THE LOST HISTORY OF JUDICIAL RESTRAINT

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For over 125 years, jurists and scholars who have championed judicial restraint have looked back to James Bradley Thayer's 1893 Harvard Law Review *article,* The Origin and Scope of the American Doctrine of Constitutional Law*, as the seminal authority for the rule that courts should presume the constitutionality of a challenged law and only invalidate it if its unconstitutionality is "clear" and "beyond a reasonable doubt." But Thayer presented those three rules (presumption of constitutionality, clear error rule, and reasonable doubt standard) as rooted in historical legal practice in America. And yet none of his twentieth or twenty-first century acolytes systematically checked to determine the accuracy of his historical account or discover whether those rules really did become widely accepted and deeply rooted in American legal practice, mostly relying instead upon Thayer's say-so. Meanwhile, some prominent historians have disputed his account of the history, and many leading originalists have disputed different elements of Thayer's thesis, some disagreeing with the presumption of constitutionality, others the clear error rule, and still others the reasonable doubt standard.*

My thesis is that over the course of America's first century, there emerged a much broader and richer historical consensus around judicial restraint than the advocates or critics of restraint have ever acknowledged. Indeed, I aim to

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show that by Thayer's time, the presumption of constitutionality, clear error rule, and reasonable doubt standard had become a widely accepted (if not always practiced), liquidated understanding of the meaning of the judicial power. From its earliest origins in the transatlantic constitution, and through piecemeal legal practice in state and federal courts, before and after the creation of the Constitution, the "Thayerian" "rules of administration" associated with judicial restraint were eventually adopted by both the U.S. Supreme Court and all fifty state supreme courts in the country.

Through a systematic exploration of two kinds of sources—over forty nineteenth-century legal treatises, dictionaries, encyclopedias, constitutional law casebooks, and manuals of federal practice, on the one hand, and decisions of the U.S. Supreme Court and hundreds of decisions by state supreme courts from 1780 to 1900 on the other—I attempt to not only demonstrate the fact of that broad consensus in the late nineteenth century, but show how that consensus and its underlying rationale developed from the American Founding to just after the Civil War. I show that two decisions in particular—the Dred Scott *decision in 1857 and the* Civil Rights Cases *in 1883—had a strong impact upon both treatise writers and state supreme courts in the direction of greater judicial restraint, especially the acceptance of the reasonable doubt standard.*

This has implications not only for legal history but for understanding the scope of the judicial power and duty today. By attempting to recapture this mostly lost history of judicial restraint, I argue that during America's first century, through the "discussions" in legal treatises and the "adjudications" in all the country's apex courts, all pointing overwhelmingly and uniformly in the direction of restraint, the Constitution's standard of review, though "more or less obscure and equivocal" in 1787, appears to have been fixed or "liquidated" by the end of the nineteenth century.

I. INTRODUCTION: AFTER JAMES BRADLEY THAYER—CYCLES OF JUDICIAL RESTRAINT

After three of the most recent and momentous terms in Supreme Court history, in which the Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey* in the 2021 Term, ruled that affirmative action in the context of admissions in higher education violates the Equal Protection Clause of the Constitution in the 2022 Term, and reversed *Chevron* deference in the 2023 Term, the concept of judicial restraint has taken center stage in the rival opinions of the Court and among scholars, court watchers, and the wider public.

In the *Dobbs* decision, Chief Justice Roberts wrote in his solo concurrence explaining why he did not join the Court in its opinion overruling *Roe v. Wade* and *Planned Parenthood v. Casey* that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."[1] And Justice Kagan invoked this principle in several speeches as well. Justice Kagan called it a central ingredient in what it means for a court to "act[] like a court."[2] But neither Chief Justice Roberts nor Justice Kagan anchored this aphoristic phrase in much legal or historic authority itself. Chief Justice Roberts called it "a simple yet fundamental principle of judicial restraint,"[3] but provided no citation for the rule. Justice Kagan offered a little more historic support by attributing this phrase to Judge Friendly,[4] who served on the United States Court of Appeals for the Second Circuit from 1959 to 1986, and for whom the Chief Justice himself had once clerked.[5]

In the 2022 Term, the Justices again found themselves sparring intensely over the proper role of the judiciary and the meaning of judicial restraint. In her dissent in the affirmative action case, Justice Sotomayor wrote that the Court was "not acting as a court of law" and "betray[ed] an unrestrained disregard for precedent."[6] "Today," she said, "the proclivities of individuals rule."[7] And in her dissent from *Biden v. Nebraska*, the student loan case, Justice Kagan said, "[T]he

1 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in the judgment) (emphasis omitted), *overruling* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

2 Northwestern Pritzker School of Law, *U.S. Supreme Court Justice Elena Kagan in Conversation with Dean Hari Osofsky*, YOUTUBE, at 26:49 (Sept. 16, 2022), https://youtu.be/9AWZcsp6wGc.

3 *Dobbs*, 142 S. Ct. at 2311.

4 Northwestern Pritzker School of Law, *supra* note 2, at 31:40.

5 *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 1, 109 (2012).

6 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2252, 2245 (2023) (Sotomayor, J., dissenting).

7 *Id.* at 2249 (quoting *Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor, & Kagan, JJ., dissenting)).

Court forgets its proper role. The Court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies."[8] And she argued that "[f]rom the first page to the last, today's opinion departs from the demands of judicial restraint."[9] Noting this trending focus on the subject, Chief Justice Roberts observed that "[i]t has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary."[10]

The proper role of the judiciary—and the relative importance of judicial restraint—has indeed become a central feature of intense debates today among not only the Supreme Court's sparring Justices, but legal scholars, journalists, pundits, politicians, and ordinary citizens.

In this Article, I propose to take a step back from the contemporary debates, centered as they understandably are on the most recent changes and developments at the Supreme Court, to ask the more basic question of how the concept of "judicial restraint" was first introduced into American legal thinking, and how it developed over time.

I focus here on just one discrete yet fundamental dimension of judicial restraint—the standard of review for constitutional cases. The proper standard of review for constitutional cases is as foundational a question of constitutional law as there can be. It defines what amount of evidence is required in court to convince a judge to set aside a law for contravening the higher law of the Constitution. And it is just as much "the law" as the underlying merits of any particular constitutional dispute. So, in resolving any given constitutional case, it is not enough for the court to sort out the semantic meaning of a disputed constitutional provision, or contested federal or state law, and render its judgment according to its best lights. It also has to apply—after full consideration of the facts and underlying legal claims—a certain disciplining evidentiary standard to that exercise. Applying this standard is at the heart of what makes *judicial* decisionmaking distinct from mere political judgments or philosophical debates. It is a disciplining rule that has traditionally helped "courts act like courts," and helped ensure that the political or ideological "proclivities" of judges did not rule the day.

And yet as law, indeed as fundamental an aspect of the judicial decisionmaking process as there can be, there has been relatively little systematic attention paid to its origins, scope, or development in America by legal historians.[11]

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8 Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting).

9 *Id.* at 2400.

10 *Id.* at 2375 (majority opinion).

11 For an extended and thoughtful discussion of this problem, see Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 859 (1992) (observing that "the problem of identifying

The most famous, influential, and yet often criticized attempt to understand the Constitution's standard of review was James Bradley Thayer's 1893 article *The Origin and Scope of the American Doctrine of Constitutional Law*.[12] Some scholars have called it "the most influential essay ever written on American constitutional law."[13] In that article, Thayer attempted to identify three interrelated rules bound up with the Constitution's standard of review: (1) the presumption of constitutionality, (2) the clear error rule, and (3) the reasonable doubt standard. According to these three rules, courts would presume the constitutionality of challenged laws; only set those laws aside when they clearly, plainly, or manifestly violated the Constitution; and require evidence of unconstitutionality that was beyond a reasonable doubt. In "doubtful" cases, judges were to uphold the challenged laws. One might call these the "triple helix" of judicial restraint in America. And Thayer attempted to locate this triple helix of rules in the history and practice of American federal and state courts. As he put it, "I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one."[14]

Thayer told part of that story, of course, but only part, and not systematically, and never traced it to its earliest origins. He lined up proof quotes articulating the clear error rule from approximately twelve state supreme court decisions ranging from 1787 to 1876, and added similar quotations from five U.S. Supreme Court decisions over the course of that same period, all in the space of about six pages.[15] This prompted Judge Richard Posner to observe that Thayer's "originality lay in organizing and rationalizing scattered judicial remarks supportive of" judicial restraint.[16] Thayer did not, however, investigate when the rule first emerged, how it was received, who else in the legal world articulated it or critiqued it in treatises, commentaries, or other extrajudicial documents, and most significantly, whether it ever really enjoyed a level of nationwide consensus in federal and state courts, or was perhaps just the idiosyncratic view of a handful of jurists.

Intriguingly, Thayer did apparently indicate that he was aware of some of the limits of his work and intended to build his article out into

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the appropriate level of evidentiary weight—that is, the appropriate standard of proof—for resolving questions of law seems to have gone unaddressed in the ongoing debate over legal interpretation")

12 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

13 Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983).

14 Thayer, *supra* note 12, at 155.

15 *Id.* at 138–43.

16 Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 523 (2012).

a longer book. Apparently among Thayer's papers at the Harvard Law School is a letter to Thayer from the Chair of the History Department at the University of Chicago who wrote, "I learn to my great satisfaction that you propose to elaborate the important question more fully and publish the results of your ever thorough researches in book form."[17] Thayer, however, never wrote such a book. And to date, despite renewed scholarly and popular interest in Thayer and the concept of judicial restraint,[18] no public law scholar or legal historian has taken up that effort either.

Regardless, Thayer's article was an acknowledged inspiration for many twentieth- and twenty-first-century acolytes of judicial restraint. And his historical narrative often became the *exclusive* basis of their historical understanding.

During the *Lochner*-era Court, figures like Oliver Wendell Holmes, Jr.,[19] Louis Brandeis,[20] Robert Jackson,[21] Felix Frankfurter,[22] and Learned Hand[23] relied heavily upon Thayer in response to a Supreme Court that regularly overturned progressive economic legislation at the state and federal level and stood athwart President Franklin

17 Letter from H. von Holst, Chair of the Hist. Dep't, Univ. of Chi., to James B. Thayer, Professor, Harvard L. Sch. (Nov. 11, 1893) (on file with the Harvard Law School Library), *quoted in* ANDREW PORWANCHER, JAKE MAZEITIS, TAYLOR JIPP & AUSTIN COFFEY, THE PROPHET OF HARVARD LAW: JAMES BRADLEY THAYER AND HIS LEGAL LEGACY 40 (2022).

18 *See, e.g.*, Liza Batkin, *The Kingdom of Antonin Scalia*, THE NEW YORKER (Nov. 12, 2022), https://www.newyorker.com/news/essay/the-kingdom-of-antonin-scalia [https://perma.cc/WMJ2-95FS].

19 Oliver Wendell Holmes, for example, wrote to Thayer praising its publication, saying, "I agree with it 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." Letter from Oliver Wendell Holmes, Assoc. J., Commonwealth of Mass., Supreme Jud. Ct., to James B. Thayer, Professor, Harvard L. Sch. (Nov. 2, 1893) (on file with the Harvard Law School Library), *quoted in* PORWANCHER ET AL., *supra* note 17, at 76.

20 MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 477 (2009); PORWANCHER ET AL., *supra* note 17, at 88–98.

21 ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 34 n.38 (1941).

22 NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 31 (2010). Felix Frankfurter called Thayer's article "the most important single essay" ever written about American constitutional law, FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES: RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS 301 (1960), and "the compelling motive behind my Constitutional views[,] . . . the Alpha and Omega," MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 31 (1991) (quoting Letter from Felix Frankfurter to Robert Jackson (Apr. 11, 1942) (on file with the Harvard Law School Library)).

23 *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 41–43 (2d ed. 2011); Learned Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 697 (1946) (calling Thayer the "prophet of a new approach").

Roosevelt's New Deal reforms in the name of freedom of contract and substantive economic due process.

Just one generation later, however, figures like a now older Learned Hand,[24] Alexander Bickel,[25] Robert Bork,[26] Raoul Berger,[27] Lino Graglia,[28] William Rehnquist,[29] Edwin Meese,[30] an early-career Antonin Scalia,[31] and Frank Easterbrook[32] invoked the merits of the clear error rule, Thayerism, and judicial restraint in response to a Warren Court that they perceived to have dropped its earlier adherence to restraint and adopted instead a more "activist" posture in the fields of criminal procedure, privacy, and fundamental rights jurisprudence.

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24 LEARNED HAND, THE BILL OF RIGHTS 73 (1958); PORWANCHER ET AL., *supra* note 17, at 123–24; Ruth Bader Ginsburg, *Foreword to Second Edition* of GUNTHER, *supra* note 23, at x, xii.

25 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35 (1962).

26 Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 385 (1985).

27 RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 305 (1977) (crediting Thayer with being the first modern scholar to articulate this deferential perspective).

28 Lino A. Graglia, *A Restrained Plea for Judicial Restraint*, 29 CONST. COMMENT. 211, 214–15 (2014) (reviewing J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012)) (arguing that the "rule of clear mistake" "was the insight that Harvard law professor James Bradley Thayer, the leading constitutionalist of his era, famously propounded at the end of the nineteenth century," which, if implemented, would end what Graglia called "activism and judicial hegemony").

29 *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 468, 470 (1972) (Rehnquist, J., dissenting) (endorsing the presumption of constitutionality and observing that "judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review").

30 Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 927 (1996) ("Like the Warren Court decades later, the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority.").

31 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 854 (1989); John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 771 n.160, 752 (2017) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) (noting that while Scalia did not "incorporate the Thayerian ideal," he "grounded originalism mainly in rule-of-law concerns related to judicial discretion").

32 Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1404 (2002) ("[U]nless the application of the Constitution or statute is so clear that it has the traditional qualities of *law* rather than political or moral philosophy, a judge should let democracy prevail.").

And today, a new cohort of jurists and scholars like retired Judge Thomas Griffith,[33] Robin West,[34] Nikolas Bowie,[35] Sam Moyn,[36] Daphna Renan,[37] Brad Snyder,[38] and Cass Sunstein[39] are rearticulating the values of Thayerism and judicial restraint (among other proposals) in response to a newly emboldened conservative Roberts Court wielding a more "engaged" version of a "new originalism," particularly in the areas of gun rights, abortion, religious liberty, voting rights, affirmative action, and administrative law. Judicial restraint has thus taken on a familiar, if also reactive and cyclical, quality in the twentieth and twenty-first century.[40]

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33 Thomas B. Griffith, *How Judicial Activism on the Right and Left Is Threatening the Constitution*, DESERET NEWS (Feb. 1, 2021, 10:00 PM MST), https://www.deseret.com/indepth/2021/2/1/21564497/thomas-griffith-judicial-activism-right-left-conservative-liberal-constitution-supreme-court-politic/ [https://perma.cc/5N86-N283].

34 *See generally* Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993).

35 Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM EDT), https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy/ [https://perma.cc/ALJ7-YGH3]; *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives; Hearing Before the Presidential Comm'n on the Sup. Ct. of the U.S.* (2021) (written statement of Nikolas Bowie, Assistant Professor of Law, Harvard Law School).

36 *See The Court's Role in Our Constitutional System: Hearing Before the Presidential Comm'n on the Sup. Ct. of the U.S.* 3–4 (2021) (written statement of Samuel Moyn, Henry R. Luce Professor of Jurisprudence and Professor of History, Yale University) (calling Thayer "our greatest constitutional theorist" who reinterpreted the role of the Supreme Court in the American constitutional system and who "originally argued at the end of the nineteenth century" for the rule of the clear mistake); *see also* Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, THE NEW REPUBLIC (Oct. 13, 2020), https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power [https://perma.cc/YZR8-KMAE] (arguing that Thayer's rule "defined the first half of the twentieth century" until "Thayer's noble dream" of self-restraint broke down); Samuel Moyn & Rephael G. Stern, *To Save Democracy from Juristocracy: J.B. Thayer and Congressional Power After the Civil War*, 38 CONST. COMMENT. (forthcoming 2024) (manuscript at 59), https://ssrn.com/abstract=4342763 [https://perma.cc/P4SJ-ECDA].

37 *See* Harvard Law School, *Daphna Renan Chair Lecture | "Federal Authority Without Judicial Supremacy,"* YOUTUBE, at 34:10 (Feb. 6, 2023), https://www.youtube.com/watch?v=xLaASZH_1Sg (noting approvingly the anticipation of Thayerism by Frederick Douglass).

38 *See, e.g.*, Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2153 (2014) (urging scholars to "dig deeper into the constitutional scholarship of James Bradley Thayer").

39 Cass R. Sunstein, *Thayerism*, 2024 U. CHI. L. REV. ONLINE *17 ("In recent decades, the left has shown far more interest in Thayerism . . . in evident response to rulings from the Supreme Court that seem, to the left, to be unfortunate or outrageous.").

40 *See, e.g.*, Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149, 149; Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 219–20 (2019).

For approximately 125 years, then, advocates of judicial restraint across the ideological spectrum have relied almost exclusively upon Thayer, the "prophet of a new approach" in Judge Hand's phrase, for historical ballast for their position.[41] They have not, however, typically bothered to check his work or independently conducted their own studies of the backstory that Thayer canvassed.[42] Instead, they have taken him mostly at face value and passed him along from one generation of elite jurists and scholars to the next.

