.[14]

As Thayer remarked in a much cited passage, "an act of the legislature" should not "be declared void unless the violation of the constitution is so manifest as to leave no room for *reasonable doubt*."[15] Judges should thus be highly reluctant to strike legislative or executive action, deferring to the other branches in all instances of uncertainty or ambiguity.

According to Alexander Bickel, since a democracy is grounded in majoritarian rule, judges repudiate democracy's very nature when nullifying legislative enactments.[16] Judges are (for the most part) appointed rather than elected, and should consequently only play a limited role within the democratic process. As Judge Learned Hand succinctly summarized, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them . . . ."[17]

A second foundational justification for judicial restraint rests on judges' personal fallibility.[18] Legislative enactments represent a number of social and political interests, and take into account many citizens' individual needs and desires. The judge possesses no such channel to the public's policy preferences, often bringing his or her own biases and prejudices to the bench. The "restraintist" judge understands his or her own intellectual limitations, refusing to impose any personal conception of the good on a democratic constituency.

Finally, justices such as Louis Brandeis have praised democracy for its experimental qualities, and especially in allowing different state legislatures to

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ry of American jurisprudence. As Justice Bushrod Washington remarked in 1827, "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution proved beyond all reasonable doubt." *Id.*

[14] James Bradley Thayer, Professor at Harvard Law School, Address Delivered at The Tribute of Massachusetts in Commemoration of the One Hundreth Anniversary of His Elevation to the Bench as Chief Justice of the Supreme Court of the United States, 69 (Marquis F. Dickinson ed., 1901).

[15] *See* Thayer, *supra* note 13, at 140 (quoting Comm. v. Smith, 4 Binn. 117, 123 (Pa. 1811) (emphasis added).

[16] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS x (1962) ("[J]udicial review is a countermajoritarian practice.").

[17] LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

[18] *See* FREDERIC R. KELLOGG, OLIVER WENDELL HOLMES, JR., LEGAL THEORY, AND JUDICIAL RESTRAINT 6, 110 (2007).

pass innovative solutions to their unique problems.[19] In Brandeis's view, judges do democracy a grave disservice by thwarting such initiatives. As the Justice repeatedly expressed,

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . . .[20]

In a recent lecture,[21] and upcoming article,[22] Judge Richard Posner offers a comprehensive summary of judicial restraint's various justifications:

> [J]udicial decisions can be rich in unintended consequences; the scope of the Constitution is vast and the Justices operate on limited information; . . . the issues presented in constitutional cases tend to be both emotional and momentous and the decisions resolving them inescapably reflect the Justices' personal values [;] . . . activist courts produce activist backlash . . . ; and courts have (only) limited tools . . . .[23]

In his influential and provocative article "Of Guns, Abortions, and the Unraveling Rule of Law" Judge Harvie Wilkinson III portrays himself as the model of a restrained judge.[24] According to Wilkinson, judges "should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it."[25] When considering any nebulous constitutional proviso, courts should always rule in favor of the legislature, executive, or other governmental agency. The best judge knows never to push a particular social or economic agenda; when considering a measure's constitutionality, he or she always grants legislative actors the benefit of the doubt.[26]

Finally, according to Professor Adrian Vermeule's institutional theory of re-

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[19] *See* Mendelson, *supra* note 5, at 76.

[20] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[21] *See* Richard A. Posner, Judge for U.S. Court of Appeals, 7th Circuit, Brennan Center Jorde Symposium Lecture: *The Rise and Fall of Judicial Restraint* (Oct. 11, 2010), *available at* http://www.brennancenter.org/blog/archives/posner_the_rise_and_fall_of_judicial_restraint/.

[22] *See* Posner, *supra* note 8.

[23] *Id.* at 37-38.

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

[25] *Id.* at 255.

[26] *Id. at* 255 ("[W]hen the channels of democracy are functioning properly, judges should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it.").

straint,[27] judges' limited knowledge and bounded rationality, combined with the legal uncertainty that "result[s] from layering judicial review on top of legislative decision making," provides a utilitarian justification for judicial restraint.[28] While Vermeule acknowledges this theory may not yield the best result in every individual case, it will nevertheless "produce the best results overall" in its allowance of authentic democratic governance and collective decision-making.[29] As Vermeule states, "[i]f judicial review is a constitutional insurance policy against erroneous legislative determinations, judicial review may dilute rather than strengthen legislators' incentives to take precautions against erroneous enactment of unconstitutional statutes."[30] According to Vermeule, "[t]his was Thayer's concern . . . that review would dilute the statesman's sense of constitutional responsibility,"[31] and place the legislative function under court control.

III. Common Criticisms

Judicial restraint has faced considerable academic criticism. These critiques can be broken into both foundational and methodological camps. According to the former, there is no obvious reason why the "role morality" "of a profession such as judging" should always "outweigh the duties of conscience."[32] Holmes's famous refrain, that "if my fellow citizens want to go to hell I will help them. It's my job,"[33] provides stark illustration of judicial restraint's amoral (and potentially immoral) nature. According to David Luban, "though we" certainly "do not want government by judiciary," the federal courts can and should help correct legislatures' "short time horizons, the well-known forms of democratic failure . . . and sheer official inertia."[34] The case of *Brown v. Board of Education* is particularly apt here: While undoubtedly a judicially activist decision, even the most extreme advocates of restraint nevertheless praise the Court's abolition of state-enforced segregation.[35]

Methodological critiques, while less expansive, have also been offered.[36] Sidestepping restraint's foundational issues, critics such as Richard Posner de-

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[27] *See generally* Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (2006).

[28] *Id.* at 260.

[29] *Id.* at 5.

[30] *Id.* at 261.

[31] *Id.*

[32] *See* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 Duke L. J. 449, 455 (1994).

[33] *See* Jeff Shesol, *Evolving Circumstances, Enduring Values*, N.Y. Times, (Sept. 17, 2010), *available at: http://www.nytimes.com/2010/09/19/books/review/Shesol-t.html.*

[34] *See* Luban, *supra* note 32, at 510.

