

The Transformation of Judicial Self-Restraint

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In his Jorde Symposium Essay, Judge Richard Posner identifies three forms of judicial restraint. He then argues that the third type, Thayerian judicial restraint characterized by a strong reluctance to declare legislative or executive action unconstitutional unless the unconstitutionality is so clear that it is not open to rational question, has disappeared because constitutional theory renders judges both certain that constitutional questions have right answers and confident that they are able to discern them. In this Essay, I respond by suggesting that Thayerian restraint has not disappeared. Rather, it has been transformed from a type of individualized self-restraint in which a lone jurist, reasoning from first principles, decides to forbear into a more systemic rule of constitutional adjudication that permeates the two most prevalent forms of contemporary constitutional litigation: habeas corpus petitions and damages actions. In habeas cases, federal courts will forbear from overturning state court convictions simply because constitutional errors occurred; they will intervene only when the state courts were unreasonably wrong. In a similar vein, in § 1983 and Bivens actions, qualified immunity doctrine means that federal courts will conclude that an official violated the Constitution, but will then grant judgment to the official anyway because, at the time of the underlying events, unconstitutionality was open to debate.

This Essay then turns to a possible tension between Thayerian restraint and another type of judicial restraint Judge Posner identifies in his Essay. Thayerian restraint tells judges to uphold a law if they can discern any constitutional basis for its enactment. Type (2) restraint, by contrast, directs judges to defer to the political branches. I show that the current marriage equality litigation

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potentially implicates both types of restraint: can, or should, a judge rely on a reason the government has affirmatively repudiated as the basis for upholding a statute?

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INTRODUCTION

I like restraint . . . if it doesn't go too far.

—Mae West

In Judge Posner's characteristically thoughtful and provocative Essay,¹ there's an echo of two ideas that appear in Judge Learned Hand's famous 1944 speech, "The Spirit of Liberty."² First, Judge Hand questions "whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts,"³ suggesting that each offers "false hopes."⁴ Liberty, he explains, "lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."⁵

As Judge Posner observes, the Thayerian argument for judicial restraint rested in significant part on the parallel fear that too much reliance on courts to enforce the Constitution might, in Thayer's words, "dwarf the political capacity of the people, and . . . deaden its sense of moral responsibility."⁶ That fear can no longer justify judicial restraint, if it ever could. Ultimately, Judge Posner concludes that changes in the nation's "political culture"⁷ long ago pushed constitutional considerations into the background and that there is scant hope of reviving constitutional conversation. Whatever might have been true in 1789 or 1893, today the political branches often relegate or delegate constitutional

1. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

2. Learned Hand, *The Spirit of Liberty* (May 21, 1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189 (Irving Dilliard ed., 1952).

3. *Id.* at 189–90.

4. *Id.* at 190.

5. *Id.*

6. Posner, *supra* note 1, at 525 (quoting James Bradley Thayer, *John Marshall*, in *JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL* 3, 86 (1967)).

7. *Id.* at 555.

analysis to the judiciary.⁸ For example, in his wonderful article, *Proposition 187 and the Ghost of James Bradley Thayer*,⁹ David Sklansky noticed something that has become clearer over the last dozen years: when it comes to immigration-related legislation, politicians are prepared to support bills they know, or strongly suspect, to be unconstitutional, leaving questions of constitutionality entirely to the courts.¹⁰ So too with post-9/11 legislation. For an especially depressing recent example of abdication of the oath, consider Senator Arlen Specter. He voted in favor of the Military Commissions Act of 2006,¹¹ which sharply limited the right of Guantanamo detainees to challenge their continued confinement, and then he turned around to file an amicus brief urging the Supreme Court to strike down the Act as “anathema” to fundamental constitutional liberty interests.¹² Even officials who have strong views on substantive constitutional issues may view them as the special province of the courts. Consider here Governor Schwarzenegger’s answer to the complaint in the California marriage case. It took no position on the merits of the plaintiffs’ complaint, stating instead that the complaint “presents important constitutional questions that require and warrant judicial determination” because “[i]n a constitutional democracy, it is the role of the courts to determine and resolve such questions.”¹³

The second point Judge Hand made that plays out in Judge Posner’s Essay is his definition of the spirit of liberty as “the spirit which is not too sure it is

8. In his Essay on Judge Posner’s Essay, my colleague Larry Kramer argues that congressional

staff and committees devote hundreds of hours to understanding, debating, and resolving constitutional issues—spending much more time, with more and better information than the Supreme Court, which dedicates an hour to oral argument and much less than this to conferencing, with little actual deliberation among the Justices and most of the work done by a single clerk with no experience and only partisan briefs for assistance.

Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 629 (2012). In my admittedly limited experience, much of that time is occupied by what we might call “second-order” considerations: it is designed not to resolve constitutional issues in the first instance but to set the stage for defending legislation against constitutional attack. It often revolves around parsing Supreme Court decisions to figure out which arguments and what evidence would be most persuasive to the Court. Cf. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 115–23 (2011) (pointing out that the Supreme Court’s recent decisions create pressures for Congress to create a quasi-judicial record to justify its exercise of commerce and Section 5 powers).

9. David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 CHICANO-LATINO L. REV. 24 (1995).

10. See *id.* at 35–40.

11. The Military Commissions Act of 2006, Pub. Law 109-366, 120 Stat. 2600.

12. Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 14, *Boumediene v. Bush*, 553 U.S. 723 (2008); see Linda Greenhouse, *Senator Specter and the Law*, N.Y. TIMES OPINIONATOR (May 10, 2010, 8:43 PM), <http://opinionator.blogs.nytimes.com/2010/05/20/senator-specter-and-the-law>.

13. The Administration’s Answer to Complaint for Declaratory, Injunctive, or Other Relief at 2, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010) (No. 3:09-cv-02292-VRW), 2009 WL 1748385.

right.”¹⁴ Judge Posner denominates the kind of judicial self-restraint for which James Bradley Thayer argued—a strong “reluctan[ce] to declare legislative or executive action unconstitutional” unless the unconstitutionality is “so clear that it is not open to rational question”¹⁵—“type (3) judicial restraint.”¹⁶ Judge Posner’s central claim is that type (3) restraint cannot survive in a world like ours where constitutional theory renders judges both certain that constitutional questions have right answers and confident that they are able to discern them. Indeed, Judge Posner suggests that Thayerism might never have “really lived (except in Thayer’s mind),”¹⁷ in that its proponents simply employed it to serve their substantive preferences.

I’m not as ready as Judge Posner to declare the death of type (3) restraint. Judge Posner is right that few judges today are prepared to uphold a statute they think is unconstitutional on the grounds that other reasonable people would disagree; even fewer would expressly say so.¹⁸ But although type (3) restraint may not operate as a stand-alone “rule of administration,”¹⁹ it has not disappeared entirely. A variant of type (3) restraint—requiring federal judges to render judgment for the defendant even in cases where they conclude that a plaintiff’s constitutional rights have been violated—operates in both habeas litigation and constitutional tort actions, the two most prevalent forms of contemporary constitutional adjudication. And type (3) restraint plays a role in equal protection litigation as well, for rationality review shares a number of salient features with Thayer’s standard. To be sure, none of these situations involves *individualized* self-restraint in which a lone jurist, reasoning from first principles, decides to forbear. But since Thayer’s time, we have moved from a world of artisanal judicial review to a more industrialized process in which constitutional determinations are embedded in contexts such as collateral attacks on criminal sentences and damages actions against state and local

14. Hand, *supra* note 2, at 190.

15. Posner, *supra* note 1, at 522 (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)).

16. See Posner, *supra* note 1 at 521 (defining and naming this form of judicial restraint).

17. Posner, *supra* note 1, at 533.

18. What one does occasionally see, of course, is judges condemning a law and then voting to uphold it. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (stating, with respect to Texas’s homosexual sodomy statute that “the law before the Court today ‘is . . . uncommonly silly,’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)) and that if he were a legislator he “would vote to repeal it” because the statute “does not appear to be a worthy way to expend valuable law enforcement resources,” but then stating that “as a member of this Court [he was] not empowered to help petitioners and others similarly situated” because he could find no constitutional provision that the law violated); *Furman v. Georgia*, 408 U.S. 238, 405, 410 (1972) (Blackmun, J., dissenting) (stating that although he “yield[ed] to no one in the depth of [his] distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds,” and thought it “serves no useful purpose that can be demonstrated,” arguments against the death penalty “make[] sense only in a legislative and executive way and not as a judicial expedient”).