Accordingly, the story of judicial restraint in America appears to have an unusually narrow, thin, even clubby basis, originated by a lone Harvard Law professor, who then passed his views on to his former employee (Holmes) and students (Brandeis and Hand), who then in turn passed it along to their friend (Frankfurter), who then introduced it to his colleagues (Jackson) and law clerks (Bickel and Friendly). This prompted David Luban to observe that "[w]e are speaking, therefore, of something like an apostolic succession, or, in Old Testament imagery, a bloodline of patriarchs."[43] And while patriarchs or popes may have been indispensable in the maintenance of the world's great religions, their place in a legal system governing a democracy of 330 million Americans seems out of place. As Luban puts it, "The classical conception of judicial self-restraint emerged, therefore, from a kind of intellectual *Gemeinschaft* almost unparalleled in the history of juridical ideas. Hence, we are dealing not with the product of a broad consensus, but rather with a doctrine emerging from a surprisingly narrow base."[44] It is perhaps no wonder then, that given the perceived narrowness and idiosyncratic quality of judicial restraint, "Thayer's dream" never had much of a chance. Why stay one's judicial hand, and prevent the righting of wrongs, if the virtues of judicial self-restraint and humility stand on such tenuous grounds?

Making matters more difficult for the cause of restraint, many prominent legal historians and theorists have since questioned the historical accuracy of Thayer's famous article. Charles Black, for example, argued that Thayer's "assertion that his 'rule of administration' was actually a part of settled tradition is plainly and flatly wrong."[45] G.

41 Hand, *supra* note 23, at 697.

42 *But see* Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 628 (2012) (observing that Thayer was "only one among many making similar arguments" and arguing that Thayer drew upon earlier Jeffersonian understandings of judicial power).

43 David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 451 (1994).

44 *Id.* at 452.

45 CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 202 (1960).

Edward White similarly skewered Thayer, noting that "[m]ost of Thayer's citations involved dissenting opinions, statements from his own Gilded Age contemporaries, or positions that were later repudiated by the judges who advanced them."[46] And Judge Posner wondered aloud whether "Thayerism" had ever really lived, except in Thayer's mind.[47]

Likewise, many prominent contemporary originalists have tended to look askance at "Thayerism," either in whole or in part.[48] And they have done so in a number of divergent ways, disagreeing with different strands of Thayer's thesis, and with each other. Some, like Randy Barnett[49] and Phillip Muñoz,[50] have questioned the very premise of the presumption of constitutionality, arguing that the text of the Constitution does not dictate *any* particular standard of review, and if anything, precludes a presumption of constitutionality. Some, like Gary Lawson, accept the presumption of constitutionality, but, in a reverse of Thayer, would have it applied only to state action, not federal.[51] Others, like Stephen Calabresi[52] and Keith Whittington,[53] have accepted the presumption of constitutionality, but rejected the clear error rule. Still others, like John McGinnis[54] and Judge Jeffrey Sutton,[55] have accepted both the presumption of constitutionality and the clear error rule, but rejected the reasonable doubt standard.

This is particularly surprising as historians, originalist scholars, and Supreme Court Justices alike in the last twenty years have developed and relied upon an increasingly sophisticated understanding of

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46 G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 76 n.117 (1993).

47 Posner, *supra* note 16, at 533.

48 *But see* Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393, 394, 411 (2019) (arguing that Thayer was an "originalist" and that Thayer "does seem to have historic norms of jurisprudence on his side").

49 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 224 (2004).

50 VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 220 (2022).

51 Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 423–28 (1996).

52 Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 275 (1993).

53 KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 232 n.82 (1999) ("Rather than a 'clear mistake' rule, perhaps an originalist Court should adopt something more closely approaching a 'preponderance of the evidence' rule to strike down laws on originalist grounds.").

54 John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 849 (2016).

55 JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 61–68 (2022).

how the otherwise underdetermined meaning of the Constitution can sometimes be "liquidated" or "fixed" over time.[56] This has been applied to particular provisions of the Constitution.[57] And it has been applied, not just to words or phrases in the Constitution, but to interpretive methods required to interpret the Constitution as well.[58] But it has not yet been applied to the Constitution's very own standard of review. However, in an intriguing footnote in his most recent book, Judge Sutton raised the possibility of its application, noting that "perhaps the practice of restraint itself became liquidated."[59] And at least one scholar has noted that whether the proper standard of review for constitutional cases was liquidated "may be one of the greatest unresolved questions in originalism" today.[60] That might be understandable if the existing historical evidence about it was too meagre to support any definitive conclusions. And it might also be understandable if the evidence was too plentiful in that there was evidence on all sides, indicating an absence of consensus or convergence. But as I shall attempt to show here, the evidence for convergence by the end of the nineteenth century was overwhelming.

In this Article, I aim to lay bare just how widely accepted *all* three dimensions of Thayer's standard of review—the presumption of constitutionality, clear error, and reasonable doubt—had become by the time he penned his famous essay. By 1893, the American legal community had largely embraced the standard for judicial review that he championed, at least in principle. Indeed, throughout the second half of the nineteenth century, Thayer's presumption of constitutionality, clear error rule, and reasonable doubt standard had come to enjoy a broad, virtually unrivaled consensus among a diverse assortment of jurists and treatise writers throughout the entire country. But this broad consensus has been almost entirely lost to history.

I aim to recall this lost history of judicial restraint and reveal that broad underlying consensus through a systematic exploration of two

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56 *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527 (2003); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1773 (2015); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 14 (2018); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019).

57 *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) ("[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . . ." (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))).

58 *See* Nelson, *supra* note 56, at 520; *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 788 (2009).

59 SUTTON, *supra* note 55, at 57 n.168.

60 ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 94 (2017).

kinds of sources—nineteenth-century legal treatises and U.S. and state supreme court decisions from 1780 to 1900.

First, I review all the major treatises on constitutional law and statutory interpretation, introductory constitutional law casebooks, legal dictionaries, legal encyclopedias, and manuals for federal practice published from 1780 to 1900. In total, I review over forty different treatises. Such works have several advantages for a project like this. First, these sorts of texts, written for a diverse audience of jurists, practicing lawyers, and often ordinary citizens, provide a helpful window into the state of the legal mind at the time they were written. Unlike more cutting-edge, theoretical pieces that would have appeared in journals like the *Harvard Law Review* and the *American Law Register* in the late nineteenth century, but that may have only reflected the idiosyncratic views of their authors, treatises, dictionaries, and practice manuals were designed to distill the "established," "settled" rules of the road for aspiring lawyers and practicing attorneys. Further, while many law review articles would have enjoyed limited circulation, treatises and casebooks were designed for broader consumption, and would have found their way into the personal libraries, law offices, and judicial chambers of lawyers and judges all over the country. And finally, treatises and dictionaries have the unique advantage of often being revised as new editions over the decades, which can (and often did) reflect subtle shifts and developments in understanding over the course of the nineteenth century. Treatises thus provide a unique, "real-time" window into contemporaneous understandings at any particular moment in American legal history.

Second, I overlay my study of legal treatises with an independent chronological review of decisions of the U.S. Supreme Court and, often even more significantly, the fifty state supreme courts. Here, jurists in courtrooms all over the country were regularly working their way through the proper standard of review for constitutional cases. Drawing on an excellent fifty-state survey by Christopher Green,[61] I show—through a series of sequenced, color-coded maps—the slow yet gradual acceptance of the clear error rule by *every* apex court in the United States and of the reasonable doubt standard by almost every court throughout the nineteenth century and into the early twentieth century. Pairing the treatises with state supreme court decisions provides an external "reality check" for the statements of the treatise writers (and, of course, this author's summaries of those statements). And such pairing often reveals that treatise writers were obviously reading the state court decisions at the time, in most instances citing them and

61 Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169 (2015).

trying to mirror what they found in the caselaw, while state court judges were also obviously reading the prominent treatises of the day, sometimes citing those treatises and following their lead.

By pairing these legal treatises and state supreme court decisions together in a chronological story throughout the nineteenth century, I try to draw back the curtain on a heretofore overlooked, century-long conversation in American law that helps makes several things evident.

First, contra Luban, the treatise writers alone show that judicial restraint stood upon a much broader, more geographically diverse, and theoretically sturdier basis than the narrow, elite, Boston Brahmin world of Thayer and his twentieth-century acolytes.

Second, contra historians and theorists like Black, White, and Posner, the state supreme court decisions alone reveal an overwhelming, remarkably uniform, "real world" consensus around the principles of judicial restraint that were applied practically in hundreds of cases in the nineteenth century, which Thayer did not just invent in 1893. But what Thayer did not show was that this process took some time and proceeded in stages. From the Founding to the Civil War, for example, the clear error rule went from the professed view of lone justices writing seriatim in the 1790s to the "leading rule" throughout the country. But the reasonable doubt standard lagged behind, with few states accepting that standard until *after* the Civil War, in apparent response to the Supreme Court's fateful *Dred Scott* decision. And just as all three strands of the "triple helix" were coming together in the late nineteenth century, thinkers and jurists like Frederick Douglass and John Marshall Harlan started to champion these rules for the first time in *dissent* from the decisions of the post-Reconstruction Supreme Court like the *Civil Rights Cases*, a sign of things to come in the twentieth century.

And third, contra some prominent originalists, while the text of the Constitution alone does not provide a standard of review for constitutional cases, its subsequent history as revealed through *both* legal treatises and state court decisions—from the Founding moment to the end of the nineteenth century—shows that that standard was gradually accepted and "liquidated" over time. In James Madison's language in *Federalist No. 37*, while the Constitution's standard of review may have been "more or less obscure and equivocal" in 1787, its meaning was "liquidated and ascertained" through "a series of particular discussions and adjudications."[62] Through the "discussions" in legal treatises *and* the "adjudications" in all the country's apex courts, all pointing overwhelmingly and uniformly in the direction of restraint during this

62 THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund 2001).

century-long history—at least as a matter of law and principle, if not always respected in practice—the Constitution's standard of review appears to have been liquidated. There appears to be, therefore, a powerful originalist argument, utilizing the methods developed by "new originalism" itself, on behalf of judicial restraint.

Judicial restraint was developed and liquidated in America gradually and in several waves. This is the story of how that happened.

II. BEFORE JAMES BRADLEY THAYER: THE ORIGINS, SCOPE, AND DEVELOPMENT OF JUDICIAL RESTRAINT, 1780–1900

A. 1780–1800: Tentative Beginnings—Judicial Restraint Before Marbury

The earliest inkling of the clear error standard in a treatise first seemed to appear in Thomas Sergeant's 1822 work *Constitutional Law*.[63] A graduate of the College of New Jersey, Sergeant was a Philadelphia lawyer who wore hats as both a lawyer and scholar throughout his career, eventually serving as a Pennsylvania Supreme Court justice.[64]

In 1822, and again in 1830, he published his treatise on constitutional law, which he described as a novel undertaking at the time.[65] And in each volume, he described a cautious, careful standard courts had come to use in assessing constitutional claims. Sergeant explained that a state law that was contrary to the federal constitution was "void," and federal courts would declare it so when a case properly before them presented the question.[66] But he added the following caveat: "But, to authorise such a decision the law must be a clear and unequivocal breach of the Constitution, not doubtful or argumentative."[67] And he cited for this proposition the opinions of several individual U.S. Supreme Court Justices writing for themselves in three separate cases during the pre-Marshall Court.[68] He cited Justice Washington in

63 THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A COLLECTION OF POINTS ARISING UPON THE CONSTITUTION AND JURISPRUDENCE OF THE UNITED STATES 279 (Philadelphia, Abraham Small 1822).

64 4 MEMORIAL BIOGRAPHIES OF THE NEW ENGLAND HISTORIC GENEALOGICAL SOCIETY 72–73 (Boston, The Society 1885).

65 SERGEANT, *supra* note 63, at i.

66 *Id.* at 353.

67 *Id.* at 353–54.

68 *Id.* at 354.

Cooper v. Telfair,[69] Justice Paterson in the same case,[70] Justice Chase in *Calder v. Bull*,[71] and Justice Chase in *Ware v. Hylton*.[72]

This first citation in Sergeant's treatise illustrates how the clear error rule was originally expressed in the 1790s as the tentative creed of individual jurists speaking for themselves. This was in part due to the policy of issuing opinions seriatim rather than as a court. But it also suggests that jurists in this period were working their way through the appropriate approach. The power of judicial review was a relatively new one. While jurists and politicians were aware of the power, and had seen it exercised, or at least invoked, in a handful of cases by state courts in the 1770s and '80s before the creation of the Constitution,[73] and even before that with British courts and the Privy Council reviewing colonial acts for compliance with their charters,[74] it remained a new and potentially explosive power in a new country.

It was this potentially dangerous power that led jurists of the era who otherwise sharply disagreed with each other to agree on the clear error rule. Justices Iredell and Chase, for example, whose famous disagreement over the role of natural law in judicial decisionmaking in *Calder v. Bull* is well-known, agreed on this point. Justice Iredell acknowledged that if an act of Congress or a state legislature violated the Constitution, it was "unquestionably void."[75] But he had to "admit[] that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."[76] And Justice Chase observed that if the Court had the power to invalidate a law on the grounds of constitutionality, "I am free to declare, that I will never exercise it, *but in a very clear case*."[77]

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69 Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 18 (1800) (opinion of Washington, J.) ("The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.").

70 *Id.* at 19 (opinion of Paterson, J.) ("[T]o authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.").

71 Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (opinion of Chase, J.) ("I will not decide *any law to be void, but in a very clear case.*").

72 Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) (opinion of Chase, J.) ("If the court possess a power to declare treaties *void*, I shall never exercise it, but in a very clear case indeed.").

73 *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 473 (2005).

74 *See* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 10 (2004); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 185 (2008).

75 *Calder*, 3 U.S. (3 Dall.) at 399 (opinion of Iredell, J.).

76 *Id.*

77 Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.).

That slow convergence in the 1790s among individual Justices built upon, in turn, the personal views of some prominent lawyers and state court jurists in the formative decade of the 1780s. As state courts wielded the power of judicial review for the first time, lawyers and judges alike grappled with the appropriate standards for that review. In 1782, in perhaps the earliest articulation of the rule in an American court after the revolution, St. George Tucker argued to the Virginia Supreme Court of Appeals in *Commonwealth v. Caton* that clear error *should* be the standard. As he argued, "If any Act thereof shall be found absolutely and *irreconcilably* contradictory to the Constitution, it can not admit of a Doubt that such act is absolutely null and void."[78] And the Court ultimately agreed, upholding the constitutionality of the law, while adding that the question was whether the law was "contrary to the plain terms of that constitution."[79] Edmund Pendleton, the President of the Court, noted that the question of whether a court could invalidate a law was a "deep, important, and I will add, a tremendous question."[80] Writing for the Court, Pendleton added, with an expression of relief, "I am happy in being of opinion there is no occasion to consider it upon this occasion."[81]

Five years later in 1787, James Iredell, the North Carolina lawyer, Federalist, and eventual Supreme Court Justice,[82] wrote to Richard Spaight who was then serving as a delegate from North Carolina to the Constitutional Convention in Philadelphia.[83] Spaight had written Iredell complaining about a recent decision by the North Carolina Superior Court in *Bayard v. Singleton*[84] to invalidate a state law. Shocked by this performance, Spaight argued that such judicial invalidation of legislation represented a "usurpation" of legislative power in the form of a judicial veto, and was "contrary to the practice of all the world."[85]

Iredell responded that such a power *was* appropriate for the court operating under a written constitution to wield. Because the state's

78 William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 527 (1994) (quoting St. George Tucker, Notes of Oral Argument in the *Case of the Prisoners* (on file with the College of William and Mary Earl Gregg Swem Library)).

79 Commonwealth v. Caton, 8 Va. (4 Call) 5, 17 (1782) (opinion of Pendleton, J.).

80 *Id.*

81 *Id.* at 17–18.

82 *James Iredell*, ENCYCLOPAEDIA BRITANNICA (Oct. 16, 2024), https://www.britannica.com/biography/James-Iredell [https://perma.cc/J38U-YCDZ].

83 *See* 2 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 120 n.† (New York, D. Appleton & Co. 1858).

84 Bayard v. Singleton, 1 N.C. 15, 1 Mart. 42 (Super. Ct. 1787).

85 Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), *in* 2 MCREE, *supra* note 83, at 168, 169.

constitution was the "fundamental law" of the state, its judges, in the exercise of their normal responsibility, "must take notice of it."[86] The constitution not being "a mere imaginary thing, about which ten thousand different opinions may be formed," the judges could not "wilfully blind themselves" to it.[87] But echoing Tucker, Iredell tried to reassure Spaight: "In all doubtful cases, to be sure, the Act ought to be supported: it should be unconstitutional beyond dispute before it is pronounced such."[88] Iredell offered that he thought "[m]ost of the lawyers . . . are of my opinion in regard to that."[89] But he acknowledged that "many think as you do upon this subject."[90]

While Spaight gave no indication that he agreed with Iredell, some of his other colleagues in Philadelphia did. James Wilson, for example, said that only laws that were "so unconstitutional" would be set aside by courts.[91] And George Mason said that only laws that were "plainly" unconstitutional would be subject to judicial invalidation.[92]

After the Convention proposed the new Constitution to the states for ratification and opened it up for nationwide debate, some Antifederalists raised concerns about the potentially sweeping powers of the Supreme Court. The New York Antifederalist Brutus, for example, argued that the Supreme Court, empowered to review the constitutionality of acts of legislatures, yet otherwise mostly unchecked by those same legislatures, was "exalted above all other power in the government, and subject to no controul."[93] Writing on March 20, 1788, Brutus argued that never in world history had a court been "invested with such immense powers, and yet placed in a situation so little responsible."[94] English courts, he observed, "in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution."[95] Rather, those courts must decide according to the existing laws of the land, and "never undertake to controul them

86 Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 2 MCREE, *supra* note 83, at 172, 172–73.