[35] *See* Vermeule, *supra* note 27, at 280.

[36] *See* Posner, *supra* note 8; Gabin, *supra* note 11 (providing a whole host of methodological criticisms).

cry restraint as an inadequate and even self-contradictory theory.[37] From this perspective, judicial restraint cannot provide "a complete account of the judicial role, because the question whether there is a clear violation depends on the method by which the Constitution is read."[38] This reveals an internally contradictory theory: Determining whether the constitution has been violated requires some developed theory of constitutional interpretation, but having a theory of constitutional interpretation essentially eliminates the need for judicial restraint. As Richard Posner argues, "the weakest part of the theory" "is that it tells judges to uphold statutes that they consider unconstitutional;" modern theorists, however, have "proved (at least their own satisfaction) that they can tell you which outcomes in constitutional cases are incontestably correct and which incorrect," effectively erasing the very need for judicial restraint.[39]

This methodological critique also extends to judicial restraint's greater practice, or supposed lack thereof. Judges may pay lip service to Thayer's model, but their actual behavior belies such claims: From *Brown* to *Roe* to *Heller* the Supreme Court has continually struck legislation not clearly unconstitutional.[40] Richard Posner contends even the original Thayerians were "pragmatists" rather than "genuine" practitioners of restraint, frequently usurping the legislature's will.[41] Oliver Wendell Holmes, perhaps the most acclaimed "restraintist" of all, limited legislative curbs on free speech;[42] Louis Brandeis discovered a revolutionary "right to privacy;"[43] and Felix Frankfurter widely interpreted the due process clause.[44] As Posner summarizes, these figures all too often emphasized "consequences over doctrine," explicitly rejecting any simple adherence to restrained principles of jurisprudence.[45]

IV. RESCUING RESTRAINT

This article focuses, save for some concluding speculations, on methodological rather than foundational critiques.[46]

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[37] *See* Posner, *supra* note 8, at 28.

[38] *See* Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435, 445 (2007).

[39] *See* Posner, *supra* note 8, at 28.

[40] *See, e.g.*, Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069 (2006).

[41] *See* Posner, *supra* note 8, at 35.

[42] *See* G. Edward White, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SOUL 415-17 (1993).

[43] *See* Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1980).

[44] *See* Brown v. Board of Education, 347 U.S. 483 (1954); Griswold v. Connecticut, 381 U.S. 479 (1965).

[45] *See* Posner, *supra* note 8, at 36.

[46] This is not to say the former claims are less important; indeed, they are equally (if not more) important, and must surely be answered by defenders of judicial restraint. Such dis-

I believe the methodological criticisms of Posner and Sunstein rest upon a conceptual confusion. This begins with their limited reading of Thayer's primary approach to constitutional law. Proper advocates of judicial restraint do not simply ask whether legislation is reasonably constitutional, as Judge Posner believes, but "whether the act under review may be sustained as a valid exercise of power."[47] As Gabin points out in a passage often ignored by these critics, "the standard of duty to which the courts bring legislative acts," concerns "not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."[48]

A proper "restraintist" does not rigorously evaluate a measure's constitutionality and then render his or her judgment, but asks if this can be demonstrated through any reasonable argument. If a measure can reasonably be thought constitutional, it should be upheld. The only motive for rejection is that none can be found. Posner's elaborate and convincing schemas of constitutional interpretation (whether constructivist, originalist, minimalist, etc.) are both unwarranted and superfluous, and should be checked at the door.[49]

This is illustrated by the difference between first and second-order reasoning. According to Professor Vermeule, judges employ first-order reasoning when applying a holistic schema of constitutional interpretation (whether constructivist, originalist, minimalist, etc.) to the measure under review.[50] Second-order reasoning is much simpler: Here judges merely determine whether there is reasonable doubt to believe the measure is constitutional.[51] Practitioners of restraint reject first-order reasoning, positing second-order reasoning as the Court's only duty. The major question is how to determine reasonable doubt, or what external standard to use in evaluating clear unconstitutionality.

The following section surveys the work of judicial restraint's leading advocates,[52] revealing a variety of discrete "reasonable doubt tests," each with their share of flaws, ambiguities, and (potential) advantages. All these accounts attempt to answer the same question: What criteria, exactly, should be used when determining whether a measure is *clearly* unconstitutional?

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cussions concern the very heart of democratic theorizing, however, and lie well beyond the present paper's purpose and scope.

[47] *See* Gabin, *supra* note 11, at 970.

[48] *See* Thayer, *supra* note 14, at 144.

[49] *See* Posner, *supra* note 8, at 25.

[50] *See* VERMEULE, *supra* note 27, at 181.

[51] *See id.* at 182.

[52] I do not discuss the highly influential work of Jeremy Waldron, Mark Tushnet, or Larry Kramer here. The latter two oppose judicial review altogether (a distinct, albeit related, issue), while the former offers no clear reasonable doubt test.

V. JUDICIAL RESTRAINTS

A. *James Bradley Thayer's Common Sense Test*

Asks whether the legislation under review is clearly unconstitutional to all men of sense and reflection in the community.

James Bradley Thayer served as a professor at Harvard Law School from 1873 to his death in 1902. Deeply affected by the Supreme Court's growing repudiation of state and federal legislation,[53] he constructed a jurisprudential theory to curb such (perceived) judicial overreach. Advocating the first formal theory of judicial restraint, Thayer argued that "violations of a constitutional right ought to be obvious to the comprehension of every one as an axiomatic truth."[54] In this formulation, "the validity of the law ought not . . . to be questioned unless it is obviously repugnant to the constitution that when pointed out by judges, *all men of sense and reflection in the community may perceive the repugnancy*."[55] According to Thayer, unconstitutional measures should therefore be prima facie apparent to the majority of citizens.