19. Thayer, *supra* note 15, at 144.

officials. I have suggested elsewhere that “judicial independence” might perhaps be better understood “as a systemic attribute rather than simply a character trait of individual judges.”²⁰ The same may be true of “judicial restraint.” Judge Posner’s primary focus on Supreme Court Justices (with a short detour to discuss Judges Clifford Wallace and J. Harvie Wilkinson III²¹) obscures the fact that most judicial review is conducted by lower court judges to whom these forms of *institutionalized* self-restraint may be more significant.

I.

THE INSTITUTIONALIZATION OF JUDICIAL RESTRAINT IN HABEAS AND CONSTITUTIONAL TORT CASES

In 1996, as part of the Antiterrorism and Effective Death Penalty Act (AEDPA),²² Congress codified the standard for granting habeas relief as follows: when an individual convicted in state court challenges a conviction on the grounds that it was obtained in violation of the Constitution, a federal court can grant relief only if the state court’s treatment of the constitutional claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”²³

In *Williams v. Taylor*,²⁴ Justice O’Connor’s opinion for the Court explained that the language Congress chose rested on its conclusion that “an unreasonable application of federal law is different from an incorrect application of federal law.”²⁵ Thus, she wrote, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”²⁶ In short, in AEDPA cases, it’s not enough for the state court to be wrong on a question of constitutional law; it has to be unreasonably wrong. While *Williams* rejected the Fourth Circuit’s formulation—that habeas

20. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 548 (1999).

21. See Posner, *supra* note 1, at 534–35.

22. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified in scattered sections of the U.S. Code).

23. 28 U.S.C. § 2254(d)(1) (2006). To be more precise, there is also a category of cases where habeas relief can be granted because a state court’s decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). And there are additional doctrines, such as exhaustion and procedural default, that also come into play. Here, I focus simply on the most judicial review-like aspects of habeas litigation.

24. 529 U.S. 362 (2000).

25. *Id.* at 410. Last Term, the Supreme Court reiterated that principle in *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410–11 (2011), and *Harrington v. Richter*, 131 S. Ct. 770, 785–86 (2011). Federal habeas relief is unavailable as long as “fairminded jurists could disagree” about whether the state processes complied with constitutional constraints. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

26. *Williams*, 529 U.S. at 411.

relief was appropriate only if “reasonable jurists would all agree” that the state court got it wrong²⁷—its standard comes fairly close to imposing type (3) judicial restraint on federal habeas courts. The *Williams* standard presupposes that there will be cases where a federal court will determine that there has been a constitutional violation—or would have done so had the case been on direct appeal²⁸—but nonetheless denies relief because the state court’s decision was not unreasonable.²⁹

A similar restraint operates when victims of unconstitutional government conduct seek damages under § 1983³⁰ or *Bivens*.³¹ Qualified immunity doctrine provides that government officers will not be held liable in damages unless the unconstitutionality of their conduct was clearly established at the time they acted.³² The upshot of qualified immunity doctrine is that a federal court will conclude that an official violated the Constitution, but will then hold that the official is entitled to judgment anyway—essentially because, at the time of the underlying events, unconstitutionality was *not* “so clear that it is not open to rational question.”³³ Indeed, for close to a decade, the Supreme Court “mandated a two-step sequence for resolving government officials’ qualified immunity claims”³⁴ that guaranteed examples of this type of restraint. Courts were required first to determine whether the facts the plaintiff alleged rose to the level of a constitutional violation before determining whether the violation at issue was clearly established at the time.³⁵

27. See *id.* at 409–11 (quoting and then rejecting the Fourth Circuit’s articulation of this standard in *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