87 *Id.* at 174.

88 *Id.* at 175.

89 *Id.* at 176.

90 *Id.* at 175.

91 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1966).

92 *Id.* at 78.

93 BRUTUS NO. 15, *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 257, 257 (Michael P. Zuckert & Derek A. Webb eds., 2009).

94 *Id.*

95 *Id.*

by adjudging that they are inconsistent with the constitution."[96] English courts were thus "under the controul of the legislature."[97]

By contrast, the U.S. Supreme Court "will controul the legislature," Brutus argued, because it is authorized in the last resort to judge whether the legislature's laws are consistent with the Constitution.[98] As he put it, "If, therefore, the legislature pass any law, inconsistent with the sense the judges put upon the constitution, they will declare it void."[99] And judges would wield that power without any external check: "[T]hey are to give the constitution an explanation, and there is no power above them to set aside their judgment."[100] Judicial independence in this context meant that judges in America would be "independent of the people, of the legislature, and of every power under heaven."[101] And he added with flourish, "Men placed in this situation will generally soon feel themselves independent of heaven itself."[102] For this reason, Brutus warned, in America "[t]he judges are supreme."[103]

Writing two months later, Alexander Hamilton responded to Brutus in *Federalist No. 78*.[104] And he did so in the name of the clear error rule. In that essay, Hamilton attempted to reassure Brutus that judges in America would not be "supreme" by selling judicial review on the assumption that it would come with a disciplining clear error rule. In response to Brutus's argument that courts would set aside laws if they were merely "inconsistent" with the "sense" that individual judges happened to put upon the Constitution, Hamilton argued that a higher evidentiary standard would prevail on both fronts.[105] Courts were only authorized to do so, he said, if the laws were in "irreconcilable variance" with the "manifest tenor" of the Constitution.[106] The Constitution's meaning thus first needed to be "manifest" or sufficiently clear to resolve doubt. And the challenged law's validity would only be put in question if it was "irreconcilable" with that meaning.

While Antifederalists never indicated that they were reassured by Hamilton's argument, his position would slowly gain broader acceptance among state courts in the 1790s. In the 1793 General Court

96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 260.
100 *Id.* at 258.
101 *Id.*
102 *Id.*
103 *Id.* at 261.
104 George W. Carey & James McClellan, *Editors' Introduction* to THE FEDERALIST, *supra* note 62, at l.
105 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 62, at 403–04.
106 *Id.*

of Virginia case of *Kamper v. Hawkins*, Judge Spencer Roane echoed Hamilton, saying that "the judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution."[107] He also added that at least in cases involving judicial power, judges should "distrust their own judgment if the matter is doubtful" and "require clear evidence" before acting.[108] Judge St. George Tucker directly quoted Hamilton's line from *Federalist No. 78* about "irreconcilable variance."[109] Calling it "the reasoning of one of the most profound politicians in America," Judge Tucker said that Hamilton's position, which of course happily reflected the position Judge Tucker had taken in *Caton* in 1782,[110] could not be improved upon.[111]

And six years later in 1799, the Supreme Court of Pennsylvania formulated a standard of review for constitutional cases that drew upon these background statements and understandings. When Pennsylvania Attorney General Jared Ingersoll sought to defend a state law against constitutional challenge, he argued that "[t]he defendant in order to succeed, must make out a clear case; on him lies the *onus probandi*; every legal presumption is in favour of the constitutionality of the acts of the legislature."[112] Interrupting Ingersoll, the Court agreed: "The law clearly is so; we must be satisfied beyond doubt, before we can declare a law void."[113] And in its gloss of the opinion, the court reporter explained that the "Court will not pronounce a law unconstitutional unless in a clear case."[114] Here by 1799 in *Respublica v. Duquet* emerged in seed form some of the major elements of judicial restraint: the presumption of constitutionality, clear error, and the beyond-a-doubt quantum of evidence standard.

It was all this historic evidence from the 1780s and 1790s that prompted the constitutional historian David Currie to observe that before 1801, "two lasting principles of construction were established . . . : doubtful cases were to be resolved in favor of constitutionality, and statutes were to be construed if possible in a manner consistent with the Constitution."[115]

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107 Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 40 (Gen. Ct. 1793) (opinion of Roane, J.).

108 *Id.* at 39.

109 *Id.* at 83 (opinion of Tucker, J.); *see supra* text accompanying note 106.

110 *See supra* text accompanying note 78.

111 *Hawkins*, 3 Va. (1 Va. Cas.) at 84 (opinion of Tucker, J.); *see supra* text accompanying note 78.

112 Respublica v. Duquet, 2 Yeates 493, 497–98 (Pa. 1799).

113 *Id.* at 498 (per curiam).

114 *Id.* at 493.

115 DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 55 (1985).

And yet scholars of this period have pointed to evidence that during this period, courts applied the clear error rule only in certain contexts and not in others.[116] And it would be another decade before the Supreme Court, speaking as a Court rather than in the voice of individual Justices, would formally embrace the clear error rule. It would take more than two decades before it would do the same for the reasonable doubt standard. And even after that, with just a couple notable exceptions, treatise writers and casebook compilers in the early republic would be slow to acknowledge its existence.

And state courts too, notwithstanding early adopters like Pennsylvania[117] and Virginia,[118] were slow to embrace the clear error rule, and none had yet adopted the reasonable doubt standard. Here below, in two maps depicting the adoption by states of the clear error rule and reasonable doubt standard, is how the state supreme courts lined up by 1800:

Figure 1. States that adopted a clear error rule by 1800

116 Treanor, *supra* note 78, at 496–97.

117 *Respublica*, 2 Yeates at 498.

118 Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 40 (Gen. Ct. 1793) (opinion of Roane, J.).

Figure 2. States that adopted a reasonable doubt standard by 1800

The rules surrounding judicial restraint, though present in seed form at the Founding, would take a couple more generations of experience to take firm root.

B. 1800–1840: An Emerging Yet Often Overlooked Rule—Judicial Restraint in the Marshall Court Era

During the Marshall Court era, as the Supreme Court's power was consolidated under Chief Justice John Marshall's leadership, the accompanying rules of judicial restraint sold to the public by the Constitution's advocates like Hamilton and Iredell in the 1780s, and tentatively embraced by individual jurists like Paterson and Chase in the 1790s, became the official rules of both the Supreme Court and several more state supreme courts in the early nineteenth century. And yet while some treatise and dictionary writers noted this development, many overlooked it.

Once again, Philadelphia lawyer Thomas Sergeant appears to have been the first treatise writer to note this development. Writing in 1822, he observed that courts in America would regard as void laws that were "repugnant to, or incompatible with the Constitution."[119] And he again added a qualifying caveat: "It seems, however, that this power

119 SERGEANT, *supra* note 63, at 393.

of declaring an act of Congress or a law unconstitutional, will be exercised only in a clear case."[120]

For this statement, Sergeant updated his authorities through the Marshall Court era.

He cited the 1810 case of *Fletcher v. Peck*,[121] the first case in which Chief Justice Marshall had adopted the clear error rule for the Court. In his opinion for the Court, Chief Justice Marshall laid out the basic elements of the clear error rule and the presumption of constitutionality. He first observed: "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy."[122]

Constitutional questions in courts were always "delicate" questions. Marshall did not explain exactly why in *Fletcher*. But it seems that it was likely the same reason that Brutus and Spaight had first raised their eyebrows at the practice. Such practice permitted an unaccountable court to effectively veto democratic preferences. They permitted an appeal from statutory law, devised by a relatively larger number of politically accountable officials, to the "higher" or "fundamental" law of the Constitution, as construed by a smaller number of mostly unaccountable judges. Those courts could not be checked through the ordinary mechanism of politics. In England, such appeals to the "higher law" had often been occasions for revolutionary outbursts. But in America, and for the first time in world history, this appeal to the "higher law" was to happen not in the streets or at the barricades, but in courts of law in ordinary lawsuits.

That was because constitutional law, as understood by Chief Justice Marshall, was also ordinary law, subject to the same, familiar rules of construction as other legal instruments. As such, courts had a duty to follow and apply the law, and prefer higher law to mere statutory law. Therefore, Chief Justice Marshall said, when the unconstitutionality of a law was clear, courts had a duty to invalidate it. Speaking grandly of the judicial duty, Chief Justice Marshall wrote that courts would be "unworthy" of their station if they failed to do so.[123] However, that duty to follow the law, precisely because it was exercised in the "delicate" scenario of constitutional litigation, needed to be exercised against a cautionary, higher evidentiary standard.

> But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the

120 *Id.*

121 *Id.* at 393 n.g.

122 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810).

123 *Id.*

> constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.[124]

Given the high stakes of constitutional contests, the evidentiary standard was higher for judges to act *against* the constitutionality of the law than in *favor* of it. As Chief Justice Marshall put it, the question of whether a law was unconstitutional "ought seldom, if ever, to be decided in the affirmative, in a doubtful case."[125] In cases of doubt, the tie went to the legislature.

Thomas Sergeant cited several other Marshall-era Court decisions that laid out the clear error standard.[126] But a theme that started to emerge in these cases was that the standard itself had been long accepted by the Court. Perhaps most illustrative was Chief Justice Marshall's opinion for the Court in 1819, nine years after *Fletcher*, in *Trustees of Dartmouth College v. Woodward*.[127] In *Dartmouth College*, Chief Justice Marshall again noted the "magnitude" and "delicacy" of constitutional questions, and pointed out that the clear error rule had been, by then, consistently embraced by the Court.[128] "On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution."[129] And in 1823, an advocate before the Supreme Court made a similar observation. "[I]t is quite clear, from the uniform language and conduct of the Court, that it will not declare an act, whether of the State or national legislature, to be void, as being repugnant to the fundamental law, unless in a very clear case."[130] The clear error rule, expressed "on more than one occasion" by 1819, was by 1823 itself now a rule clearly mandated by the Court's "uniform language and conduct."

Four years later, in 1827, Justice Bushrod Washington in *Ogden v. Saunders* shifted the standard of review yet higher. Writing for himself, but in the court's majority, he said that a law's unconstitutionality had to be shown "beyond all reasonable doubt."[131] "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 favour of its

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124 *Id.*

125 *Id.*

126 SERGEANT, *supra* note 63, at 393 n.g.

127 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

128 *Id.* at 625.

129 *Id.*

130 Green v. Biddle, 21 U.S. (8 Wheat.) 1, 38 (1823) (argument of Mr. Bibb).

131 Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (opinion of Washington, J.).

validity, until its violation of the constitution is proved beyond all reasonable doubt."[132]

But like the clear error rule, and the presumption of constitutionality, he argued that this position had also been consistently and uniformly recognized by the Court, at least as the appropriate standard. As he put it, "This has always been the language of this Court, when that subject has called for its decision."[133] And though he wrote for himself, even in a case that split 4–3, he assured the opinion's readers that "I know that it expresses the honest sentiments of each and every member of this bench."[134]

And he clarified that the test for "reasonable doubt" was not whether *other* reasonable people or jurists happened to disagree, but whether the jurist himself, after careful consideration, personally had any lingering, reasonable doubt about the constitutionality of the law.[135] If he did, "that alone would, in my estimation, be a satisfactory vindication of" the challenged law.[136] But just that other members of a court felt differently was not enough. Justice Washington illustrated this point by noting that while three members of the Court voted to void the law in the case, including Chief Justice Marshall and Justice Story, "I am perfectly satisfied" that the reasonable doubt standard was "entertained by those of them from whom it is the misfortune of the majority of the Court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them."[137]

At least three other state supreme courts—Pennsylvania, Massachusetts, and Maryland—adopted the higher "reasonable doubt" standard during this period as well. And they often did so in a way that emphasized the standard's widespread acceptance throughout the country. They also did so in agreement with Justice Bushrod Washington's "best judgment" point, that the reasonable doubt standard was to be applied by the individual jurist *after* their own careful study of the case, not just in deference to the views of any reasonable person, whether real or hypothetical.

In an 1811 decision, for example, Chief Justice William Tilghman of the Pennsylvania Supreme Court wrote:

> [I]t has been assumed as a principle in construing constitutions, by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an act of the

132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*

> legislature is not to be declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.[138]

In an 1834 opinion for the Massachusetts Supreme Judicial Court, Chief Justice Lemuel Shaw observed that the

> [d]elicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.[139]

And just four years later in 1838 in Maryland, Chief Judge John Buchanan observed: "It has been said, that a legislative act should not be pronounced unconstitutional or invalid, in a doubtful case: nor should it, where the doubt is *bona fide*, and well founded, and not the result of a disinclination to deny the authority of the legislature . . . ."[140]

Despite the professions of these eminent jurists that this deferential standard of review had come to enjoy unwavering, timeworn acceptance at the Supreme Court and in state courts, it is striking to note how seldom either the clear error rule or the reasonable doubt standard was recognized by prominent treatise writers of the era. Thomas Sergeant had noticed both the clear error rule[141] and the reasonable doubt standard.[142] James Kent gave a quick nod to the clear error rule in his 1826 *Commentaries on American Law*.[143] After observing that John Marshall had established the principle of judicial review in *Marbury v. Madison* with almost "the precision and certainty of a mathematical demonstration,"[144] he noted that in New York, "[w]e never had any doubt or difficulty . . . in respect to the competency of the courts to declare a statute unconstitutional, when it clearly appeared to be so."[145] And Nathan Dane, in his 1829 *General Abridgment and Digest of American*

138 Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811) (opinion of Tilghman, C.J.).

139 *In re* Wellington, 33 Mass. (16 Pick.) 87, 95 (1834).

140 Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 383 (Md. 1838).

141 *Supra* text accompanying notes 66–72, 119–20.

142 THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES 285 (Philadelphia, P.H. Nicklin & T. Johnson 1830).

143 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 425 (New York, O. Halsted 1826).

144 *Id.* at 424.

145 *Id.* at 425.

Law, remarked that "[t]he law courts will not declare acts of the legislature unconstitutional, except where clearly so."[146] But while these three treatise writers noticed the clear error rule, only one acknowledged the higher reasonable doubt standard.

The clear error rule also appeared in the first edition of *Bouvier's Law Dictionary* in 1839. *Bouvier's Law Dictionary* was the first law dictionary that was written specifically for an American legal audience and eventually became the standard law dictionary in nineteenth-century America.[147] In the preface, Bouvier said that he had been inspired to write the dictionary by the difficulties he had encountered seeking admission to the bar.[148] Frustrated by his inability to efficiently learn the law, and lacking the knowledge which his "elder brethren of the bar seemed to possess," Bouvier said that when he conducted legal research as a new lawyer, he often found himself "in a labyrinth without a guide."[149] And the English legal dictionaries available to him at the time were mostly unhelpful, he said, "written for another country possessing laws different from our own."[150]

In writing his legal dictionary for an American legal audience, Bouvier included a definition of the word "constitutional" that would have had a distinct significance for an American audience that was just getting accustomed to the new practice of judicial review. "Constitutional," according to the 1839 *Bouvier's Law Dictionary*, meant "that which is consonant to, and agrees with the constitution."[151] And it further elaborated: "When laws are made in violation of the constitution, they are null and void: but the courts will not declare such a law void unless there appears to be a clear and unequivocal breach of the constitution."[152] That "clear and unequivocal" standard remained in the definition of "constitutional" in every subsequent edition of *Bouvier's Law Dictionary* published every few years until the fifteenth edition in 1883, when it underwent a substantial revision.[153]

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146 9 NATHAN DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 600 (Boston, Hilliard, Gray, Little, & Wilkins 1829).

147 Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 240 (1999).

148 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION, at v (Philadelphia, T. & J.W. Johnson 1839) [hereinafter BOUVIER, LAW DICTIONARY 1].

149 *Id.*

150 *Id.*

151 *Id.* at 219.

152 *Id.*

153 See *infra* text accompanying notes 362–66. The definition did not change between the first edition in 1839 and the fourteenth edition in 1880. *Compare, e.g.*, 1 BOUVIER, LAW DICTIONARY 1, *supra* note 148, at 219, *with* 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL

But in general, the major treatise writers of the Marshall Court era overlooked any discussion of a clear error rule, and did not mention the beyond-a-reasonable-doubt standard. It was not to be found anywhere, for example, in St. George Tucker's 1803 edition of *Blackstone's Commentaries*,[154] William E. Rawle's 1825 *View of the Constitution*,[155] Nathaniel Chipman's 1833 *Principles of Government: A Treatise on Free Institutions*,[156] or even Joseph Story's 1833 *Commentaries on the Constitution*.[157] But neither was there any outright disagreement with this standard in these works.

Treatise writers would occasionally propose creative, alternative standards. In 1832, Benjamin Lynde Oliver, a Massachusetts attorney, former student of Joseph Story, and sometime tutor of Nathaniel Hawthorne,[158] published *The Rights of an American Citizen; With a Commentary on State Rights, and on the Constitution and Policy of the United States*.[159] In it he proposed that the "presumption in favor of the constitutionality" of a law varies depending on whether it is a state or federal law.[160] In some ways anticipating Thayer's own argument, Oliver said that at the federal level, it was distressing to think that "a law may be enacted unanimously by congress, and be approved of by the President, and, on a question in relation to its constitutionality before the supreme court, may be decided to be unconstitutional, by the turning voice of the least able of all the judges on the bench."[161] Accordingly, he advocated that federal courts presume the constitutionality of all federal laws. And to operationalize that presumption, he recommended that the Supreme Court only invalidate federal laws with a two-thirds majority.[162] But state law, created by states with often "*particular or partial*

STATES OF THE AMERICAN UNION 337 (Philadelphia, J.B. Lippincott & Co. 14th ed. 1880) [hereinafter BOUVIER, LAW DICTIONARY 14].