Unfortunately, Thayer's "sense and reflection test," despite its perhaps admirable simplicity, is too vague to lend much guidance. Most common men (or women) have quite limited knowledge of the Constitution and its various provisions.[56] Further, those that do may act politically rather than legally, having little substantive understanding of constitutional law. Finally, individual judges will surely have different conceptions of what counts as a sensible and reflective standard,[57] leading to the very problem that Thayer seeks to avoid: rule by judicial fiat rather than reasoned deference. Thayer's test leaves the judge free to construct his or her own reasoned individual, whom will likely share strikingly similar views to him or herself.

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[53] *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 207 (2009). Prior to the Civil War, the Supreme Court only voided federal legislation on two separate occasions. With the war's end the Court began to do so relatively regularly, however, believing the Fourteenth Amendment's due process clause substantively protected private property and freedom of contract. This notion reached its apex four years after Thayer's death in *Lochner v. New York*, 198 U.S. 45 (1905), where the Court found unconstitutional a New York law limiting the number of hours that bakers could work each day.

[54] *See* Thayer, supra *note* 14, at 140.

[55] *Id.* at 136.

[56] *See, e.g.*, Erik Robelen, *Karl Marx, Founding Father? Survey Shows Knowledge Gaps*, EDUC. WK. (December 16, 2010), http://blogs.edweek.org/edweek/curriculum/2010/12/bill_of_rights_blog_post.html.

[57] *See, e.g.*, Planned Parenthood of S.e. Pa. v. Casey, 505 U.S. 833 (1992) (evidencing the plurality's apparent inabilty to decide what their "undue burden test" actually means in regard to state abortion laws).

B. *Oliver Wendell Holmes's "Reasonable Man" Test*

Asks whether a reasonable man could conceivably support the legislation under review.

Oliver Wendell Holmes modeled his reasonable doubt test directly after that of Thayer's common sense approach. According to the justice, "I agree with it (Thayer's essay on Constitutional Law) heartily and it makes explicit the point of view from which implicitly I have approached the constitutional questions upon which I have differed from some of the other judges."[58]

Holmes proposed a similar, although differently articulated, test of reasonable doubt. In the justice's view, if a reasonable or intelligent man could find a certain provision constitutional,[59] it should be upheld.[60] According to Holmes in *Adair v. United States*,[61] any legislation in which "intelligent men may differ" should be considered constitutional. This was further reflected in *Coppage v. Kansas*, where the justice declared that "whether right or wrong," any belief "held by a reasonable man" regarding an amendment's constitutionality should be enforceable.[62] Similarly, in *Adkins v. Children's Hospital*, Holmes stressed that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good," but whether "a reasonable man reasonably might have that belief."[63] This principle is perhaps best reflected in his landmark *Lochner* dissent, where Holmes proclaimed that a law should be duly upheld "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."[64]

Holmes's reasonable man test shares similar flaws with Thayer's: Equally rational men and women may have very different understandings of their peoples' traditions and laws, often dependent upon their particular ideological backgrounds or personal predilections. What is clear to Holmes's "reasonable man" may be very different than what is clear to my own "reasonable man." One need only look to current court conflicts to realize that very rational people may share very different conceptions of supposedly obvious ideas. Like Thayer, Holmes's test ultimately provides inadequate guidance for determining constitutional boundaries.

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[58] *See* Mendelson, *supra* note 5, at 73.

[59] Holmes seems to have used the descriptors "reasonable" and "intelligent" interchangeably.

[60] *See* KELLOGG, *supra* note 18, at 150.

[61] Adair v. United States, 208 U.S. 61, 191 (1908).

[62] Coppage v. Kansas, 236 U.S. 1, 27 (1915).

[63] *See* Mendelson, *supra* note 5, at 74 (quoting Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 567 (1923) (Holmes, J., dissenting)).

[64] 198 U.S. 45, 76 (1906).

C. *Learned Hand's Originalist Test*

Asks whether the Court has legitimate historical grounds to oppose the legislation under review.

Although he was never a Supreme Court Justice, Learned Hand's tenure on the Second Circuit Court of Appeals generated more precedent than many jurists on the High Court.[65] A great admirer of Justice Holmes and an intellectual colleague of Felix Frankfurter,[66] Learned Hand was also Thayer's pupil at Harvard.[67] Few jurists followed judicial restraint as closely as Hand: In his first twenty-five years on the Second Circuit, Hand nullified federal law on only two separate occasions.[68]

Perhaps equally unique, Hand's long judicial tenure yielded three distinct models of judicial restraint. The judge's early years on the Second Circuit were most influenced by Justice Holmes, and Hand advocated Holmes's reasonable man test. Writing in a 1915 issue of *The New Republic*, Hand advised judges to consider "whether a fair man could believe that the law as enacted really served any genuine public interest" and that "[b]etween all reasonable differences of opinion, the legislature has the right to choose."[69]

This test soon gave way to a more precedent-based standard of judicial restraint.[70] As biographer Gerald Gunther summarized, "Hand had a rigid adherence to precedent even concerning decisions whose outcome he found "cruel and inhuman."[71] As Hand remarked in one influential opinion, "it was only in a rare case that we ought to back out of our decisions, deliberately made."[72] The judge's memoranda list countless legislative acts as "rotten" yet not clearly unconstitutional.[73] Here Hand portrayed himself as "gagged" by precedent

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[65] *See, e.g.*, Masses Publ'g Co. v. Patten, 244 F. 535 (1917) (where the justice carved out an "incitement test" regarding First Amendment rights decades before the High Court adopted such a test).

[66] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 272, 274 (1994); at 299 (Felix Frankfurter continually lobbied for Hand's promotion to the High Court).

[67] *Id.* at 47.

[68] *Id.* at 453.

[69] *Id.* at 248. During this time Hand also proposed a form of structured judicial restraint regarding vague clauses. According to biographer Gerald Gunther, the nebulousness of due process particularly irked the judge: "[T]he Supreme Court, Hand suggested, should be able to declare a law unconstitutional on due-process grounds only if two thirds of the Court voted that way." *Id.* at 252; *see also* Shesol, *supra* note 13, at 120 (while many restraintists would undoubtedly be sympathetic to proposals for a sort of "structural judicial restraint," and it has a history of suggestion, the present paper focuses on individual decision making rather than structural schemas).