28. See *Richter*, 131 S. Ct. at 785.

29. For a particularly striking example of this practice, consider *Greene v. Fisher*, 132 S. Ct. 38 (2011). At Greene’s trial, the State introduced a redacted confession from a co-defendant who did not testify. After the state intermediate appellate court affirmed Greene’s conviction and while his petition for review to the state supreme court was pending, the U.S. Supreme Court held, in *Gray v. Maryland*, 523 U.S. 185 (1998), that the kind of redaction that occurred in Greene’s case violated the Sixth Amendment. The state supreme court subsequently denied review. Had Greene sought review from the U.S. Supreme Court, the petition for a writ of certiorari “would almost certainly have produced a remand in light of the intervening *Gray* decision.” *Greene*, 132 S. Ct. at 45. But the Court unanimously held that habeas relief was nonetheless unavailable because, at the time the state intermediate court ruled, the unreasonableness of the practice had not yet been established. (I note, in the interests of full disclosure, that I served as co-counsel in the Supreme Court for Mr. Greene.)

30. 42 U.S.C. § 1983 (2006) provides, in pertinent part, for liability “in an action at law” for “the deprivation of any rights, privileges, or immunities secured by the Constitution” committed by a person acting under color of state law.

31. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court created an implied right of action for plaintiffs whose constitutional rights were violated by officials acting under color of federal law that parallels in important respects the express cause of action provided in § 1983 for violations by state and local officials.

32. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials “generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

33. Posner, *supra* note 1, at 522 (quoting Thayer, *supra* note 15, at 144).

34. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

35. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Taken together, habeas cases, § 1983 cases, and *Bivens* actions represent the largest categories of constitutional litigation in U.S. courts.³⁶ Each of these categories is governed by a rule imposing, as an institutional matter, the form of type (3) restraint for which Thayer argued—a strong presumption against courts holding the government accountable for constitutional violations save where the unconstitutionality is clearly established. Judicial restraint has not so much disappeared, as it has been institutionalized.

II.

RESTRAINT, RATIONALITY, AND RESPECT IN EQUAL PROTECTION REVIEW

A version of type (3) restraint also survives in equal protection cases involving challenges to laws that involve neither a suspect classification nor a fundamental right. Indeed, there's a similarity in nomenclature between the Thayerian principle that laws be declared unconstitutional only where their infirmity is "so clear that it is not open to rational question"³⁷ and what has come to be called rationality review. It has long been the law in cases where rationality review applies that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."³⁸ Because these states of facts need have nothing to do with what the legislature or executive thought at the time of enactment³⁹—or, indeed, any great empirical support⁴⁰—rationality review resembles the practice of type (3) restraint that Judge Posner describes in the decisions of Holmes, Brandeis, and Frankfurter. Judges uphold laws on the bases of empirical hypotheses they advance for themselves. There will likely be cases where the actual motivation for the government act is either impermissible or unconstitutionally arbitrary,⁴¹ but the judge can devise a legitimate reason related, albeit tenuously, to the challenged distinction. In such cases, the judge engages in a form of type (3) restraint.

36. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, at 46 tbl.C-2 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C02Mar10.pdf>.

37. Posner, *supra* note 1, at 522 (quoting Thayer, *supra* note 15, at 144).

38. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

39. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (stating that where a court can find "plausible reasons" for legislative action, "[i]t is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision'" (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960))).

40. I discuss this point in more depth in a recent article, Pamela S. Karlan, *Old Reasons, New Reasons, No Reasons*, 27 GA. ST. U. L. REV. 873 (2011), from which significant parts of the following discussion are taken.

41. Such appears to have been the case with respect to the statute at issue in *Fritz*. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69–70 (1985).

Marriage equality litigation—an issue that lies at the heart of current debates over judicial activism and judicial self-restraint—provides several illustrations of this point.⁴²

In *Hernandez v. Robles*,⁴³ the New York Court of Appeals upheld the state's restriction of marriage to opposite-sex couples. The restriction was a longstanding one.⁴⁴ At the time the statute was enacted, homosexual activity was itself a crime.⁴⁵ If the court had tried to determine the most likely *actual* reason for New York's restriction, it would probably have concluded that access to marriage for same-sex couples had never crossed the legislators' minds and, if it had, they would have rejected it on the grounds that homosexual activity was immoral and should not entitle its practitioners to the privileges attached to marriage. In short, the kind of bias against gay people that the United States Supreme Court had condemned in *Romer v. Evans*⁴⁶ and *Lawrence v. Texas*⁴⁷ formed an indispensable part of the actual rationale for New York's law. If the New York court had framed the question as whether anti-gay bias constituted a rational basis for restricting marriage to opposite-sex couples, the answer would have been “no,” and the law would have been struck down.