154 *See generally* ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (Philadelphia, William Young Birch & Abraham Small 1803).

155 *See generally* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Philadelphia, H.C. Carey & I. Lea 1825).

156 *See generally* NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT; A TREATISE ON FREE INSTITUTIONS (Burlington, Edward Smith 1833).

157 *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray & Co. 1833).

158 *See* Margaret B. Moore, *Hawthorne, the Tories, and Benjamin Lynde Oliver, Jr.*, *in* STUDIES IN THE AMERICAN RENAISSANCE 213, 219–20 (Joel Myerson ed., 1991).

159 BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN; WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES (Boston, Marsh, Capen & Lyon 1832).

160 *Id.* at 127.

161 *Id.* at 126–27.

162 *Id.* at 127.

interest[s]," did not merit such deference.[163] "The presumption in favor of the constitutionality of a state law, consequently, must naturally be much weaker, than that of an act of congress."[164] Only a bare majority on the Supreme Court, Oliver argued, was needed to invalidate state laws.[165]

Other treatise writers from this era pointed directly away from any such deferential standard. In his 1839 work *Principles of Interpretation and Construction in Law and Politics*, Francis Lieber argued that among the essential rules of "constitutional hermeneutics" was the principle,

> [L]et, with a manly nation, every thing that is in favor of power, be closely construed; every thing in favor of the security of the citizen and the protection of the individual, comprehensively, for the simple reason, that power is power, and, therefore, able to take care of itself as well, as tending, by its nature, to increase, while the citizen wants protection.[166]

Lieber did not offer this rule as if it were a settled rule in American courts. And he did not cite any cases as authority for this claim; nor did he cite or distinguish the Marshall-era decisions of *Fletcher*, *Dartmouth College*, or *Ogden*. He cited instead his own 1838 work, *Manual of Political Ethics*, part I on public power.[167] And he offered it as a rule of construction, inspired mostly by a political theory informed by a healthy skepticism about the capacity for power to expand and look after itself.

But in general, treatise writers of this era overlooked the rule. Alexis de Tocqueville was an interesting example. In his 1835 first volume of *Democracy in America*, published in the last year of Marshall's reign as Chief Justice,[168] Tocqueville devoted an entire chapter just to the judicial power in America. And he explained his special focus: "I do not think that, until now, any nation in the world has constituted judicial power in the same manner as the Americans."[169] In some respects, judges in America behaved like judges in other countries.[170] And yet, he said, judges in America were "vested with an immense

163 *Id.*

164 *Id.*

165 *Id.*

166 FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 177, 188 (Boston, Charles C. Little & James Brown 1839).

167 *Id.* at 188 (citing 1 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS: DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW (Boston, Charles C. Little & James Brown 1838)).

168 *Previous Chief Justices*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/chief-justices/ [https://perma.cc/3G44-QRWB].

169 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835).

170 *Id.* at 95.

political power" not seen in other countries.[171] That was because, he explained, Americans had "recognized in judges the right to found their rulings on the Constitution rather than on the laws."[172] American judges had the unique power "not to apply laws that might appear to them unconstitutional."[173] As a result, a foreigner visiting America would naturally conclude that "the judge is one of the prime political powers."[174]

Tocqueville added, however, that while Americans had given courts this immense political power, "in obliging them to attack the laws only by judicial means, they have much diminished the dangers of this power."[175] Certain "judicial prerogatives and habits," he explained, hemmed in this potentially dangerous power.[176] And as examples, he offered the rule that courts would only exercise it in the context of a particular case or controversy, not head-on; only when litigants had a concrete interest in the case; and only when the challenged laws could give rise to a clearly formulated dispute.[177] And when courts disregarded a law, it was not wiped off the statute books, but just diminished in "moral force."[178] But he did not mention the existence of a cautious, self-imposed standard of review for constitutional questions.[179] So aware of the "immense" nature of the power of judicial review, and yet persuaded that certain judicial habits had "diminished" it to render it safe, he would surely have been interested to learn of this restraining rule.[180] But he, like many other treatise writers of the era, seems to have missed it.

Part of the explanation for this appears to be that while the Supreme Court had adopted the clear error rule as its formal standard of review in 1810, and adopted the reasonable doubt standard in 1827, state courts were still slowly adopting these standards for themselves. By the end of the 1830s, as the figures below show, out of twenty-six states then in the Union, only ten state supreme courts had adopted the clear error rule.[181]

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171 *Id.*
172 *Id.* (emphases omitted).
173 *Id.*
174 *Id.* at 93.
175 *Id.* at 96.
176 *Id.* at 93.
177 *Id.* at 94–97.
178 *Id.* at 96–97.
179 *See id.*
180 *Id.* at 95–96.
181 Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 40 (Gen. Ct. 1793); Respublica v. Duquet, 2 Yeates 493, 497–98 (Pa. 1799); Kendall v. Inhabitants of Kingston, 5 Mass. (5 Tyng) 524, 534 (1809); Syndics of Brooks v. Weyman, 3 Mart. (o.s.) 9, 12 (La. 1813); Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 94 (1822); Bowdoinham v. Richmond, 6 Me. 112, 114 (1829);

Figure 3. States that adopted a clear error rule by 1840

And just three had adopted the reasonable doubt formulation.[182]

Figure 4. States that adopted a reasonable doubt standard by 1840

State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 144, 164 (1838); Trs. of the Bishop's Fund v. Rider, 13 Conn. 87, 93 (1839); State v. Cooper, 5 Blackf. 258, 259 (Ind. 1839); Trs. of the Caledonia Cnty. Grammar Sch. v. Burt, 11 Vt. 632, 637–38 (1839).

182 Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811) (opinion of Tilghman, C.J.); *In re* Wellington, 33 Mass. (16 Pick.) 87, 95 (1834); Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 383 (Md. 1838).

The process of accepting, fixing, and liquidating these rules through the country's *entire* legal system remained ahead.

C. 1840–1860: The Clear Error Rule Becomes the "Leading Rule" Amid Concerns About an "Aggressor Court"

In the next two decades, the clear error rule would slowly emerge as the "leading rule" in state courts throughout the country and be labeled as such in a prominent legal treatise. And the reasonable doubt evidentiary standard would make its first clear appearance in a legal treatise too, as six more state supreme courts adopted that standard amid growing concerns in the mid-nineteenth century of unchecked, "aggressor" courts.

The first treatise to elaborate upon the clear error standard with any theoretical sophistication, and to quote the Marshall-era decisions in support of it, appears to have been E. Fitch Smith's 1848 *Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction*.[183] Smith designed his commentaries to be a successor to Joseph Story's 1833 *Commentaries on the Constitution*.[184] Smith added in his preface that he could not hope to achieve the level of brilliance Story had attained.[185] He was not a Harvard Law professor blessed with a "refined and cultivated intellect."[186] Nor had he "occupied a seat in the highest, and I hesitate not to say, the ablest judicial tribunal, which ever adorned the jurisprudence of any nation."[187] He had derived his knowledge of constitutional law, instead, from "the humbler walks of a private professional life."[188]

And he was upfront with his readers about his priors. He had become concerned with the rise of what he termed "[a]n excess of legislation" that he believed in many cases was unconstitutional.[189] He lamented both a "propensity to legislate" and what he called a "latitudinarian construction" of the Constitution from the courts, which had permitted such legislation of "doubtful constitutionality" to settle like "a mildew" upon the body politic.[190]

Even so, when Smith came to describe the judicial role, he made it clear that judges ought only to invalidate laws upon the clearest showing of unconstitutionality. He observed that "[i]t has . . . become a

183 E. FITCH SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION (Albany, Gould, Banks & Gould 1848).

184 *See id.* at v.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.* at vi.

189 *Id.*

190 *Id.* at vi–vii.

settled principle" in the United States that courts "have a right, and are in duty bound, to bring every law to the test of the constitution," and that they therefore have both a right and a duty to "declare every act of the legislature made in violation of the constitution, or of any provision of it, null and void."[191]

But Smith then immediately qualified that account via citation to two cases we have already seen that announced the clear error rule, the Supreme Court's 1810 decision in *Fletcher v. Peck* and the Maryland Court of Appeals' 1838 decision in *Regents of University of Maryland v. Williams*.[192] Smith quoted Chief Justice Marshall from *Fletcher v. Peck* about the "delicacy" of constitutional questions, which required that a judge have "a clear and strong conviction" of incompatibility.[193]

Quoting Chief Judge Buchanan's 1838 Maryland Court of Appeals opinion, Smith added that when judges, after "full consideration," did come to feel such a clear conviction of incompatibility between the Constitution and a statute, they "ha[ve] no choice" but "honestly and fearlessly to do [their] duty" and invalidate the law.[194] The Constitution was law and courts were bound to interpret that law. And every act of the legislature contrary to the "true intent and meaning of the constitution, is absolutely null and void."[195] But, he added, when judges did not possess such a "clear and strong conviction," and had a "*bona fide*" doubt that the law was unconstitutional, they should not "suffer [themselves] to be betrayed" into holding the law void "by a morbid apprehension that a contrary decision might be ascribed to the want of a proper sense of judicial duty."[196] In other words, even for a treatise writer who called himself "an advocate for a strict construction of the constitution,"[197] while judges had a duty to invalidate clearly unconstitutional laws, they also had a duty not to be intimidated into invalidating laws whose unconstitutionality was not to them clear.

Nine years later, in 1857, Theodore Sedgwick published his work *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law*.[198] Sedgwick was a New York lawyer and

191 *Id.* at 575, 574–75.

192 *Id.* at 576 (first citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810); and then citing Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 384 (Md. 1838)). At the time *Regents* was decided and until 2022, the Maryland Supreme Court was known as the Maryland Court of Appeals.

193 *Id.* at 576.

194 *Id.* at 576 (quoting *Regents*, 9 G. & J. at 383).

195 *Id.* at 574.

196 *Id.* at 576.

197 *Id.* at vii.

198 THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW (New York, John S. Voorhies 1857).

the son and grandson of prominent New York and Massachusetts lawyers and politicians.[199] In his treatise, Sedgwick described the clear error rule as "[t]he leading rule in regard to the judicial construction of constitutional provisions."[200] It was, for him, a "wise and sound" rule and, by 1857, an "established principle of construction."[201] Sedgwick presented the rule in more categorical terms than Smith had done, and with more supporting caselaw. The rule, according to Sedgwick, held that "in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in cases of clear and unquestioned violation of the fundamental law."[202]

But Sedgwick went further. In a first for treatises in American history, Sedgwick also said that the proper evidentiary standard courts should apply in constitutional cases was reasonable doubt. "It has been repeatedly held," he said, "that to warrant the courts in setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist."[203] Sedgwick listed that rule as the very first in his list of the legal, as opposed to what he called the merely "political," "rules of construction" of the Constitution.[204]

Quoting not only the familiar, cautionary lines from *Fletcher v. Peck*, but state cases from New York, Massachusetts, Illinois, and Pennsylvania, Sedgwick highlighted several articulations of this "leading rule."[205] The presumption in favor of the act's constitutionality was not to be overcome "unless the contrary is clearly demonstrated."[206] Courts were not to invalidate a law "except in cases admitting of no reasonable doubt."[207] Courts were to exercise the power of judicial review with "extreme caution" and "never where a serious doubt exists as to the true interpretation of the provisions alleged to be repugnant."[208] Courts would only set aside laws that "manifestly infringe some of the provisions of the constitution, or violate the rights of the subject."[209] And where the meaning of a constitutional clause was doubtful, "a statute alleged to conflict with it must be held valid."[210]

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199 *Sedgwick, Theodore*, 9 THE TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS (1904).

200 SEDGWICK, *supra* note 198, at 482.

201 *Id.* at 482, 485.

202 *Id.* at 482.

203 *Id.* at 592.

204 *Id.*

205 *Id.* at 482.

206 *Id.*

207 *Id.* at 483.

208 *Id.*

209 *Id.* at 484.

210 *Id.* at 485.

Thus, nine years after E. Fitch Smith had published his treatise, Sedgwick presented the rule in a more categorical fashion than Smith had done, and in the direction of greater judicial restraint. The rule had subtly shifted from one in which courts should "seldom" invalidate laws in a doubtful case, to one in which courts should *never* do so in a doubtful case: only where the unconstitutionality could be "clearly demonstrated" and could admit of "no reasonable doubt."[211]

This emerging consensus around a strong categorical formulation of the rule was reflected in prominent state court decisions in the 1850s. And it reflected a growing concern, reminiscent of Brutus's original worries in 1788, that if given too much power, judges could just as easily become aggressors as could tyrannical legislators.[212]

In 1853, the Pennsylvania Supreme Court observed that if it were to extend the scope of its review to laws that violated the "spirit" of the Constitution, or other unenumerated rights, "we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could."[213] While it was possible to imagine a thousand tyrannical things a legislature could do, "transferring the seat of authority from the legislature to the Courts[] would be putting our interests in the hands of a set of very fallible men," and an electorally unaccountable set too.[214]

In 1856, the Florida Supreme Court made a similar point. "Instances are not lacking to show that the judiciary, in essaying to shield the Constitution against the presumed aggressions of the Legislature, has itself become the greater aggressor."[215] The court's duty to review the constitutionality of laws, it explained, was a "delicate" one.[216] While it was "essential" that an independent judiciary "firmly" and "resolutely" exercise its powers when properly invoked, the court added, "[I]t is equally its duty to be careful not rashly and inconsiderately to trench upon or invade the precincts of the other departments of the government."[217]

And it was the presumption of constitutionality, the clear error rule, and now increasingly the reasonable doubt standard, that was key to ensuring that judges did not become "aggressors." As the Florida Supreme Court put it, "If there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law."[218] The

211 *Id.* at 482, 592.
212 *See supra* text accompanying notes 93–103.
213 Sharpless v. Mayor of Phila., 21 Pa. 147, 161 (1853).
214 *Id.* at 162.
215 Cotten v. Cnty. Comm'rs, 6 Fla. 610, 613 (1856).
216 *Id.*
217 *Id.*
218 *Id.*

court cited as authority for that standard the early decisions of the Supreme Court[219] and various state court decisions from Massachusetts, Kentucky, Louisiana, and Ohio.[220] And it noted, it could have cited "any number of decisions by the State courts" for those rules, but "if there be one to be found which constitutes an exception to the general doctrine, it has escaped our search."[221]

This provides strong evidence for Sedgwick's observation that the clear error rule had by the 1850s become the "leading rule" of statutory construction.[222] And the court concluded that it was "the rigid observance" of this rule upon which "depends the harmony of the great departments of the government."[223] "Violate it," the court warned dramatically, "and soon they will be seen like errant spheres madly shooting from their appropriate orbits, and engendering passion, strife, embarrassment, confusion, uncertainty, where there should alone exist love, peace, union, concord and co-operation."[224]

In 1858, the Michigan Supreme Court echoed these points. Justice Manning, writing for the court, noted that politically fraught constitutional questions seemed to proliferate on the dockets of state courts. And he observed: "The time was, and the period not very distant, when courts were reluctant to declare a statute void, and did not feel warranted in doing it unless they could lay their finger on the particular clause that was violated, and the conflict between the statute and Constitution was *obvious*."[225] Here Justice Manning's point was that at least in the first half of the nineteenth century, courts not only invoked the rule of clear error, but *followed* it in practice as well.[226] And writing in agreement, Justice Christiancy put the clear error rule this way:

> No rule of construction is better settled in this country, both upon principle and authority, than that the Acts of a State Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the

219 *Id.* at 613–14 (citing Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.); Cooper v. Telfair, 4 U.S. (4. Dall.) 14, 18 (1800) (opinion of Washington, J.); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, J., majority opinion)).

220 *Id.* at 614–15.

221 *Id.* at 614.

222 *See supra* text accompanying note 200.

223 *Cotten*, 6 Fla. at 616.

224 *Id.*

225 Sears v. Cottrell, 5 Mich. 251, 255 (1858) (opinion of Manning, J.) (emphasis added).

226 For empirical evidence that state courts *did* follow this rule in practice in the first half of the nineteenth century, see William E. Nelson, Commentary, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166 (1972).

> Constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject-matter, is to be made in favor of the constitutionality of the Act.[227]

The Michigan Supreme Court also ratified the reasonable doubt standard. Writing for the Court, Justice Manning observed, "When the power in the Legislature to pass a law is called in question, and there is a reasonable doubt as to the power, it is better the Court should err in favor of the power than against it."[228] And Justice Christiancy again echoed Manning: "[I]f the case be not clear from a reasonable doubt, then, within the principle of all the authorities, the law must be sustained."[229]

And the reason for these self-imposed rules and evidentiary standards was, at least in part, to provide a check upon the courts themselves. As Justice Christiancy put it: "These rules are founded in the best of reasons; because, as suggested by my brother Manning, while the supreme judicial power may interfere to prevent the legislative and other departments from exceeding their powers, no tribunal has yet been devised to check the encroachments of that judicial power *itself*."[230]

Writing their opinions in 1858, just one year after the Supreme Court's fateful decision to invalidate the Missouri Compromise in *Dred Scott*,[231] these Michigan judges seemed to emphasize the clear error rule, reasonable doubt standard, and the modest role that courts should take in constitutional cases, with even greater urgency than state court judges had before. As Justice Manning put it for the court, with a hint of foreboding, "The judiciary is not above the laws and Constitution."[232] Its province was to "declare what the Constitution and laws are; giving a pre-eminence to the former, and declaring the latter void only when repugnant to it."[233] But when it performed that duty, he said, the court "should be recollected its powers are as clearly limited by the Constitution and laws as those of the executive and legislative departments of the government."[234] When those departments exceeded their powers, "their acts may be declared void by the courts."[235] But, he concluded, "there is no power given to any department of the government to annul the acts of the judiciary when it exceeds its

227 *Sears*, 5 Mich. at 259 (opinion of Christiancy, J.) (emphasis omitted).
228 *Id.* at 256 (opinion of Manning, J.).
229 *Id.* at 261 (opinion of Christiancy, J.).
230 *Id.* at 259–60.
231 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
232 *Sears*, 5 Mich. at 255 (opinion of Manning, J.).
233 *Id.*
234 *Id.*
235 *Id.*

powers; for which reason, if no other, it should always be careful to keep clearly within them."[236]

On the eve of the Civil War, the country had tipped strongly in favor of clear error. Sedgwick was right to call it the "leading rule."[237] By 1860, twenty-seven state supreme courts out of thirty-three states (82%) then in the Union had formally announced a clear error standard.[238]

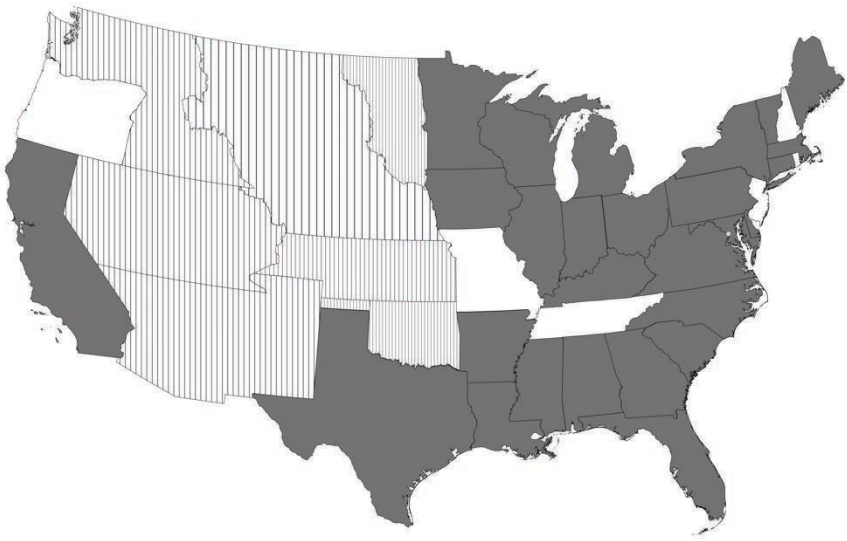

Figure 5. States that adopted a clear error rule by 1860

And the reasonable doubt standard was slowly getting support as well. Spurred on by concerns of "aggressor" courts, nine state supreme courts had adopted that higher standard by 1860, with five joining since 1850, three of them in the North—Michigan, New Hampshire,

236 *Id.*

237 SEDGWICK, *supra* note 198, at 482.

238 Lane v. Dorman, 4 Ill. (3 Scam.) 238, 240 (1841); Campbell v. Miss. Union Bank, 6 Miss. (5 Howard) 625, 672 (1842); State *ex rel.* Washington County v. Balt. & Ohio R.R. Co., 12 G. & J. 399, 438 (Md. 1842); Bailey v. Phila., Wilmington & Balt. R.R. Co., 4 Del. (4 Harr.) 389, 403 (1846); Nunn v. State, 1 Ga. 243, 246 (1846); Morris v. People, 3 Denio 381, 394 (N.Y. 1846) (opinion of Lott, Sen.); Sutherland v. DeLeon, 1 Tex. 250, 305 (1846); Reed v. Wright, 2 Greene 15, 21 (Iowa 1849); Eason v. State, 11 Ark. 481, 486 (1851); Cin., Wilmington & Zanesville, R.R. Co. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77, 83 (1852); Dickson v. State, 1 Wis. 122, 126 (1853); Cotten v. Cnty. Comm'rs, 6 Fla. 610, 613 (1856); Att'y Gen. *ex rel.* Indep. or Congregational Church v. Soc'y for the Relief of Elderly & Disabled Ministers, 29 S.C. Eq. (8 Rich. Eq.) 190, 226 (Ct. App. Eq. 1856); *Sears*, 5 Mich. at 259 (opinion of Christiancy, J.); People *ex rel.* Att'y Gen. v. Burbank, 12 Cal. 378, 384–85 (1859); Sadler v. Langham, 34 Ala. 311, 321–22 (1859); Heyward v. Judd, 4 Minn. 483, 491 (1860); *see also supra* note 181.

and Connecticut—all in the immediate aftermath of the *Dred Scott* decision.[239]

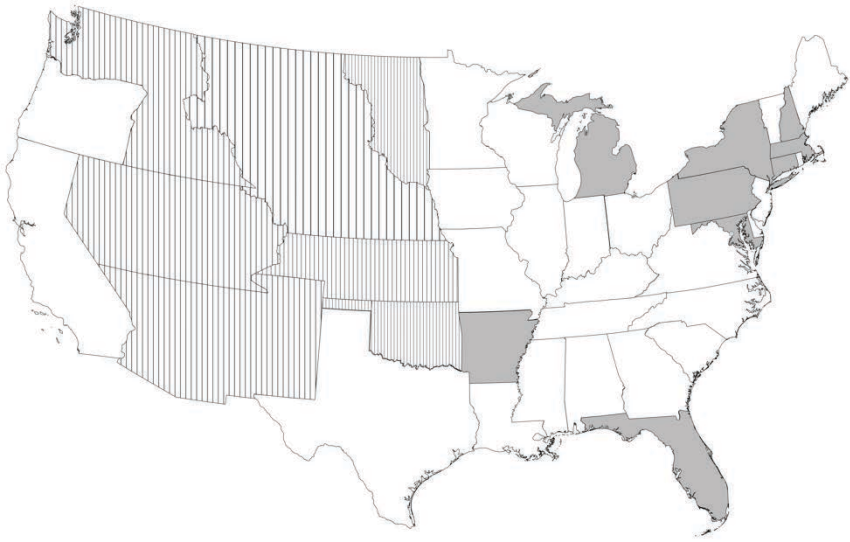

Figure 6. States that adopted a reasonable doubt standard by 1860

As the country plunged into civil war in the following decade, driven in part by the Supreme Court's own aggressive decision in *Dred Scott*, a new cohort of jurists and treatise writers would emerge after the war's conclusion who would make even more central the constitutional and legal limits on judicial decisionmaking, and remind their readers, particularly new law students, of the lessons of the clear error rule *and* the reasonable doubt standard.

D. 1860–1870: Thomas Cooley and the Rise of the "Reasonable Doubt" Standard in the Shadow of Dred Scott

The 1860s proved to be a turning point decade in the development and liquidation of the Constitution's standard of review. In the hands of Michigan jurist Thomas Cooley, the "reasonable doubt" standard received emphatic attention that would prove to be highly influential in the spread of the standard in state courts in the late nineteenth century. Cooley's crystallization of this standard would have an impact twenty-five years later upon Thayer himself. And other notable

239 *Morris*, 3 Denio at 394 (opinion of Lott, Sen.); *Eason*, 11 Ark. at 486; *Cotten*, 6 Fla. at 613; *Sears*, 5 Mich. at 256 (opinion of Manning, J.); Rich v. Flanders, 39 N.H. 304, 312 (1859); Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210, 227 (1860); *see also supra* note 182.

jurists and treatise writers of the era likewise converged on these rules and standards.

In 1868, John Bingham, for example, the architect of the Fourteenth Amendment and a Republican representative from Ohio,[240] had occasion to articulate the clear error rule and reasonable doubt standard on the floor of the House of Representatives. Bingham served as the House Manager in the impeachment trial of President Andrew Johnson.[241] Confronted by a claim that President Johnson could ignore a law as unconstitutional, Bingham observed that "[i]t has been settled law in this country from a very early period" that "the constitutionality of a law should not be questioned much less adjudged against the validity of the law, by a court clothed by the Constitution with jurisdiction in the premises, unless upon a case so clear as to scarcely admit of a doubt."[242] As support for his claim, he quoted from the opinion of Chief Justice Marshall in *Fletcher v. Peck*, an opinion of Chief Justice Savage of the New York Supreme Court of Judicature, and an opinion of the New York Court for the Correction of Errors.[243] And from the New York Supreme Court decision, he quoted an endorsement of the reasonable doubt standard: "Before the court will deem it their duty to declare an act of the Legislature unconstitutional a case must be presented in which there can be no rational doubt."[244] He insisted, with inaccurate exaggeration, that the Supreme Court itself had never set aside a law for unconstitutionality.[245] And he noted that as a technical matter even the Supreme Court's decision in *Dred Scott* had not done so, interpreting its declaration of the unconstitutionality of the Missouri Compromise to be mere dicta.[246]

But the *Dred Scott* decision loomed large for Bingham in coloring his views of the Supreme Court, fueling his desire to see it returned to a posture of greater restraint. In *Dred Scott*, the Supreme Court "dared to descend from its high place in the discussion and decision of purely judicial questions to the settlement of political questions."[247] But the Court had no more right to decide political questions for the American

240 Michael Zuckert, *The Intent of the Framer: John Bingham's Fourteenth Amendment*, 97 NOTRE DAME L. REV. 1411, 1411 (2022).

241 CONG. GLOBE, 40th Cong., 2d Sess. vii (1868).

242 PROCEEDINGS IN THE TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE UNITED STATES SENATE, ON ARTICLES OF IMPEACHMENT 811 (Washington, F. & J. Rives & Geo. A. Bailey 1868).

243 *Id.* (first quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810); then quoting *Ex parte* M'Collum, 1 Cow. 550, 564 (N.Y. Sup. Ct. 1823); and then quoting *Morris*, 3 Denio at 394 (opinion of Lott, Sen.)).

244 *Id.* (quoting *Ex parte M'Collum*, 1 Cow. at 564).

245 *Id.*

246 *Id.*

247 CONG. GLOBE, *supra* note 241, at 483 (statement of Rep. Bingham).

people, Bingham said, "than has the Court of St. Petersburg."[248] And its decision to transgress beyond its jurisdictional lane had wrought "terrible consequences" for the country.[249] "[It] disgraced not only itself as a tribunal of justice," he said, "but it disgraced our common humanity, when it mouthed from that high seat sacred to justice the horrid blasphemy that there were human beings either in this land or in any land who had no rights which white men were bound to respect."[250]

Outraged by that decision, Bingham proposed a bill in January 1868 that would have required a two-thirds supermajority vote before the Supreme Court could ever again invalidate an act of Congress.[251] By requiring a two-thirds vote, he hoped to make it more difficult for the Court to invalidate democratic decisionmaking.[252] And in support of that bill, and other proposals to require a unanimous vote, fellow congressmen argued that it would help operationalize the time-honored clear error rule. Republican Congressman Thomas Williams of Pennsylvania spoke as if the clear error rule was, as Sedgwick had put it a decade earlier, the "leading rule" of statutory construction: "He is perfectly well aware, as is every lawyer here, that it is a well-settled principle that no act of the law-making power should ever be declared invalid upon constitutional grounds unless it be a clear case."[253] And Congressman James Wilson of Iowa echoed Williams: "There is a rule of law that we are all perfectly familiar with, that whenever there is a doubt in the mind of the court as to the constitutionality of a law it is to be resolved in favor of the law . . . ."[254] "Every lawyer," he said, "understands this principle."[255]

As further evidence that, in the shadow of *Dred Scott*, the 1860s witnessed a shift towards greater emphasis upon judicial restraint, Timothy Walker's popular casebook, *Introduction to American Law: Designed as a First Book for Students*, is illustrative.[256] Walker was a former student of Joseph Story's at Harvard Law School and the founding dean and professor of law at Cincinnati College. His book was well received and popular. An 1837 review in the *North American Review* called it "an admirable First Book for Students of Law. It is also thoroughly

248 *Id.*
249 *Id.* at 484.
250 *Id.* at 483.
251 *Id.* at 484.
252 *Id.*
253 *Id.* at 479 (statement of Rep. Williams).
254 *Id.* at 488 (statement of Rep. Wilson).
255 *Id.*
256 TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS (Philadelphia, P.H. Nicklin & T. Johnson 1837).

American."[257] It was called "the most generally used text-book in this country."[258] This book earned the title "The American Blackstone."[259]

Introduction to American Law went through different editions in 1837, 1846, 1855, and 1860. In each of those first four editions, Walker laid out the principle that courts could invalidate laws in the course of reaching their decision. Reviewing the language of Article III about the "judicial power," Walker stated: "It is then the high function of the federal judiciary, to arrest the arm of either [branch of] government, when it would overstep its prescribed limits, and encroach upon the precincts of the other."[260] Walker conceded that some felt that this power was "a departure from the democratic theory."[261] But, he reassured his readers, this power was "one of the noblest features in our system."[262] And he explained:

> One cannot easily conceive of a more sublime exercise of power, than that by which a few men, through the mere force of reason, without soldiers, and without tumult, pomp, or parade, but calmly, noiselessly, and fearlessly, proceed to set aside the acts of either government, because repugnant to the constitution.[263]

But by 1869, when *Introduction to American Law* was republished as a fifth edition, the "sublimity" of this power was moderated. Immediately after this glowing tribute to the countermajoritarian power of judicial review, Walker's son, the new editor of the treatise, added a new footnote to this section that laid out the clear error caveat: "The courts will not declare an act unconstitutional, unless it is clearly and evidently a violation of the constitution. In all cases of doubt, the doubt must be resolved in favor of the legislative power."[264] This 1869 note cited recent state supreme court cases from Connecticut, New Hampshire, Maryland, Michigan, Iowa, Kansas, and Indiana.[265] And that clear error rule remained a feature of *Introduction to American Law* in every subsequent edition through 1905,[266] with new caselaw regularly added for support.

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257 Book Review, 45 N. AM. REV. 485, 485 (1837) (reviewing WALKER, *supra* note 256).

258 1 CHARLES THEODORE GREVE, CENTENNIAL HISTORY OF CINCINNATI AND REPRESENTATIVE CITIZENS 630 (1904).

259 *See* Irvin C. Rutter & Samuel S. Wilson, *The College of Law: An Overview, 1833–1983*, 52 CIN. L. REV. 311, 312 (1983).

260 WALKER, *supra* note 256, at 73.

261 *Id.*

262 *Id.*

263 *Id.*

264 TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS 71 n.b. (J. Bryant Walker ed., Boston, Little, Brown, & Co. 5th ed. 1869).

265 *Id.*

266 *See* TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS 73 n.b (Clement Bates ed., 11th ed.1905).

And as further evidence that the clear error rule was catching on after the Civil War, George Washington Paschal's 1868 book, *The Constitution of the United States: Defined and Carefully Annotated*, is another example.[267] Paschal offered a line-by-line commentary on every phrase in the Constitution, from the Preamble through the Tenth Amendment, as a popular reference book on the Constitution for lawyers, politicians, journalists, and citizens. As a Southern lawyer and judge who had opposed secession, supported union, and thought the Civil War had been prompted by a fundamental misreading of the Constitution and would be a disaster for the South, Paschal offered his postwar work as a form of popular civic education.[268] He did so, he said, because "[t]here is a kind of popular fallacy that everybody understands the Constitution of his country, when, truth to confess, comparatively few have ever read it at all, and still fewer have studied it carefully."[269] And he worried that the Constitution was simply unavailable to most citizens: "It is not even a book in all our public libraries; it is not in one house in fifty; it is nowhere on the catalogue of school-books; and it is not taught in one school in a thousand."[270] In that work, Paschal explained that "[a] law will not be held to be unconstitutional, unless it is clearly and plainly so."[271] And he cited *Fletcher v. Peck*, *Ogden v. Saunders*, and state supreme court decisions from New York and Massachusetts as his chief evidence.[272]

But both the clear error rule and especially the reasonable doubt standard received their most thoughtful and influential articulation ever in 1868 by Thomas M. Cooley, who served as both the Chief Justice of the Michigan Supreme Court and dean of the University of Michigan Law School.[273] In September 1868, Cooley published the first edition of his first significant treatise, *A Treatise on the Constitutional Limitations*.[274] In the preface to his work, Cooley acknowledged the "valuable" work of his two predecessors in the field, E. Fitch Smith and Theodore Sedgwick, and described his treatise as "supplementary to their labors" rather than a "substitute for them."[275]

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267 GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED (Washington, D.C., W.H. & O.H. Morrison 1868).

268 *Id.* at viii–xvii.

269 *Id.* at vii.

270 *Id.*

271 *Id.* at 155.

272 *Id.*

273 *See* Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865–1885*, 10 AM. J. LEGAL HIST. 97, 97 (1966).

274 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown & Co. 1868).

275 *Id.* at iii.