[70] GUNTHER, *supra* note 66, at 303.

[71] *Id.* at 299.

[72] *Id.*

[73] *Id.* at 302.

with little choice but to affirm.[74]

Judge Hand's third and final phase of judicial restraint was his most radical, and continues to generate a considerable amount of academic controversy.[75] In a remarkable three-part lecture in 1958, the judge first questioned the legitimacy of judicial review, and eventually concluded that the Bill of Rights justiciable only in First Amendment cases, although even his support in that area was tenuous.[76] Regarding the succeeding amendments, Hand demanded that judges search for their proper historical meaning.[77] Citing the *Brown* decision, Hand declared that the Equal Protection Clause was originally written to entirely eliminate racial discrimination, and nothing short of an absolute ban on segregation would therefore suffice.[78] According to the judge, the Court's sole role is legislatively determined, and anything beyond this endangers the very foundations of democracy.[79] Judge Hand concluded that only a "radical doctrine of judicial restraint" could prevent justices's personal values from affecting their jurisprudence: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians . . . . If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."[80]

While Hand's "reasonable man" test was criticized in the previous section and precedence-based restraint is explored in greater depth below, Hand's "originalist test" deserves scrutiny. Hand was a philosophical skeptic and political moderate,[81] and it is thus all the more striking that he adopted such an extreme position on restraint. Judge Hand's schema fails on two distinct levels. First, the judge's analysis of judicial review contains little practical merit. As Edward L. Barrett, Jr., recognized half a century ago, the issue of judicial review was "irrevocably decided by a century and a half of practice."[82] Second, embracing originalism violates the very nature of judicial restraint: Rather than empowering legislatures, theories of originalism subordinate legislative supremacy to whichever historical account garners the most votes. Legislative acts will thus live or die based on the more popular theory of originalism, whether liberal (like that of Justice Hugo Black) or conservative (like that of Justice Antonin Scalia). Such schemas force judges to adopt a complex legal theory of constitutional interpretation, the very thing Thayer sought to avoid

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[74] *Id.*

[75] *See, e.g.*, Richard Polenberg, *"A Conservative Among Liberals, and a Liberal Among Conservatives:" The Life of Learned Hand*, 23 REVIEWS IN AMERICAN HISTORY 296 (1995).

[76] *See* Learned Hand, THE BILL OF RIGHTS 67-69 (1964 Atheneum Publishing 6th ed. 1977).

[77] *Id.* at 69.

[78] *Id.* at 54.

[79] *Id.* at 29.

[80] *Id.* at 73-74.

[81] *See* GUNTHER, *supra* note 66, at 33-34.

[82] *Id.* at 664.

and for which Judge Posner criticizes judicial restraint in the first place.[83]

D. *Louis Brandeis's Empirical Test*

Asks whether adequate empirical evidence exists in order to suggest that the legislation under review is socially disadvantageous.

Justice Louis Brandeis was a close colleague and disciple of Holmes's[84] and a good friend of Thayer's,[85] once even teaching a class in Thayer's absence.[86] Brandeis's earliest jurisprudence seemed to mimic that of Holmes's. According to the young justice:

> This court is not burdened with the duty of passing upon the disputed question whether the legislature . . . was wise or unwise . . . . The question is merely whether you can see that the legislators had no ground on which they could, as reasonable men, deem this legislation appropriate to abolish or mitigate the evils believed to exist . . . . If you cannot find that, the law must stand.[87]

The philosophy that "[i]n no doubtful case" should the Court "pronounce a legislative act to be contrary to the Constitution"[88] influenced Brandeis to uphold legislation even Holmes found wanting in *Pennsylvania Coal Co. v. Mahon*.[89] While Holmes viewed the regulations under review as overly burdensome, Brandeis believed these had reasonably been enacted and should subsequently stand.[90] As Brandeis summarized (in a separate case), "[t]he most important thing we do . . . is not doing."[91] This was particularly reflected in the justice's principled stance towards jurisdictional matters and his belief that the Court should only decide those cases that it was clearly entitled to decide.[92]

Brandeis also expanded significantly upon Holmes's "reasonable man" approach to judicial restraint. Perhaps recognizing that such a test was both too simplistic and potentially arbitrary, Justice Brandeis promoted a more "scientific" test of reasonableness, embodied by the famous "Brandeis Briefs."[93] Rather than relying on an abstract reasonable man, Brandeis here sought to determine whether a certain provision was actually reasonable through empirical research

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[83] *See* Posner, *supra* note 8, at 28.

[84] *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 319 (1993).

[85] *See* Mendelson, *supra* note 5, at 73.

[86] *Id.* at 73 n.12.

[87] *See* UROFSKY, *supra* note 53, at 221.

[88] *Id.* at 709.

[89] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[90] *Id.* at 417-418.

[91] *See* BICKEL, *supra* note 16, at 71.

[92] *See* Mendelson, *supra* note 5, at 78.

[93] *See* Muller v. Oregon, 208 U.S. 412 (1908) (concerning women's freedom to contract).

or likely to accomplish the goal it sought to achieve.[94] If no empirical research existed, as was commonly the case, Brandeis believed the Court had no grounds to reject the measure under review, and states therefore best left to experiment with such legislation.[95] If an act was "empirically unreasonable," however, the justice seemingly had fewer qualms about striking it down.[96] Brandeis's most famous demonstration of this test was in *New State Ice Co. v. Liebmann,*[97] where the justice declared that, while the state's proposal seemed "obvious and grave" and "might bring evils worse than the present disease," since the "economic and social sciences" were "largely uncharted seas," he had no choice but to uphold it.[98] As the justice frequently remarked, "[t]here must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."[99] This principle was further reflected in *Duplex Printing Press Co. v. Deering* and *Truax v. Corrigan*,[100] where the justice couched the reviewed legislation as empirically beneficial, exploring its public and financial benefits.