But instead of asking the law's actual purpose, the New York Court of Appeals sustained the law on the basis of a hypothetical rationale that “comes quite close to turning the conventional justification on its head.”⁴⁸ The court now hypothesized that the difference between straight and gay couples that supported the challenged statute was that *heterosexual* sexual activity involved “relationships [that are] all too often casual or temporary” ending in unplanned pregnancies,⁴⁹ while homosexuals “do not become parents as a result of accident or impulse,”⁵⁰ and thus do not need state-created institutions and incentives to take care of their children.

[B]y contrasting the feckless, reckless, accident-prone straight fornicator with the gay or lesbian couple that painstakingly achieves parenthood through deliberative means, the New York court assured

42. Judge Posner's claim that “[t]he ‘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,” Posner, *supra* note 1, at 534, does not take account of the large number of liberty claims that are also subject to rationality review.

43. 855 N.E.2d 1 (N.Y. 2006).

44. The articles of the state's domestic relations law that govern marriage were adopted in 1909. *Id.* at 6.

45. And it remained so until the New York Court of Appeals' decision in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), holding that such laws violated the due process and privacy principles of the state constitution.

46. 517 U.S. 620 (1995).

47. 539 U.S. 558 (2003).

48. Karlan, *supra* note 40, at 882.

49. *Hernandez*, 855 N.E.2d at 7.

50. *Id.*

that its justification involves judicial invention rather than discernment of actual purpose: It defies belief to assume that New York's longstanding marriage restriction in fact excluded gay people because [the legislature believed that] they could be trusted to take care of their children.⁵¹

As with Holmes's dissent in *Lochner*,⁵² the New York court merely "*assert[ed]* . . . the reasonableness of [the] challenged legislation."⁵³

In a different vein, because rationality review involves judicial invention, albeit in the service of upholding challenged acts of the political branches, rationality review can create a tension between type (3) judicial restraint and what Judge Posner calls type (2) judicial restraint—that is, deference to the decisions of other officials.⁵⁴ The hypothetical reasons advanced in favor of upholding a challenged statute might often be viewed as a sort of best-lights reading of the statute: What rationales might justify the legislative choice? But saying that rationality review authorizes a court to imagine justifications for a law does not answer a question that has arisen in a striking way in two other recent marriage equality cases: Can a court rely on reasons that the government affirmatively repudiates?

When Congress enacted the provision in the Defense of Marriage Act that defines marriage for purposes of federal law to mean "only a legal union between one man and one woman,"⁵⁵ it identified four interests that the government sought to advance: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources."⁵⁶ In the course of the litigation, however, the federal government's attorneys initially "disavowed Congress's stated justifications for the statute."⁵⁷ They instead defended it on the basis of a quite different rationale—"preservation of the 'status quo,' pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage."⁵⁸ And the government later went further still. In February 2011, Attorney General Eric Holder announced that the government would not itself continue to defend the federal refusal to recognize marriages that were

51. Karlan, *supra* note 40, at 882–83.

52. *Lochner v. New York*, 198 U.S. 45 (1905).

53. Posner, *supra* note 1, at 529 (emphasis added). It is hard to know with any certainty what role the sheer disingenuousness of the New York court's reasoning played in the state legislature's subsequent decision to amend the state's law to recognize same-sex marriage.

54. Judge Posner himself focuses more on the potential tension between "type (1) judicial restraint"—what he describes as "the law made me do it"—and type (3) restraint. *See* Posner, *supra* note 1, at 521.

55. 1 U.S.C. § 7 (2006).

56. *Gill v. Office of Pers. Mgmt.*, 669 F. Supp. 2d 375, 388 (D. Mass. 2010) (citing H.R. REP. NO. 104-664, at 12–18 (1996)).