The text of Cooley's lectures to law students at Michigan,[276] *Constitutional Limitations* was, despite its author's modest aspirations, quickly recognized as a masterpiece. Andrew McLaughlin described it as "an indispensable companion for every one interested in constitutional problems,"[277] and Lawrence Friedman called it the most important treatise "for its own generation."[278] Fifteen years after its initial publication, a reviewer raved that "[i]t is impossible to exaggerate its merits. It is an ideal treatise . . . . It is cited in every argument and opinion on the subjects of which it treats, and not only is the book authoritative as a digest of the law, but its author's opinions are regarded as almost conclusive."[279]

Similar to Smith, Cooley acknowledged in the preface to *Constitutional Limitations* that while he intended to present the caselaw as it was, he would "not attempt to deny—what will probably be sufficiently apparent—that he has written in full sympathy with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government."[280] But he added that he advocated for limitations not only upon the legislative authority, but also upon the courts. As he put it, he preferred checks and balances and the ultimate supervisory power of "general public sentiment" to the "judicious, prudent, and just exercise of unbridled authority by any one man or body of men, whether sitting as a legislature *or as a court*."[281]

Writing after both the *Dred Scott* decision and the Civil War, Cooley noted, in an understated way, that certain issues he would highlight in his new treatise "have acquired their importance in a considerable degree from subsequent events or decisions."[282] Foremost among these issues was the matter of judicial restraint, which prior to Cooley had never received any systematic attention in a treatise or casebook. And according to Paul Carrington, "He found no occasion to discuss *Dred Scott*, but his contemporary readers must surely have had that decision in mind when considering his injunction against judicial overreaching."[283]

Thus, in an entire lengthy, yet often overlooked, chapter in *Constitutional Limitations* entitled "Of the Circumstances Under Which a

276 Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 AM. J. LEGAL HIST. 368, 372 (1997).

277 *Cooley, Thomas McIntyre*, 4 DICTIONARY OF AMERICAN BIOGRAPHY 392, 393 (1930).

278 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 545 (1973), *cited in* Carrington, *supra* note 276, at 372.

279 Book Review, 27 ALB. L.J. 300 (1883) (reviewing COOLEY (5th ed. 1883), *supra* note 274), *cited in* Carrington, *supra* note 276, at 373.

280 COOLEY, *supra* note 274, at iv.

281 *Id.* (emphasis added).

282 *Id.* at iii.

283 Carrington, *supra* note 276, at 375 (footnote omitted).

Legislative Enactment May Be Declared Unconstitutional," Cooley laid out the constitutional limitations upon courts. Cooley prefaced his discussion with this initial observation:

> It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.[284]

Judges did have the power and duty to declare laws unconstitutional, and could not decline that duty.[285] "Being required to declare what the law is in the cases which come before them," Cooley explained, "they must enforce the constitution as the paramount law."[286] Whatever doubts may have once existed about that power or duty, Cooley observed, had long since been removed.[287] But the task was nonetheless "a delicate one, and only to be entered upon with reluctance and hesitation."[288]

Accordingly, Cooley adopted the "reasonable doubt" standard as the appropriate evidentiary standard for constitutional cases. Approaching any constitutional question with "great caution," courts were to first study the issue carefully.[289] Quoting the "eminent jurist" Lemuel Shaw, the former Chief Justice of the Massachusetts Supreme Judicial Court, courts were to "examine it in every possible aspect" and "ponder upon it as long as deliberation and patient attention can throw any new light upon the subject."[290] And following such careful study, courts should "never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."[291] In other words, after careful, thorough study, if a reasonable doubt about the constitutionality of the law remained, then that doubt "must be solved in favor of the legislative action, and the act be sustained."[292]

Reasonable doubt—post study and reflection—was thus sufficient to warrant judicial restraint. Cooley cited former Supreme Court Justice Bushrod Washington for this point. In *Ogden v. Saunders*, Justice Washington had noted that the constitutional question in that case was

284 COOLEY, *supra* note 274, at 159.
285 *Id.* at 160.
286 *Id.* at 159.
287 *Id.* at 160.
288 *Id.*
289 *Id.* at 182.
290 *Id.*
291 *Id.*
292 *Id.*

mired in "difficulty and doubt."[293] Justice Washington, Cooley approvingly noted, explained that "if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it."[294] And that is because, still quoting Justice Washington, "[i]t 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 is proved beyond all reasonable doubt."[295] As Cooley summarized it, "The constitutionality of a law, then, is to be presumed."[296] For Cooley, the presumption of constitutionality could only be rebutted by clear evidence that left the decisionmaker without any reasonable doubt of its unconstitutionality.

And reasonable doubt was not only *sufficient* to justify restraint, as Justice Washington had formulated it in 1827, but *required* restraint. As Cooley would later formulate this rule in 1880, "To be in doubt, therefore, is to be resolved" in favor of upholding the constitutionality of a challenged law.[297] In discussing the rules of constitutional construction in *Constitutional Limitations*, Cooley offered this rule:

> But when all the legitimate lights for ascertaining the meaning of the Constitution have been made use of, it may still happen that the construction remains a matter of doubt. In such a case it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon the doubt alone to abstain from acting. . . . Whether the power be legislative, executive, *or judicial*, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions.[298]

Thus, after a court had exhausted the standard interpretive methodologies for extracting meaning from the Constitution and the relevant statute, if doubt about the law's validity still remained, it was not the court's role to step into the breach and offer its own gloss. Rather, it was, in Cooley's words, its duty to "abstain from acting."[299]

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293 *Id.* at 183.

294 *Id.* (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (opinion of Washington, J.)).

295 *Id.* (quoting *Ogden*, 25 U.S. at 270).

296 *Id.*

297 THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 153 (Boston, Little, Brown & Co. 1880).

298 COOLEY, *supra* note 274, at 73–74 (emphasis added).

299 *Id.* at 74.

Cooley remained committed to these principles of the presumption of constitutionality, clear error, and reasonable doubt throughout his career as both jurist and scholar. In 1865, for example, he observed on the Michigan Supreme Court:

> It is conceded to be the settled doctrine of this state, that every enactment of the state legislature is presumed to be constitutional and valid; that before we can pronounce it otherwise we must be able to point out the precise clause in the constitution which it violates, and that the conflict between the two must be clear or free from reasonable doubt; since it is only from constitutional provisions limiting the legislative power and controlling the legislative will, that we derive authority to declare void any legislative enactment. And the rule so well settled here is not left in doubt by decisions elsewhere.[300]

In every subsequent edition of his popular *Constitutional Limitations* treatise, Cooley retained this long chapter on judicial restraint.[301] Cooley not only never retracted or modified his commitment to the reasonable doubt standard, but in the 1874 and 1878 editions of the treatise, he *added* more recent cases in support of his claims that "[a] reasonable doubt must be solved in favor of the legislative action," and that courts must "presume in favor of [the challenged law's] validity, until its violation of the constitution is proved beyond all reasonable doubt."[302]

And in 1880, in his new work intended as a casebook or "manual"[303] for law students entitled *The General Principles of Constitutional Law in the United States of America*, Cooley retained all these principles of restraint. He offered this global formulation of the principles of judicial duty *and* restraint:

> The obligation to perform this duty, whenever the conflict appears, is imperative; but the duty is nevertheless a delicate one, because the court in declaring a statute invalid must necessarily overrule the decision of the legislative department, made in the course of the performance of its peculiar duties, and where it must be assumed to have acted on its best judgment. The task, therefore, is one to be entered upon with caution, reluctance, and hesitation, and

300 People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127, 161 (1865) (opinion of Cooley, J.) (citing People v. Gallagher, 4 Mich. 244 (1856); Sears v. Cottrell, 5 Mich. 251 (1858); Tyler v. People, 8 Mich. 320, 333 (1860)).

301 New editions were released in 1871, 1874, 1878, 1883, 1890, 1903, and 1927.

302 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 182–83 (Boston, Little, Brown & Co. 3d ed. 1874); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 220–21 (Boston, Little, Brown & Co. 4th ed. 1878).

303 COOLEY, *supra* note 297, at iii.

> never until the duty becomes manifestly imperative. The following general propositions will be found to state the obligations of duty and of forbearance for such cases which are generally recognized.[304]

The judicial "obligation," in Cooley's assessment, was thus twofold—one of duty to set aside clearly unconstitutional laws, but also one of forbearance from setting aside laws whose unconstitutionality was not shown beyond a reasonable doubt.

Cooley's explanation of the reasonable doubt standard reflected underlying state practice at the time he wrote. But it also seemed to strongly *influence* that practice going forward. From 1881 to 1904, for example, at least twelve different state supreme courts representing all parts of the country cited Cooley as they adopted the reasonable doubt standard as their own for the first time.[305]

And Thayer himself was influenced by Cooley's articulation of the reasonable doubt standard. In his 1893 *Harvard Law Review* article, Thayer said that "[t]his well-known rule is laid down by Cooley," and cited both Cooley's *Constitutional Limitations* and *General Principles*.[306] He referenced a handful of the cases Cooley had cited for the rule.[307] This further supports the point made by one contemporaneous reviewer of Cooley's work that in the late nineteenth century, Cooley's works were "so far the best on the subject that little resort . . . is had of late to any other."[308] But it also shows the special reliance of Thayer upon Cooley. And Thayer openly acknowledged his indebtedness to Cooley. In a letter he wrote to Cooley in 1885, Thayer expressed

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304 *Id.* at 145.

305 Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881); Chesapeake & Ohio Ry. Co. v. Miller, 19 W. Va. 408, 422 (1882); State v. District of Narragansett, 16 A. 901, 906 (R.I. 1889); State v. Morgan, 48 N.W. 314, 316 (S.D. 1891); Cole Mfg. Co. v. Falls, 16 S.W. 1045, 1046 (Tenn. 1891); State v. Camp Sing, 44 P. 516, 517 (Mont. 1896); Lommen v. Minneapolis Gaslight Co., 68 N.W. 53, 54 (Minn. 1896); Mayor of Wilmington v. Ewing, 43 A. 305, 309 (Del. 1899); State v. Lubee, 45 A. 520, 521 (Me. 1899); Park v. Candler, 40 S.E. 523, 525–26 (Ga. 1902); Brown v. City of Galveston, 75 S.W. 488, 492 (Tex. 1903); State v. Ide, 77 P. 961, 962 (Wash. 1904).

306 Thayer, *supra* note 12, at 142 n.1 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 216 (Boston, Little, Brown & Co. 6th ed. 1890) [hereinafter COOLEY, TREATISE 6]); *see id.* at 144 n.1 (citing COOLEY, TREATISE 6, *supra*, at 68); *id.* at 148 n.3 (citing THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 57 (Boston, Little, Brown & Co. 2d ed. 1891)).

307 *Id.* at 140–43, 142 n.1. Of the eighteen citations Thayer used, at least seven were cited in the 1890 version of Cooley's *Constitutional Limitations*. *Compare id.* at 140–43, 142 n.1, *with* COOLEY, TREATISE 6, *supra* note 306, at 201 n.3, 202 n.2, 216 nn.2–3, 217 n.2, 219 n.3.

308 *Cooley's Constitutional Law*, 21 ALB. L.J. 338, 338 (1880) (reviewing COOLEY, *supra* note 297).

admiration for *Constitutional Limitations* and told him that *General Principles* was the only book he required his Harvard Law students to read.[309]

Cooley, in turn, expressed admiration for Thayer's 1893 *Harvard Law Review* article. After Thayer sent him a copy of that article, Cooley responded by telling him that his own views were "entirely in harmony with what you have written."[310] And in the seventh edition of *Constitutional Limitations,* published in 1903, five years after Cooley's passing and just one year after Thayer's, the new editor of Cooley's treatise inserted a tribute to Thayer's article as the new lead footnote to Cooley's chapter on judicial restraint.[311]

By 1870, the most noticeable jump in state courts was in the direction of the reasonable doubt standard. Within just thirteen years of the *Dred Scott* decision, seven more states had adopted that as their evidentiary standard for constitutional cases, bringing the total to thirteen out of thirty-seven states.[312]

309 *See* Carrington, *supra* note 276, at 376 n.53; ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY 247 (1987).

310 Letter from Thomas M. Cooley to James B. Thayer, Professor, Harvard L. Sch. (Nov. 23, 1893) (on file with the University of Michigan Bentley Historical Library), *quoted in* Moyn & Stern, *supra* note 36 (manuscript at 23 n.112).

311 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 227 n.a (Victor H. Lane ed., 7th ed. 1903) ("For a very learned discussion of the origin and scope of the American doctrine of constitutional law treating of the power of the courts to declare statutes void because in conflict with the constitution, see a paper by the late Professor James B. Thayer read before the Congress on Jurisprudence and Law Reform, and published in the October, 1893, number of the 'Harvard Law Review.'" (citing Thayer, *supra* note 12)).

312 Sears v. Cottrell, 5 Mich. 251, 256 (1858) (opinion of Manning, J.); Rich v. Flanders, 39 N.H. 304, 312 (1859); Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210, 227 (1860); Cohen v. Wright, 22 Cal. 293, 308 (1863); State *ex rel.* Chandler v. Main, 16 Wis. 398, 399, 415 (1863); Abbott v. Lindenbower, 42 Mo. 162, 168 (1868); Stewart v. Bd. of Supervisors, 30 Iowa 9, 15 (1870); *see also supra* notes 182, 239.

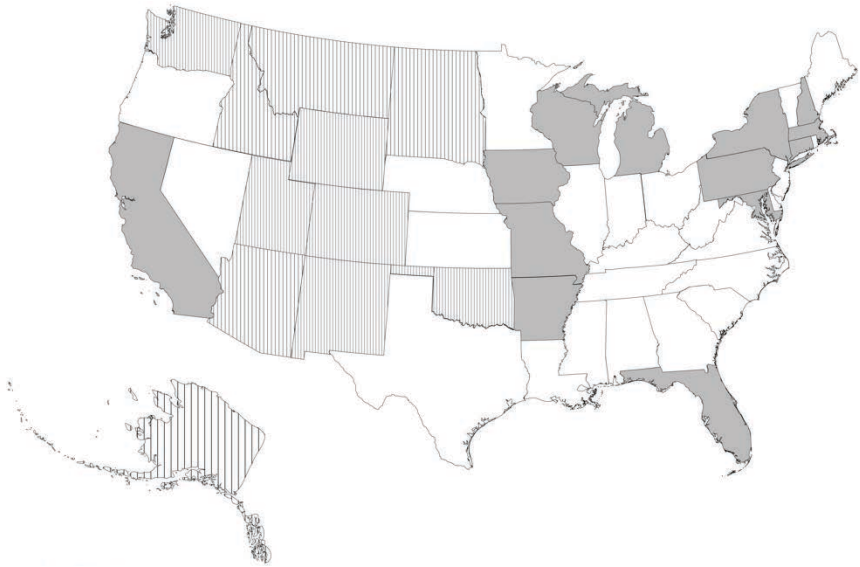

Figure 7. States that adopted a reasonable doubt standard by 1870

And the clear error standard remained the overwhelming "leading rule" in the country with thirty states in its camp.[313]

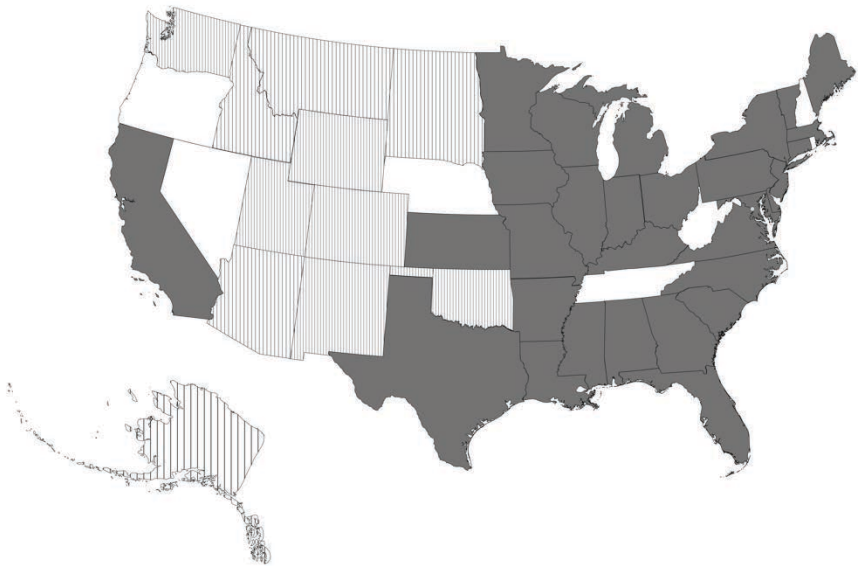

Figure 8. States that adopted a clear error rule by 1870

313 State *ex rel.* Crawford v. Robinson, 1 Kan. 17, 27 (1862); Stephens v. St. Louis Nat'l Bank, 43 Mo. 385, 390 (1869); State v. Fuller, 34 N.J.L. 227, 232 (1870); *see also supra* notes 181, 238.

E. 1870s: The Two Wings of Judicial Duty—Engagement in Cases of Clear Error, Forbearance in Cases of Doubt

In the 1870s, prominent treatise writers continued to reaffirm principles of both judicial duty and judicial restraint. This was an era marked by increasing confidence both in the Court's powers and in the importance of limits on those powers. On the writers' view, courts had both the duty to invalidate laws whose unconstitutionality was clear, and also the duty to go "slowly" and cautiously in this direction, operating under the presumption of constitutionality and the clear error rule. Indeed, treatise writers of this decade regularly presented both sets of duties as two sides of the same coin. Both were based upon "undeniably clear" legal principles and upon a growing and "unbroken" set of judicial decisions in America. And while treatise writers occasionally acknowledged some lingering disagreement in practice among judges on the point of restraint, they were willing to take sides and argue that the view associated with restraint was "the true view" and the one "best supported" by caselaw.