Perhaps more than any justice previous or since,[101] Justice Brandeis thus sought to bring social science into the judicial process. While this may make good law, such efforts seem quite contrary to the practice of judicial restraint. Deciding what social science material to survey, and which are appropriate in a given judicial context, is highly subjective. Further, Brandeis's social scientific test provides no clear answer for what judges should do if an act is clearly unconstitutional but supported by methodologically sound social science. For these reasons, Judge Richard Posner has embraced Brandeis as a "pragmatist," having occasionally paid lip service to principles of restraint while actually more concerned with the potential effects of public policy.[102] Perhaps Holmes himself put it best, remarking that Brandeis was often more an advocate for a cause than an impassioned jurist.[103] While Brandeis was undoubtedly a brilliant and singular justice, his embrace of restraint was perhaps the most tenuous of the figures surveyed throughout this article.

E. *Felix Frankfurter's Precedence-based Test*

Asks whether any precedent exists to support the legislation under review.

Few jurists have done more to openly promote judicial restraint than Felix

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[94] *See* Mendelson, *supra* note 5, at 76.

[95] *See* Posner, *supra* note 8, at 13.

[96] *Id.*

[97] Mendelson, *supra* note 5, at 76.

[98] *Id.* (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 309-10 (1932)).

[99] *See id.* at 76-77.

[100] *See* UROFSKY, *supra* note 53, at 603-604.

[101] Although Justice Breyer certainly comes to mind here.

[102] *See* RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 84 (2003).

[103] *See* UROFSKY, *supra* note 53, at 578.

Frankfurter. Justice Frankfurter continually referred to Thayer as the "great master of Constitutional Law," once remarking that, "If I were to name one piece of writing on American Constitutional Law . . . I would pick [Thayer's once famous essay] . . . [b]ecause . . . it's the great guide for judges, and therefore the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions."[104]

In one of his most famous opinions, that of *Minersville School District v. Gobitis*,[105] Justice Frankfurter concisely summarized his motive for adopting Thayer's judicial philosophy: In his view, "To fight out of the wise use of legislative authority in the form of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."[106] Yet Frankfurter, as well as his colleague and occasional disciple John Marshall Harlan, used a very different test of reasonableness than Thayer, Holmes, or Brandeis. This reasonable doubt test was best reflected in perhaps his most passionate dissent, that of *West Virginia State Board of Education v. Barnette*.[107] Ruling on a statute requiring all public school pupils in West Virginia to salute the flag, Justice Frankfurter constructed a reasonable doubt test focused primarily around precedent. While Frankfurter thought the law under review in *Barnette* politically unwise, he also believed the "history of this question in this Court" indicated "reasonable legislators could have taken the action which is before us for review."[108] According to the justice, "The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples."[109]

While Frankfurter admitted that previous precedents were somewhat ambiguous, he highlighted that "[f]ive times has the precise question now before us been adjudicated," and that in four of these times the Court had refused to strike state law.[110] Even more influential to Frankfurter, thirteen Justices had hitherto found no constitutional infirmity, and it would therefore be a gross act of judicial power to defy them.[111] Frankfurter knew of no better test to administer in deciding whether to nullify legislation: "In view of this history, it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators cannot be deemed unreasonable in enacting."[112]

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[104] *See* Mendelson, *supra* note 5, at 73-4.

[105] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

[106] *Id.* at 600.

[107] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (assessing a state statute requiring public school pupils in West Virginia to salute the flag).

[108] *Id.* at 647 (Frankfurter, J., dissenting).

[109] *Id.* at 655.

[110] *Id.* at 664.

[111] *Id.* at 665.

[112] *Id.* at 666.

Frankfurter's concurrence in the case of *Green v. United States*[113] made his precedence-based standard even clearer. Disagreeing with Justice Hugo Black's theory of originalism, Frankfurter listed almost twenty justices who had previously "sustained the exercise of . . . power" under review.[114] According to the Justice, it was absurd to claim that "everybody on the Court has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated . . . ."[115] If legislative action had precedential support, it was the justice's duty to uphold it regardless of his or her political beliefs. This was further reflected in *Poe v. Ullman*,[116] concerning Connecticut's ban on contraceptives. While the socially progressive Frankfurter likely disagreed with the law itself, he found sufficient precedent to deny the proponents' standing. Echoing both Thayer and Brandeis, Frankfurter proclaimed that "[t]he best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."[117] As Wallace Mendelson summarized, "[i]f Holmes's methodological forte was skepticism," and if Brandeis's "specialized in mining the facts," undoubtedly "Frankfurter's specialty was precedent."[118]

Frankfurter's precedence-based standard of restraint seems more fully developed than that of Holmes or Thayer, and less subject to potential activism than either that of Brandeis or the later Hand. This standard, however, has flaws its own. First, Justice Frankfurter failed to specify the degree of precedence necessary for clear constitutionality. If significant precedence can be mustered for both positions, a measure should clearly be upheld (as seen in *Barnette*). Frankfurter does not provide guidance, however, when precedence on one side is relatively marginal and the other extensive. Further, Frankfurter does not consider rules of temporality: Frankfurter fails to explain if precedent should ever be discarded for being too archaic or unworkable. Finally, and perhaps most critically, Frankfurter's test does not resolve what restraints practitioners should rely upon when textual interpretation and *stare decisis* conflict. This ambiguity enables clearly activist decisions that critics such as Posner (rightly) pounce upon.[119]

F. *Alexander Bickel's "First Principles" Test*

Asks whether the measure under review violates society's "first principles."

Alexander Bickel shared Brandeis's maxim that the Court (generally) acts

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[113] Green v. United States, 356 U.S. 165, 184 (1957).

[114] *Id.* at 192.

[115] *Id.* at 193.

[116] Poe v. Ullman, 367 U.S. 497 (1961).

[117] *Id.* at 503.

[118] *See* Mendelson, *supra* note 5, at 83.