57. *Id.*

58. *Id.* at 390.

valid under state law.⁵⁹ The Attorney General took the position that heightened scrutiny applied to the plaintiffs' equal protection claim.⁶⁰ Under that standard, the United States "cannot defend [DOMA's definition of marriage] by advancing hypothetical rationales, independent of the legislative record," but could defend the statute "only by invoking Congress' actual justifications for the law."⁶¹ The Attorney General described Congress's actual reasons as "reflecting moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against."⁶²

Suppose, however, that the courts were ultimately to conclude that rationality review applies to DOMA. At this point, they would face a type (2)–type (3) tension: type (3) restraint would direct them to uphold the law if there is any constitutional basis for its enactment, while type (2) restraint would direct them to defer to the views of the political branches—political branches that may themselves be divided.

An equally complicated version of the issue has arisen in the context of *Perry v. Schwarzenegger*, the federal constitutional challenge to California Proposition 8, a recent initiative constitutionalizing the restriction of marriage to opposite-sex couples. In that case, the state defendants declined to appeal a district court ruling that the restriction violates the Fourteenth Amendment.⁶³ Given that the state's legal representatives have disclaimed reliance on rationales such as the welfare-of-the-child justification or an interest in the protection of traditional marriage, does a judge serve or undermine Thayerian restraint by upholding the law on a basis the state expressly disclaims? Does it undermine rather than respect a state's autonomy for a federal court to foist a rationale on a resisting state?

III.

CONFORMING CONSTITUTIONAL RIGHTS TO JUDICIAL REMEDIES

What has changed with respect to judicial restraint between Thayer's time, the era Judge Posner describes, and today may not so much be the actual amount of restraint. Rather, it may be the source of that restraint, and judges'

59. He made this announcement in a letter sent to Speaker of the House John Boehner, pursuant to 28 U.S.C. § 530D (2006), which requires that the Attorney General notify Congress when he decides "to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial . . . proceeding, the constitutionality of any provision of any Federal statute." § 530D; see Letter from Eric H. Holder, Jr., Att'y Gen., to Rep. John A. Boehner, Speaker of the House, Letter to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

60. Because the plaintiffs were challenging a federal law, they were relying on the equal protection component of the Fifth Amendment's Due Process Clause, rather than the Equal Protection Clause of the Fourteenth Amendment itself.

61. Holder, *supra* note 59.

62. *Id.*

63. See *Perry v. Schwarzenegger*, 628 F.3d 1191, 1993 (9th Cir. 2011).

own comfort in explicitly acknowledging the kind of right/remedy gap that judicial restraint can produce. In light of AEDPA's standard, for example, one might expect to see an array of decisions in which federal courts find violations but conclude that the violations were not unreasonable. Instead, what one finds is that federal habeas courts tend to avoid that possibility. Sometimes, they do so by finding that even if there was a constitutional violation, the law was not clear enough at the time to warrant habeas relief.⁶⁴ Other times, they do so by going directly to the reasonableness inquiry without first finding a constitutional violation.⁶⁵ Still other times, they strain to find that the state's decisions were consistent with constitutional principles. Or they strain in the opposite direction to find the state courts' decisions unreasonable as well as wrong.⁶⁶

Why do courts avoid admitting their restraint, particularly when judicial restraint seems to be such an admirable quality? Nancy Leong has suggested, in the context of qualified immunity decisions, that cognitive dissonance plays an important role.⁶⁷ Justice Holmes may have been prepared to stand by and invoke the political question doctrine as an explanation for why courts could not intervene to prevent even crystal clear constitutional violations. In *Giles v. Harris*,⁶⁸ for example, faced with Alabama's blatant attempt to disenfranchise black voters, Justice Holmes wrote that in light of the plaintiffs' allegation that "the great mass of the white population intends to keep the blacks from voting" there was no point to the court getting involved:

Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. . . . [R]elief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.⁶⁹

64. For a trenchant discussion of the role this retroactivity doctrine plays, see Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1690–98 (2007); see also Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006).

65. In the context of § 1983 litigation, the Supreme Court recently resuscitated the practice of permitting courts faced with a constitutional tort claim to decide whether clearly established law forbade the defendant's conduct without first deciding whether that conduct in fact violated the Constitution. See *Pearson v. Callahan*, 555 U.S. 223 (2009).