In 1870, Thomas W. Powell published a one-volume work called *Analysis of American Law*. Presented as an analytical "outline of the law" for the new law student on the model of *Blackstone's Commentaries*, it was designed to be a general "map or guide-book" to American law.[314] It included suggestions for what other volumes, treatises, and case reports readers should acquire, both at the outset of their legal studies and upon admission to the bar.[315] And it even included approximate prices for these volumes. "These two lists of law books will form a very respectable library for a lawyer to begin with. The first (the student's library) will cost about $150; the second, about $400."[316]

Introducing students to the power of the courts to invalidate legislative acts, Powell laid out the rule. When such acts are "in direct and irreconcilable conflict" with the Constitution, it becomes the "right and duty" of courts to treat them as "null."[317] But immediately after laying out the right and duty of the courts, Powell explains: "In such cases, however, the presumption is always in favor of the law, and of its capacity to be reconciled; and it is only when manifest incompatibility exists that this judicial power will be exercised."[318] And Powell cited an

314 THOMAS W. POWELL, ANALYSIS OF AMERICAN LAW, at v (Philadelphia, J.B. Lippincott & Co. 1870).

315 *Id.* at xiv.

316 *Id.*

317 *Id.* at 89.

318 *Id.*

1852 Ohio Supreme Court decision that expanded upon the point.[319] Judges were indeed duty bound to invalidate laws that conflicted with the Constitution. If judges were to ignore this duty, it would be tantamount to nullifying all constitutional guarantees and proclaiming "the legislative body, like the British Parliament, omnipotent."[320] But while this "right and duty" of the courts was "undeniably clear," the principles by which a court should be guided in carrying out this duty were "equally clear."[321] And those principles, formed by the "uniform language" of Supreme Court decisions and an "unbroken chain of decisions to the same effect . . . in the State courts," required the presumption of validity, clear error rule, and reasonable doubt standard before invalidating laws on the grounds of unconstitutionality.[322]

In 1871, Platt Potter, a Supreme Court Justice of New York, republished a widely used treatise on statutory interpretation called *Dwarris on Statutes*.[323] That volume, originally published in England in 1835 by Sir Fortunatus Dwarris, an English lawyer and member of the Middle Temple in London, became a standard text for the interpretation and construction of statutes in England and America.[324] After it went out of print and became difficult to find, Justice Potter decided to republish the work, retaining nearly all Dwarris had included in his previous volumes, but adding new materials drawing upon American caselaw for American lawyers.[325] As a treatise written for English barristers, *Dwarris on Statutes* had never addressed questions of the *constitutionality* of statutes. So, when Potter reworked Dwarris's classic text for an American audience, he had to start afresh on that subject.

Potter explained that when the "constitutional validity" of the law was in question, courts sought to construe statutes to save their constitutionality.[326] But when that could not be done, he explained, "[t]he presumption is always in favor of the constitutionality of a law, and before declaring it void, the court must be satisfied that it violates the constitution, clearly, plainly, palpably."[327] For that proposition, he cited state supreme court decisions in Pennsylvania and Indiana.[328] But Potter added that while the presumption of constitutionality was

319 *Id.* (citing Cin., Wilmington & Zanesville, R.R. Co. v Comm'rs of Clinton Cnty., 1 Ohio St. 77 (1852)).

320 *Cin., Wilmington & Zanesville, R.R. Co.*, 1 Ohio St. at 82.

321 *Id.*

322 *Id.* at 83–84.

323 FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES (Platt Potter ed., Albany, William Gould & Sons 1871).

324 *See id.* at iii.

325 *See id.* at iii–iv.

326 *Id.* at 111 n.8.

327 *Id.*

328 *Id.*

demanding and required a clear showing of unconstitutionality for invalidation, it was not an unrebuttable presumption. The presumption was "not to be indulged to the extent of making all statutes constitutional," but only those which, "if possible," could be construed to uphold their validity.[329]

In 1873, Joel Prentiss Bishop published his influential treatise *Commentaries on the Law of Statutory Crimes*.[330] A New York lawyer, treatise writer, and officer of the New York Anti-Slavery Society, Bishop was regarded by some as "the foremost law writer of the age."[331] The *American Law Review* would later rave that Bishop wrote "the most thorough, original, sound, and useful treatises upon several leading titles of the law which have been written in the English language."[332]

In his 1873 treatise, Bishop explained, "When a statute is void, as in conflict with a constitutional inhibition, the courts should pronounce it so."[333] The judge's oath of office, Bishop said, "compels them to this course."[334]

However, Bishop explained, courts should be "slow" to take up the hammer of invalidation.[335] In general terms, "courts will presume the legislature intended its acts to be reasonable, constitutional, and just."[336] But he admitted some judicial disagreement on this point. As he put it, "Judges, however, differ somewhat on this point, some being inclined to pay little or no regard to the judgment of the law-makers."[337] But upon surveying the state of the law, Bishop argued that

> [t]he true view in principle, and the one best supported by judicial authority is, that, since the legislators are themselves sworn to support the constitution, and they pass no act which they deem to be in violation of it, and since they are presumed to be men of learning and understanding, the decision which, in passing the act, they pronounce in favor of its constitutionality, prevails with the judges unless they affirmatively and distinctly see that the decision is wrong.[338]

And the quantum of proof required for Bishop was reasonable doubt: "If there exist upon the mind of the court a reasonable doubt, that

329 *Id.*

330 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (Boston, Little, Brown & Co. 1873).

331 *See* Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215, 215 (1995) (quoting *Mr. Bishop as a Law Writer*, 21 CENT. L.J. 81 (1885)).

332 Note, *A Deserved Tribute*, 18 AM. L. REV. 853, 853 (1884).

333 BISHOP, *supra* note 330, § 91.

334 *Id.*

335 *Id.*

336 *Id.* § 90.

337 *Id.* § 91.

338 *Id.*

doubt must be given in favor of the law."[339] For this claim he cited state supreme court decisions from all over the country, including Florida, Georgia, California, Indiana, Iowa, Maryland, Michigan, and New Hampshire.[340] And Bishop closed his discussion with a citation to the 1856 warning from "a learned judge" on the Florida Supreme Court that the judiciary, in "essaying to shield the constitution against the presumed aggressions of the legislature," could itself become "the greater aggressor."[341]

Throughout the 1870s, the Supreme Court would continue to reaffirm the principles underlying judicial restraint that it had first articulated more than half a century earlier in *Fletcher v. Peck* and *Ogden v. Saunders*.[342] For example, in the *Legal Tender Cases* of 1870, the Court took the unusual step of reversing its own decision, *Hepburn v. Griswold*, from just the prior Term in 1869. In *Hepburn*, the Court had invalidated an act of Congress that had made paper money legal tender for prior debts by a vote of 5–3.[343] But in the 1870 case, now with a full complement of nine justices, it said that there must be a "clear incompatibility" between the Constitution and the legal tender acts to justify invalidation of the law.[344] It anchored that rule in comity: "A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution."[345] "Such has always been the rule," it explained, citing Chief Justice Marshall in *Fletcher* and Chief Justice Tilghman from the Pennsylvania Supreme Court.[346] Accordingly, the Court in the *Legal Tender Cases* reversed its own one-year-old decision invalidating a federal law in the name of the clear error rule and reasonable doubt standard.

Eight years later in 1878, writing for a unanimous Court in a case popularly known as the *Sinking-Fund Cases*, Chief Justice Morrison Waite announced, without the aid of any citation, the following:

> It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never

339 *Id.* (quoting Cotten v. Cnty. Comm'rs, 6 Fla. 610, 613 (1856)).

340 *Id.* at 60 n.2.

341 *Id.* (quoting *Cotten*, 6 Fla. at 613).

342 *See supra* text accompanying notes 121–25, 131–37.

343 Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 625–26 (1870).

344 Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871).

345 *Id.*

346 *Id.* (first citing Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811) (opinion of Tilghman, C.J.); and then quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810)).

> be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.[347]

Chief Justice Waite echoed here the now self-confident, twofold understanding of judicial review worked out by the treatise writers of the 1870s, and Cooley before them. The duty of the Court was to declare an act of Congress void if it was not within the scope of its constitutional authority. But it was just as much the Court's duty to *refrain* from declaring an act of Congress void if its unconstitutionality could not be shown "beyond a rational doubt." That rule, he said, required "strict observance."[348]

Just one Term later, Justice Samuel Miller, again writing for a unanimous Court, articulated this same position. "[A] due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty."[349] And it was because of that "uniform course" that a Court watcher could "count, as he may do on his fingers, the instances in which this court has declared an act of Congress void for want of constitutional power."[350]

State courts expressed a similar confidence in the rule. In 1875, for example, the Virginia Supreme Court of Appeals observed that the presumption of constitutionality had been settled beyond question. "The decisions of all the courts, state and federal, speak a uniform language on this subject."[351] To provide a string cite in its favor, Judge Joseph Christian, writing for the court, quipped, "would include nearly every case in which a question of constitutional law has ever arisen."[352] The "rule" in those cases, the court explained, was straightforward: "[W]e can declare an act of the general assembly void *only* when such act *clearly and plainly* violates the constitution, and in such manner as to leave no doubt or hesitation on our minds."[353] And contrary authority to this rule was nowhere to be found. "The rule referred to has, I

347 The Sinking-Fund Cases, 99 U.S. 700, 718 (1879).

348 *Id.*

349 The Trade-Mark Cases, 100 U.S. 82, 96 (1879).

350 *Id.*

351 Commonwealth v. Moore & Goodsons, 66 Va. (25 Gratt.) 951, 953 (1875). At the time of the decision and until 1971, the Virginia Supreme Court was known as the Supreme Court of Appeals.

352 *Id.* at 953–54.

353 *Id.* at 953 (emphasis added).

believe, the singular advantage of not being opposed even by a *dictum*."[354]

The Virginia Supreme Court of Appeals' observation tracked the trend lines throughout the country. Tennessee and Colorado formally adopted the clear error standard.[355] And Vermont adopted the reasonable doubt standard.[356]

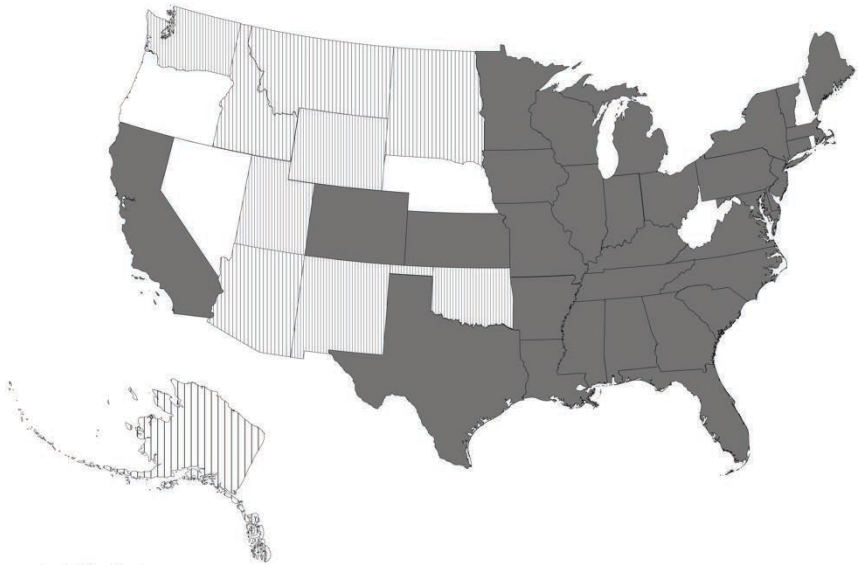

Figure 9. States that adopted a clear error rule by 1880

354 *Id.* at 954 (emphasis added).

355 State *ex rel.* Morrell v. Fickle, 71 Tenn. 79, 81–82 (1879); People *ex rel.* Tucker v. Rucker, 5 Colo. 455, 458–59 (1880).

356 Town of Bennington v. Park, 50 Vt. 178, 192 (1877).

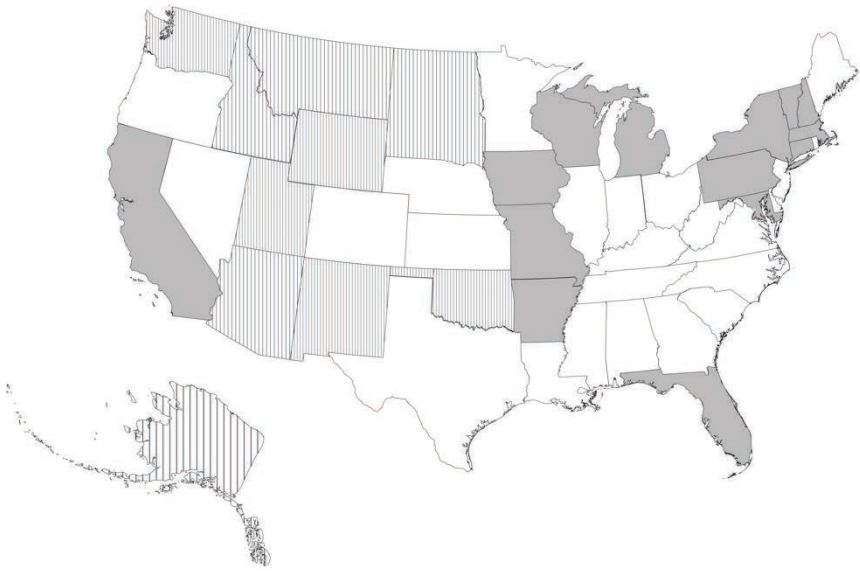

Figure 10. States that adopted a reasonable doubt standard by 1880

Despite this judicial sense of assurance, courts in the next two decades would start to invalidate federal and state laws at a higher rate. And this would prompt some jurists to double down on the well-settled principles of restraint, but now increasingly in dissent.

F. 1880–1900: The "Leading Rule" Moves into Dissent

The 1880s and 1890s witnessed a complicated twofold movement around principles of judicial restraint. On the one hand, there was an extraordinary proliferation of treatises, manuals, encyclopedias, and dictionaries that all confidently embraced the presumption of constitutionality, the clear error rule, and the reasonable doubt standard as the well-settled standard of review for constitutional cases. No treatise writers advocated an alternative standard, or even flagged the existence of an alternative standard in the Supreme Court or in any state supreme court. By the time James Bradley Thayer wrote his essay in 1893, he was just one of many legal writers writing within an overwhelming, undisputed consensus about these rules.

And yet, starting in the 1880s and 1890s, the Court became more active in practice, invalidating federal and state laws at a higher rate and infamously pulling back from the promises of Reconstruction and the Second Founding. For the first time in Supreme Court history, but as a sign of things to come, a Supreme Court Justice would cite these "well-settled" rules of restraint in a *dissenting* opinion. Frederick Douglass would rally a crowd of 2,000 with invocations of the clear

error rule. Another Supreme Court Justice would argue against the entire tradition of restraint in a commencement address at Yale Law School. An obscure Supreme Court Justice would invoke the clear error rule and reasonable doubt standard in nearly his dying words in his final dissent from the bench, just months before passing away. And several scholars, Thayer included, would publish law reviews criticizing all these trends in the name of the traditions of restraint.

1. Widespread Consensus in Treatises

On the consensus side of the ledger, new editions of treatises, dictionaries, encyclopedias, and manuals of federal practice released in the 1880s and 1890s reiterated earlier formulations of the clear error rule made in prior decades, but now often with greater confidence that it reflected widespread judicial acceptance, and with added emphasis upon "reasonable doubt" as the appropriate evidentiary standard.

In 1882, Joel Prentiss Bishop published his major treatise on statutory interpretation, which retained his earlier support for judicial restraint from his 1873 treatise on criminal statutes.[357] But he acknowledged the additional caselaw around the clear error rule and the reasonable doubt standard that had developed in the intervening nine years. Now, he said, "[g]reater numbers" of judges supported deference to legislative decisionmaking under this rule.[358] The "true rule," compared to what he had called the "true view" in 1873,[359] was now supported "overwhelmingly" by the "weight of authority."[360] And to confirm this point, he cited twenty-five state court decisions (up from fourteen in 1873), including from states like New York, Pennsylvania, Illinois, and West Virginia, in support of the rule that "[i]f there exist upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law."[361]

In 1883, *Bouvier's Law Dictionary* modified its definition of "constitutional" for the first time since it was first published in 1839.[362] All its prior versions had included the line, "the courts will not declare such a law void unless there appears to be a clear and unequivocal breach of the constitution."[363] But in the new version, it added that "[t]he

357 JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 91 (Boston, Little, Brown & Co. 1882).

358 *Id.*

359 *See supra* text accompanying note 338.

360 BISHOP, *supra* note 357, § 91.

361 *Id.* § 91 & at 80 n.1 (quoting Cotten v. Cnty. Comm'rs, 6 Fla. 610, 613 (1856)).

362 *See supra* notes 151–53 and accompanying text.

363 This definition was contained in all editions from the first edition in 1839 through the fourteenth edition in 1880. *Compare, e.g.*, 1 BOUVIER, LAW DICTIONARY 1, *supra* note 148, at 219, *with* 1 BOUVIER, LAW DICTIONARY 14, *supra* note 153, at 292.

presumption is always in favor of the constitutionality of a law, and the party alleging the opposite must clearly establish it."[364] Going even further than the "clear and unequivocal" language from the previous fourteen editions, it now said that a law's unconstitutionality must be "so clear that no reasonable doubt can be said to exist."[365] And in support of this reasonable doubt standard, it cited state supreme court decisions from Missouri, New York, Arkansas, Massachusetts, Pennsylvania, and Georgia.[366]

In the very first encyclopedia of law ever published in the United States, the 1887 *American and English Encyclopædia of Law*, the authors expanded upon the various rules surrounding restraint. Closely following Cooley's presentation of those rules in his 1867 *Constitutional Limitations*, the editors of the encyclopedia explained:

> [E]very presumption and intendment is in favor of the constitutionality of an act of the legislature, and the courts will not be justified in pronouncing it invalid unless satisfied beyond a reasonable doubt of its repugnance to the constitution. And nothing but a clear violation of the constitution—a clear usurpation of power prohibited—will warrant the judiciary in declaring an act of the legislative department unconstitutional and void.[367]

And as authority for these two sentences, the editors cited one Supreme Court decision, *Cooper v. Telfair*, and thirty-five state supreme court decisions.[368]

The treatises and manuals of Robert Desty, a Canadian-born, California-based lawyer and prolific author who became "one of the best-known legal writers of the United States,"[369] also reveal this emerging consensus around the clear error rule and reasonable doubt requirement. Desty produced the first-ever *Manual of Practice in the Courts of the United States*, publishing nine revised editions over two decades between 1875 and 1899.[370] And in his sixth edition, published in 1884, Desty explained the power of the federal courts to invalidate unconstitutional laws. Desty explained that while federal courts have power

364 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 384–85 (Philadelphia, J.B. Lippincott & Co. 15th ed. 1883).