[119] *Brown* chief among them.

best by not acting, proclaiming judges must show "patience, deference" and "trained sensitivity to the ways of the world."[120] According to Bickel, judges should only strike legislation that violates society's "first principles"[121] or "enduring values,"[122] or those things that constitute the "very essence of a scheme of ordered liberty,"[123] and otherwise stay its hand. Bickel drew such principles from the Courts' history, general reason, past decisions, and confidence in the democratic process: "[T]hat is, from the morality of our tradition as they find it in their deepest selves."[124] This is contrasted with any "personal or group preferences,"[125] which must be cast aside when contemplating constitutionality.

While Bickel acknowledged that his conception of judicial restraint was somewhat vague,[126] he claimed its greatest advocates to have followed this "first principle" jurisprudence.[127] According to Bickel, the best judges did not see ultimate "presuppositions at stake in every second or third case," but only acted in truly fundamental ones.[128] This power to "not do," or the court's "passive virtues," constituted and constitutes its most integral function.[129]

While Bickel's version of judicial restraint is rhetorically powerful, it offers little guidance for constructing any sort of comprehensive reasonable doubt test. His vague list of judicial virtues falls too easily into "I know it when I see it" jurisprudence, offering no obvious rule of application. This is not to say that Bickel's vision is flawed or incomplete; rather, he glides over instead of systematically tackling the actual mechanics of judging. While Bickel provides powerful foundational support for judicial restraint, he offers little by way of practice, or how his principles can be applied on a case-by-case basis.

G. *J. Harvie Wilkinson and Andrew Vermeule's Textualist Tests*

Ask whether a reasonable textual interpretation can be constructed to support the measure under review.

Perhaps judicial restraint's most prominent advocate currently on the bench, Fourth Circuit Judge J. Harvie Wilkinson III has heavily criticized what he sees as judicial activism both on the left and right. According to Wilkinson, judges should only overturn legislation that is clearly contradictory to the applicable

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[120] *See* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1589. (1985).

[121] *Id.* at 1614.

[122] *Id.* at 1575.

[123] *See* Alexander Bickel, *Learned Hand's Lecture At Harvard On Judicial Restraint And The Bill of Rights*, THE NEW REPUBLIC, May 12, 1958, at 19.

[124] *Id.* (quoting Frankfurter, J.).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *See* Kronman, *supra* note 120, at 1585.

text and its history.[130] If a plausible argument can be made that a certain provision is at least somewhat textually supported, deference should be given to the legislature.

Wilkinson uses the examples of both *Roe v. Wade* and *District of Columbia v. Heller* to illustrate appropriate judicial deference.[131] Because no exhaustive analysis of due process and the Second Amendment yields a definitive interpretation, Wilkinson argues the existing legislation should have been upheld.[132] In the judge's view, a "court that decides to strike down legislation based on an interpretation of the Constitution that is only plausible and not incontrovertible," as was done in *Roe* and *Heller*, is exercising inappropriate discretion and therefore violating core principles of restraint and democratic integrity.[133]

In *Judging Under Uncertainty*, Professor Adrian Vermeule offers a textually-based reasonable doubt test (or "default rule") similar to that of Wilkinson.[134] According to Vermeule, judges should always follow "the clear and specific meaning" of legal texts,[135] and when unable to do so, should "defer to the interpretations offered by legislatures and agencies."[136] Quoting Justice Frankfurter, Vermeule breaks texts into two categories: those with "explicit and specific" provisions,[137] and those more conceptual in nature, such as those having to do with "commerce, due process, and liberty."[138] The latter group involves any texts that are "ambiguous, can be read at multiple levels of generality, or embody aspirational norms" that involve shifting public values.[139] This "neo-Thayerian" framework,[140] akin to that of Hand, should remove much of the Bill of Rights and Fourteenth Amendment from judicial authority, relegating such substantive matters to the legislature.[141]

Judge Wilkinson and Andrew Vermeule offer clearer reasonable doubt tests than many of their "restraintist" brethren. Like Frankfurter, however, they fail to determine the judge's role when textualism and stare decisis conflict. Should decades-old precedence be rejected that cannot be textually grounded? If so, should substantive due process be abolished? Both imply a negative (or at best an equivocal) answer, and potentially open the door to more conservative forms of activism.[142]

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[130] *See generally* Wilkinson, *supra* note 24 (outlining his theory of judicial restraint).

[131] *See generally id.*

[132] *Id.* at 267.

[133] *Id.*

[134] *See* Vermeule, *supra* note 27, at 184.

[135] *Id.* at 1.

[136] *Id.*

[137] *Id.* at 270.

[138] *Id.* at 146.

[139] *Id.* at 230, 271.

[140] *Id.* at 232.

[141] *Id.* at 233.

[142] *See, e.g.* Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abor-*

VI. GLIMMERS OF RESTRAINT

While the majority of reasonable doubt tests are too vague or contradictory to provide adequate standards, some yield some viable insights. Felix Frankfurter and J. Harvie Wilkinson's, precedent and text-based standards seem especially tenable, and have even been applied in two (relatively) recent, important cases. In his brief but pithy dissent in *Lawrence v. Texas*,[143] for example, Justice Clarence Thomas offered a prime example of textual-based restraint. While deciding whether Texas's anti-sodomy law was inherently unconstitutional, Justice Thomas advocated rigid adherence to the constitution's text: Echoing Justice Stewart's comments in *Griswold*, Justice Thomas proclaimed that the anti-sodomy law was "uncommonly silly,"[144] and as a Texas legislator he "would vote to repeal it,"[145] but he felt legally unable to help the "petitioners and others similarly situated."[146] Justice Thomas concluded:

> My duty . . . is to decide cases agreeably to the Constitution and the laws of the United States. And . . . I can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy, or as the Court terms it today, the liberty of the person both in its spatial and more transcendent dimensions.[147]

Although he was personally opposed to the anti-sodomy statute, Justice Thomas's limited reading of the constitutional text ultimately gave him little ground to declare the Texas measure unconstitutional.