66. Prompting the Supreme Court to reverse them. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

67. See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 700–08 (2009). For a response to Leong's argument, see John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115.

68. 189 U.S. 475, 488 (1903).

69. *Id.* at 488. For a wonderful discussion of *Giles*'s place in American constitutional law, how Holmes's opinion "stunningly shifts from tortured legalisms to brutal political 'realisms,'" and "the human tendency, from which judges are hardly immune, to find 'reality' so refractory as to provide an

Today, by contrast, courts have few doubts that their injunctions will be followed, largely as a result of the structural reform litigation that followed from *Brown v. Board of Education*⁷⁰ and related cases. Think *Bush v. Gore*.⁷¹ As a result, judges, like lawyers generally, assume that for every violation of an individual right there is a remedy—and usually a judicially available remedy at that. Candid application of type (3) judicial restraint would force judges to admit—to the world and to themselves—a right-remedy gap even within justiciable claims.⁷² Judges are far more likely to conform the right to the remedies they are willing to order than to leave an overt gap. And this pressure is at least partially independent of the dynamic that Judge Posner identifies, which focuses on judges' confidence in their constitutional judgment, rather than on their desire to avoid the appearance of ineffectuality.

Put another way, a judge who was inclined toward type (3) judicial restraint might reason internally that because she was not certain about the unconstitutionality of a legislative or executive act, she should vote to uphold it. But once she has reached that conclusion, she will likely articulate her decision quite differently, by declaring that the challenged act was constitutional, rather than “not clearly unconstitutional.” Type (3) restraint thus survives underground, as a product of institutional restraining rules rather than an individual judge's internal, psychological self-restraint.

Because Thayer was writing in the 1890s, he never confronted the question of how judicial restraint should operate in the context of judicial review of direct democracy. The very purpose of the initiative process was to bypass the policy choices made by the political branches. But because the people do not provide the actual explanation for their acts, the rationale for an initiative is always subject to judicial invention.⁷³

excuse for not doing what little might be done,” see Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295, 306, 311 (2000).

70. 347 U.S. 483 (1954).

71. 531 U.S. 98 (2000) (per curiam).

Imagine how different the reaction of the Jeffersonians would have been two hundred years earlier had counterfactual litigation resulted in a Federalist Supreme Court awarding victory to John Adams (or Aaron Burr) in the disputed presidential election of 1800. . . . The idea of that Court attempting to adjudicate the results of a presidential election (and having anyone pay attention to its determination, should it dare to do so) is simply incomprehensible.

Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1762 n.237 (2001). So, too, with the disputed election of 1876, which prompted passage of an Electoral Count Act designed to “deliberately and conspicuously exclude[] the courts” from deciding presidential elections. Larry D. Kramer, *The Supreme Court 2000 Term, Foreword: We the Court*, 115 HARV. L. REV. 4, 157 (2001).

72. For discussions of the pressure for reconciling rights and remedies, see, for example, Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1015 (2010); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

73. See generally Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995) (describing the difficulties in determining the actual reasons an initiative was passed).

The California situation thus also pits different forms of judicial self-restraint against one another. On the one hand, to legitimate a challenged state constitutional provision on the basis of reasons the state itself disclaims through its elected officials seems to disrespect the state. It would resemble a form of compelled speech to associate a government with a justification that its representatives deem repugnant.⁷⁴ In a sense, forcing a rationale upon the state resembles a kind of *Faretta* violation, in which a court provides unwanted assistance to the government in the form of a rejected rationale.⁷⁵ On the other hand, to permit elected officials to undermine laws enacted by initiative seems equally disrespectful of self-government. In such situations, it may be difficult to determine which position is the restrained one—not because the term has no meaning, but because the relationship between a court’s reasons and its results is complicated. But you knew that too.

74. Cf. *Wooley v. Maynard*, 430 U.S. 705 (1975) (holding that it violated the First Amendment to force a motorist to display the motto “Live Free or Die” on his license plate when he disagreed with the premise).

75. *Faretta v. California*, 422 U.S. 806, 821 (1975) (a criminal defendant’s Sixth Amendment rights are violated when denied the right to self-representation because “[a]n unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction”).