Equally controversial, although steeped in precedent-based principles of restraint, was Justice John Paul Stevens's opinion in *Kelo v. City of New London*.[148] Justice Stevens reviewed a host of previous court decisions in supporting the City of New London's policy of eminent domain. Acknowledging that precedent existed on both sides, Justice Stevens found that past cases "defined [the] concept [of eminent domain] broadly, reflecting a longstanding poli-

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tion, and the Faux Conservatism of J. Harvie Wilkinson, III, J. L. & POL. (forthcoming 2011); *see also* Richmond Medical Center for Women v. Herring, 570 F.3d 165, 183 (2008) (Wilkinson, J., concurring) (Justice Wilkinson reveals his own political inclinations, declaring that "[W]e-a civilized people-are retreating to the haven of our Constitution to justify dismembering a partly born child and crushing its skull. Surely centuries hence, people will look back on this gruesome practice done in the name of fundamental law by a society of high achievement. And they will shudder.").

[143] Lawrence v. Texas, 539 U.S. 558 (2003).

[144] *Id.* at 605 (Thomas, J., dissenting) (quoting Griswold. v. Connecticut, 381 U.S. 479, 527 (1965)).

[145] *Id.* at 605-606.

[146] *Id.*

[147] *Id.* at 605-606 (alteration in original) (citations omitted) (quoting Griswold, 381 U.S. at 530).

[148] Kelo v. City of New London, 545 U.S. 469 (2005).

cy of deference to the legislative judgments in [the] field."[149] Justice Stevens followed Justice O'Connor's approach in *Hawaii Housing Authority v. Midkiff*, where she declared that "[the Supreme Court's] cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not be carried out in the federal courts."[150]

In subsequent speeches, Justice Stevens decried such use of eminent domain as constitutionally valid but politically unwise.[151] Although personally opposed to New London's policies on takings, Justice Stevens highlighted *Kelo* as requiring a legal result "entirely divorced from [his] judgment concerning the wisdom of the program," embracing precedent over judicial fiat.[152]

VII. No Way Forward?

Perhaps unsurprisingly, Justices Thomas and Stevens found themselves diametrically opposed in both *Lawrence* and *Kelo*. Although their disagreements may reflect their dueling jurisprudences, they also reveal the potential tension existing between textualist and precedent-based accounts of judicial restraint. Any consistent measure of reasonable doubt thus demands reconciliation between these two poles.

Although a rigorous and entirely comprehensive theory of restraint lies outside this article's scope, its rough outlines seem possible to trace. Perhaps most obviously, any piece of legislation clearly refuted or contradicted by the text of the Constitution should always be held void.[153] If such a clear interpretation is impossible (or exceedingly difficult) to determine, the Court's own precedents should hold sway. Weighing these dueling precedents may be difficult, but such weight is surely not impossible to gauge: If a reasonable amount of past decisions support a measure, that measure should clearly stand. Only when the vast majority of precedent clearly disfavors the legislation should judges consider striking it down.

If the precedential support for a piece of legislation is still ambiguous, the Court should either deny certiorari or unequivocally uphold the legislation on review. Ambiguity is, as always, a matter of interpretation; however, resolving ambiguity is where a judge's interpretive skills lie, not in applying his "proven"

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[149] *Id.* at 480.

[150] Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 243 (1984).

[151] *See* Orin Kerr, *Guess Who Calls Outcomes in Kelo and Raich "Unwise"?*, The Volokh Conspiracy (August 25, 2005, 11:05 AM), *available at*: http://volokh.com/posts/1124982318.shtml.

[152] *See* Eric Rutkow, *Kelo v. City of New London*, 30 Harv. Envtl. L. Rev. 261, 270 n.64 (2006) (quoting Linda Greenhouse, *Supreme Court Memo: Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. Times, Aug. 25, 2005, at A1).

[153] Such as laws seeking to disallow citizenship to children born in the United States to immigrant parents.

model of constitutional interpretation to a vague or ambiguous text.[154] Such jurisprudence will undoubtedly lessen the power of judicial review but certainly will not eliminate it altogether, as the more reactionary opponents of restraint argue.[155]

As noted previously, a second methodological criticism of judicial restraint is that even its most passionate advocates fail to practice it.[156] According to these critics, judicial restraint is largely a facade, perpetuated to cover justices' own conservative instincts or more pragmatic inclinations.[157] Such critiques hold some water: Holmes[158] and Hand[159] were early advocates of substantially expanding free speech protections, Brandeis discovered a "right to privacy" where none previously existed,[160] Harlan expanded the boundaries of substantive due process,[161] and Wilkinson made strikingly moral claims when considering issues such as abortion.[162] Many contemporary proponents of judicial restraint also seem to use restraint as a smokescreen for more conservative activism.[163]

Ultimately, whether judicial restraint is possible in practice is an empirical question, recently approached in Stefanie A. Lindquist and Frank B. Cross's *Measuring Judicial Activism*[164] and Corey Yung's upcoming article regarding judicial activism.[165] The former study identified five degrees of activism and restraint based around judicial review of (1) federal statutes' constitutionality, (2) state and local statutes' constitutionality, (3) the constitutionality of federal

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[154] *See* Posner, *supra* note 8, at 28.

[155] *See* Gabin, *supra* note 11, at 962.

[156] *Supra* Part III.

[157] *See* Posner, *supra* note 8, at 35.

[158] *See* KELLOGG, *supra* note 18, at 155.

[159] *See, e.g.*, HAND, *supra* note 17, at 60-73.

[160] *See, e.g.*, Warren & Brandeis, *supra* note 43.

[161] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[162] *See* Richmond Center for Women v. Herring, 527 F.3d 128, 33 (2008) ("The fact is that we—civilized people—are retreating to the haven of our Constitution to justify dismembering a partly born child and crushing its skull. Surely centuries hence, people will look back on this gruesome practice done in the name of fundamental law by a society of high achievement. And they will shudder.").

[163] *See generally* Richard Garnett, *Citizens United and 'Conservative Judicial Activism'*, NAT'L REV. ONLINE (January 21, 2010, 12:14 PM), http://www.nationalreview.com/bench-memos/49335/i-citizens-united-i-and-conservative-judicial-activism/richard-garnett; *and* Robert F. Nagel, *Conservative Judicial Activism? Inverting a Constitutional Rightto "Medical Self-Defense"*, 12 THE WEEKLY STANDARD No. 20 (February 5, 2007), *http://www.weeklystandard.com/Content/Public/Articles/000/000/013/224mekzh.asp.*

[164] STEFANIE L. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 29 (2009).

[165] Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1 (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434742.

executive branch officials and federal agencies, (4) attitudes toward justiciability, and (5) overruling precedent.[166] These criteria were then applied to all justices from 1953 to 2004, covering a total of twenty-two judges.[167] While the authors found no "perfectly" restrained justice, some justices were clearly more restrained than others, with Justice Felix Frankfurter topping the list.[168]

The Yung study focuses exclusively on the circuit courts and is even more telling.[169] By testing for each judge's standard of review, or the degree of deference shown to lower courts and executive agencies, Yung was able to measure judges' willingness to adhere to precedent and show deference to other branches of government.[170] The author found a great deal of variation among the 142 federal judges he measured, and successfully isolated a handful of judges who clearly adhered to the principles of judicial restraint.[171] Yung identifies J. Harvie Wilkinson, III as the most restrained by a significant margin,[172] again attesting to the possibility of a genuinely restraint-oriented jurisprudence.

Of course, restraint, like any principle, is ultimately an ideal rather than a consistent reality. Continued lip service by judges pretending to adhere to restraint may harm its practice, but hardly discredits the theory itself. As Wallace Mendelson eloquently summarized: "The point is not that anyone does this perfectly, but rather that some try and indeed, as in all phases of life, some are far more capable of objectivity and detachment than others."[173]

VIII. CONCLUSION

Since this paper primarily focuses on methodological critiques of judicial restraint, it seems wise to end with some foundational reflections. Perhaps most obvious is the *Brown* dilemma:[174] What are the advocates of restraint to do when a state law that is not simply unwise but also morally heinous passes the reasonable doubt test?

There seem two plausible responses. According to Adrian Vermeule, while judicial restraint will undoubtedly yield a number of politically problematic outcomes, it remains justified from a Rule-consequentialist standpoint.[175] Focusing on *Brown* alone paints a morally incomplete picture, as deference to judicial restraint would also never have "declared a constitutional right to own

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[166] *See* LINDQUIST & CROSS, *supra* note 164, at 29.

[167] *Id.* at 45 (Judges who served particularly short terms were omitted).

[168] *Id.* (Justice Brandeis's recorded activism was considerably higher, again testifying to his greater flexibility in following principles of restraint).

[169] Yung, *supra* note 165, at 53.

[170] *Id.* at 21.

[171] *Id.* at 53.

[172] *Id.* at 56.

[173] *See* Mendelson, *supra* note 5, at 84.

[174] *See* Brown, 347 U.S. at 483.

[175] *See* VERMEULE, *supra* note 27, at 38.

slaves (*Dred Scott v. Sanford*), invalidated a generation's worth of legislation against child labor (*Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.*), or invalidated congressional attempts to provide legal redress for gender motivated violence."[176] The correct question is "not whether *Brown* was right or wrong, taken in isolation," but "whether a jurisprudential record containing neither *Brown* nor these and other abominable decisions" would be better than one containing them all.[177] Vermeule's own position, based on judges' inherently bounded rationality and the structural burdens of legislative uncertainty, is unequivocally in the affirmative.[178]

Even Vermeule recognizes, that gathering empirical evidence for such a counterfactualist position is impossible,[179] and such a priori faith (no matter how well articulated) is unlikely to satisfy judicial restraint's most fervent skeptics. Further, acting on higher principles of judicial restraint would have done precious little to actually end segregation. Holding one's nose and refusing to repeal pernicious legislation might be philosophically satisfying, but still seems morally problematic.

Perhaps a better solution lies in embracing a form of "faint-hearted restraint," wherein the necessity raised by particularly egregious scenarios temporarily overrules a purely restrained jurisprudence.[180] Conceivably, judges should be honest when writing such opinions, making it clear that the individual decision is a rare case of ideological desperation. Of course, such "faint-hearted restraint" potentially opens the floodgates to strike down everything from capital punishment to holding gay marriage constitutional.[181] To prevent this, such drastic decisions should be kept extremely rare, essentially on the same level of moral imperativeness as ending segregation.[182] The Affordable Care Act comes to mind here, being a provision that may be politically problematic but is not clearly unconstitutional, with little precedent for its proponents or detractors to invoke.[183] I conclude with an old story about two of restraint's godfa-

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[176] *See* VERMEULE, *supra* note 27, at 281.

[177] VERMEULE, *supra* note 27, at 281.

[178] VERMEULE, *supra* note 27, at 5.

[179] VERMEULE, *supra* note 27, at 162-63.

[180] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). Here I echo Justice Scalia's embrace of "faint hearted originalism," or the acknowledgment that he would reject an originalist understanding for certain severe punishments, such as floggings or the rack.

[181] *Id.*

[182] Personally, I cannot think of any social issues currently meeting this level of severity or ideological necessity.

[183] *See* John Schwartz, *Health Law Survives Test in Court of Appeals,* THE NEW YORK TIMES (November 8, 2011) (detailing the split among appellate courts (and even conservative judges) regarding the law's constitutionality).

thers, Oliver Wendell Holmes and Learned Hand.[184] As the tale goes: "Learned Hand was visiting Washington and went to lunch with Justice Holmes. They walked back to the Capitol. . . . As they parted, Hand called, "Sir, do justice." The old man turned on him fiercely, eyebrows bristling: "Justice? What's that? That's none of my business. Law is my business."[185]

Few treat the business of law more sacredly than the practitioners of judicial restraint. What relation judicial restraint bears to justice remains another matter entirely.

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[184] *See* Michael Herz, *"Do Justice!": Variations Of A Thrice Told-Tale*, 82 VA. L. REV. 111 (1996).

[185] *Id.* at 111-112 (according to one of its many variations).