365 *Id.* at 385.

366 *Id.*

367 *Constitutional Law*, 3 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 670, 673–74 (1887).

368 *Id.* at 674 nn.1–2.

369 Patrick Lacroix, *American and French: Robert Desty (1827–1895), Part II*, QUERY THE PAST (July 18, 2019), https://querythepast.com/american-french-robert-desty-part-2/ [https://perma.cc/WEQ9-GPLP].

370 *See, e.g.*, ROBERT DESTY, A MANUAL OF PRACTICE IN THE COURTS OF THE UNITED STATES (San Francisco, Bancroft-Whitney Co. 9th ed. 1899).

over statutes claimed to be in violation of the U.S. Constitution, "the objection must not be doubtful, but the act must be clearly subversive of the Constitution."[371]

Desty cited a handful of cases for these claims from Nebraska, Vermont, and New York.[372] One case he cited, an 1877 Vermont Supreme Court opinion, nicely captured all the themes of judicial review and restraint as they were generally understood in the late nineteenth century. On the one hand, the power and duty of the courts to invalidate unconstitutional laws was beyond question.

> It is not to be doubted, however, that the judiciary has the right to declare null any act of the Legislature that is in plain contravention of the organic law. In no other way can the personal and property rights of the citizen be vindicated against illegal or despotic legislation—from no other source can the people secure to themselves a government that shall be a government of laws and not of men.[373]

That duty, however indispensable to the rule of law, needed to be balanced by a commitment to principles of judicial restraint. And the Vermont Supreme Court laid those principles out, citing in turn other neighboring state supreme courts. First, there was the presumption of constitutionality, paired with the clear error rule:

> It is obvious, therefore, in dealing with this question of constitutional power, that the presumptions are all in favor of the validity of the action called in question; and if we find invalidity at all, it must be upon clear and irrefragable evidence that the action challenged is in conflict with some express provision of the organic law or its necessary implications. . . . "The acts of the Legislature are to be presumed constitutional, and their operation cannot be impeded unless they manifestly infringe some provision of the Constitution."[374]

Next, in looking for such "clear and irrefragable evidence," courts were to apply a reasonable doubt standard:

> "It is, however, a well-settled principle of judicial construction, that before an act of the Legislature ought to be declared

371 ROBERT DESTY, A MANUAL OF PRACTICE IN THE COURTS OF THE UNITED STATES § 629a, at 137 (San Francisco, Sumner Whitney & Co. 6th ed. 1884) [hereinafter DESTY 1884 MANUAL] (citation omitted). Desty made that same point in other works too. *See* THE CONSTITUTION OF THE UNITED STATES: ANNOTATED BY ROBERT DESTY 217 (San Francisco, Sumner Whitney & Co. 1881); ROBERT DESTY, THE REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS 57 (San Francisco, Sumner Whitney & Co. 1882); 1 ROBERT DESTY, THE AMERICAN LAW OF TAXATION, AS DETERMINED IN THE COURTS OF LAST RESORT IN THE UNITED STATES 427 (Saint Paul, West Publ'g Co. 1884).

372 DESTY 1884 MANUAL, *supra* note 371, § 629a, at 137.

373 Town of Bennington v. Park, 50 Vt. 178, 191 (1877).

374 *Id.* at 191–92 (emphasis omitted) (quoting Foster v. President, Dirs. & Co. of the Essex Bank, 16 Mass. (16 Tyng) 245, 270 (1819)).

> unconstitutional, its repugnance to the provisions or necessary implications of the Constitution should be manifest and free from all reasonable doubt." . . . "It is an elementary rule that courts must be satisfied beyond a reasonable doubt that the act called in question is unconstitutional."[375]

The reasonable doubt standard had become, by the mid-1870s, a well-settled rule. And lawyers toting around Desty's manuals as they prepared for appearances in federal courts in the 1880s and 1890s were put on notice that this was, by then, a "well-settled principle of judicial construction."[376]

Francis Wharton, a Yale-educated lawyer from Philadelphia who taught at Kenyon College and George Washington University Law School,[377] put the point in even stronger terms. In 1884 he published a treatise, *Commentaries on Law*.[378] It was designed, he wrote in the preface, as an introduction to "public law" for "the use of students of all classes."[379]

Wharton, who spent two years travelling Europe before returning to America,[380] drew a sharp contrast between English and American constitutional practice. In England, he said, "parliament is so far omnipotent" that it could constitutionally impair the obligation of contracts, establish religious tests, deny jury trials, confiscate private property, or impose ex post facto punishment.[381] But in the United States, Wharton said, sounding in the nature of a boast, "[s]tatutes to effect any one of these objects would in this country be mere blank paper. All that the courts would have to say would be that they are unconstitutional, and this would be an end to them."[382]

But immediately following this claim, he inserted a section in his treatise entitled "Presumption in favor of constitutionality."[383] That appears to be the earliest formulation in a legal treatise of that phrase, one that would only grow in prominence. He wrote that "[n]ot only is the burden of proof on the party setting up the unconstitutionality of a statute, but the courts will not hold a statute to be unconstitutional

375 *Id.* at 192 (first quoting Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210, 227 (1860); and then quoting Perry v. Keene, 56 N.H. 514, 534 (1876)) (alterations in original).

376 *Id.* (quoting *Hartford Bridge*, 29 Conn. at 227).

377 *Wharton, Francis*, 28 ENCYCLOPÆDIA BRITANNICA 575 (11th ed. 1911).

378 FRANCIS WHARTON, COMMENTARIES ON LAW, EMBRACING CHAPTERS ON THE NATURE; THE SOURCE; AND THE HISTORY OF LAW; ON INTERNATIONAL LAW; PUBLIC AND PRIVATE; AND ON CONSTITUTIONAL AND STATUTORY LAW (Philadelphia, Kay & Brother 1884).

379 *Id.* at iii.

380 *Wharton, Francis*, *supra* note 377, at 575.

381 WHARTON, *supra* note 378, § 605.

382 *Id.*

383 *Id.* § 606.

unless on a clear case."[384] And he cited as authority for this claim the Supreme Court's familiar decisions in *Fletcher v. Peck*, *Ogden v. Saunders*, and *Trustees of Dartmouth College*, and more recent state supreme court decisions from all over the country, including the Northeast and mid-Atlantic (New York, Pennsylvania, Maryland), the South (Alabama, Arkansas, South Carolina, West Virginia) and the Midwest (Illinois, Iowa).[385]

In 1888, G.A. Endlich published *A Commentary on the Interpretation of Statutes*, which served as an Americanization of the popular 1875 British treatise on statutory interpretation written by the English jurist Sir Peter Benson Maxwell.[386] It retained as much as possible from Maxwell's classic English work, but overlaid it with commentary more relevant to an American legal audience. In a section entitled "Presumption against Intent to Violate Constitution," Endlich observed:

> A presumption of much importance in this country, but, of course unknown in England, where the courts cannot question the authority of Parliament, or assign any limits to its power, is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction.[387]

Endlich observed that courts were under an obligation to "harmonize" legal materials, where possible, reading the Constitution and statute *in pari materia*.[388] He added that "every doubt as to constitutionality of an act is to be resolved in its favor" and that courts were not to invalidate a law "unless what an ordinance says is necessarily repugnant" to a higher law or charter.[389]

A host of other treatise and dictionary writers, from all over the country, all reiterated these points in the late 1880s and early 1890s, without any indication of contrary views. For example, Christopher Stuart Patterson, the Dean of the University of Pennsylvania Law School and veteran of the Battle of Gettysburg,[390] articulated the presumption of constitutionality in his 1888 *The United States and the States Under the Constitution*.[391] William Anderson articulated both the clear error rule and reasonable doubt standard in his definition of

384 *Id.*

385 *Id.*

386 G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES (Jersey City, Frederick D. Linn & Co. 1888).

387 *Id.* § 178.

388 *Id.* § 180 n.154, § 181.

389 *Id.* § 180 n.154.

390 UNIVERSITY OF PENNSYLVANIA: ITS HISTORY, INFLUENCE, EQUIPMENT AND CHARACTERISTICS 418 (Edward Potts Cheyney & Ellis Paxson Oberholtzer eds., 1901).

391 CHRISTOPHER STUART PATTERSON, THE UNITED STATES AND THE STATES UNDER THE CONSTITUTION 274 (Philadelphia, T. & J.W. Johnson & Co. 1888).

"unconstitutional" in his 1889 *Dictionary of Law*.[392] John Innes Clark Hare, a law professor at the University of Pennsylvania Law School,[393] articulated the presumption of constitutionality, clear error rule, and reasonable doubt standard in his lectures on constitutional law published in 1889 under the title *American Constitutional Law*.[394] John D. Lawson, a professor of law at the University of Missouri Law School, did the same in 1890 in his comprehensive seven-volume treatise on American law, citing the Supreme Court's decisions in *Fletcher* and *Ogden* and twenty-seven different state supreme court decisions from all over the country.[395] J. Warner Mills, a Colorado attorney, laid out the clear error rule and the requirement of harmonizing statutory construction in 1890.[396] And in 1891, J.G. Sutherland, a onetime judge in Michigan and then professor of law at (what is now) the University of Utah,[397] published his influential treatise *Statutes and Statutory Construction* in which he laid out the presumption of constitutionality and what he called the "cardinal rule" that courts would read statutes to "sustain rather than ignore or defeat them." [398]

In perhaps the most telling indication that these rules had become widespread in late nineteenth-century America, James Bryce reported them all in his 1888 classic, *The American Commonwealth*. Bryce was an English lawyer, Regius Professor of Civil Law at Oxford University, and Ambassador of the UK to America.[399] Bryce set himself the task of "portraying the whole political system of the country in its practice as well as its theory," an endeavor that involved nine months of travel throughout the United States, effectively producing a new version of Tocqueville's *Democracy in America* for the second half of the nineteenth century.[400] But while Tocqueville had not noticed the

392 WILLIAM C. ANDERSON, A DICTIONARY OF LAW 239–40 (Chicago, T.H. Flood & Co. 1889).

393 1 J.I. CLARK HARE, AMERICAN CONSTITUTIONAL LAW, at viii (Boston, Little, Brown & Co. 1889).

394 2 *id.* at 703–04.

395 7 JOHN D. LAWSON, RIGHTS, REMEDIES, AND PRACTICE, AT LAW, IN EQUITY, AND UNDER THE CODES § 3745 (San Francisco, Bancroft-Whitney Co. 1890).

396 J. WARNER MILLS, MILLS' CONSTITUTIONAL ANNOTATIONS 130 (Chicago, E.B. Myers & Co. 1890).

397 *See Sutherland, Jabez Gridley*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/S001082 [https://perma.cc/RHR8-GGP3].

398 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 332 (Chicago, Callaghan & Co. 1891).

399 *Bryce, James*, 4 ENCYCLOPÆDIA BRITANNICA 699 (11th ed. 1910).

400 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 3 (London, Macmillan & Co. 1888); *see* Gary L. McDowell, *Introduction*, *in* 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH, at xi, xxii–xxiii (Liberty Fund 1995) (1888); *see also supra* text accompanying notes 168–80 (discussing Tocqueville's observations regarding judicial power in the United States).

existence of any deferential standard of review like clear error or reasonable doubt in 1835, Bryce could not help noticing it in 1888. As he put it, it was by then a "well-established rule" that "judges will always lean in favour of the validity of a legislative Act; that if there be a reasonable doubt as to the constitutionality of a statute they will solve that doubt in favour of the statute."[401] And echoing the "harmonizing" point of Endlich, he observed that "where the construction of a statute is doubtful, they will adopt such construction as will harmonize with the Constitution, and enable it to take effect."[402] Bryce cited Cooley in this section,[403] and indeed listed Cooley first among those he thanked in the work's preface.[404]

It was in all that context that Thayer published his famous article in 1893 advocating the presumption of constitutionality, clear error rule, and reasonable doubt standard.[405]

And numerous treatise and dictionary writers echoed all these points about restraint and the proper standard of review in the years immediately *after* Thayer wrote too. Revealingly, not a single one ever cited Thayer, suggesting the unremarkable nature of Thayer's argument at the time.

For example, Henry Campbell Black, the great logophile, founder of *Black's Law Dictionary*, and editor of the journal *Constitutional Review*,[406] incorporated all these principles into his treatises, including his 1895 *Handbook of American Constitutional Law*[407] and 1896 *Handbook on the Construction and Interpretation of the Laws*.[408] T.C. Simonton worked these rules into his 1896 *A Treatise of the Law of Municipal Bonds*.[409] The 1897 edition of *Bouvier's Law Dictionary* retained all these principles of restraint in its definition of "constitutional."[410] In 1899, John Randolph Tucker, the Virginia lawyer, first dean of Washington and Lee Law School and grandson of St. George Tucker,[411] incorporated into

401 2 *id.* at 46.

402 *Id.*

403 *Id.* at 46 n.1.

404 1 *id.* at vii.

405 *See supra* text accompanying notes 12–18.

406 *See* 1 CONST. REV., at i (1917).

407 HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 59–60 (St. Paul, West Publ'g Co. 1895).

408 HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 93 (St. Paul, West Publ'g Co. 1896).

409 T.C. SIMONTON, A TREATISE OF THE LAW OF MUNICIPAL BONDS OF THE MUNICIPAL CORPORATIONS OF THE UNITED STATES 444–45 (New York, Banks & Bros. 1896).

410 1 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 412–14 (Francis Rawle ed., Boston, The Boston Book Co. new ed. 1897).

411 John W. Davis, *John Randolph Tucker: The Man and His Work*, 6 WASH. & LEE. L. REV. 139, 140 (1949).

his work, *The Constitution of the United States: A Critical Discussion of Its Genesis, Development, and Interpretation*, the same "well established" rule that a judge "cannot declare a law void or unconstitutional unless for clear and undoubted repugnancy" that his grandfather had first articulated in the Virginia Supreme Court of Appeals in 1782.[412] And in 1900, William Callyhan Robinson, a professor of law at Yale Law School and the first dean of Catholic University Law School,[413] incorporated the clear error rule into his treatise *Elements of American Jurisprudence*.[414]

2. The Leading Rule Moves into Dissent at the Supreme Court: Frederick Douglass, John Marshall Harlan, and Howell Jackson

Despite this impressive consensus around the principles of restraint among treatise writers in the late nineteenth century, with nary a dissenting perspective voiced among them, the Supreme Court began to defy these now well-settled norms in practice. During this era, it notoriously pulled back from the promise of Reconstruction. And it began to exert more searching scrutiny over economic regulation in the name of substantive economic due process. The leading opponents of this jurisprudential shift during these two decades voiced their disagreement chiefly in the language of the presumption of constitutionality, clear error rule, and the reasonable doubt standard.

Easily the most dramatic instance of this occurred in 1883. On October 15, 1883, the Supreme Court handed down its decision in the *Civil Rights Cases*, holding the 1875 Civil Rights Act unconstitutional.[415] The Court found that Congress lacked authority under the Thirteenth and Fourteenth Amendments to pass the Act, which had outlawed private discrimination on the basis of race in the context of public accommodations.[416]

The ruling sent shock waves through much of the country. Commentators immediately compared it with *Dred Scott*. One African-American commentator writing in the *Cleveland Gazette* observed:

> It is worse than the Dred Scott decision. We would have expected anything else at the time. . . . [It] sweeps from more than six million of people their personal rights, and throws us entirely at the mercy

412 1 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION §§ 184–85 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899); *see supra* text accompanying note 78.

413 Frederick H. Jackson, *William C. Robinson and the Early Years of the Catholic University of America*, 1 CATH. U. AM. L. REV. 58, 58 (1951).

414 WILLIAM C. ROBINSON, ELEMENTS OF AMERICAN JURISPRUDENCE §§ 253, 278 (1900).

415 The Civil Rights Cases, 109 U.S. 3 (1883).

416 *Id.* at 25.

> of traitors and outlaws. . . . I feel that this decision is the worst thing that has occurred since the war.[417]

Just one week after the decision, Frederick Douglass gave a speech in Washington, D.C., on the case to a crowded room in Lincoln Hall. According to the *National Republican*, 2,000 people packed into the hall, including such legal luminaries as Belva Lockwood, while another 4,000 had to be turned away in disappointment from what the newspaper described as "the largest meeting ever gathered in a Washington hall."[418]

Douglass prefaced his comments by observing that "[w]e have been, as a class, grievously wounded, wounded in the house of our friends, and this wound is too deep and too painful for ordinary and measured speech."[419] He observed that in its decision, the Supreme Court had "humbled the Nation."[420] The Supreme Court, he said, was "the autocratic point in our National Government. No monarch in Europe has a power more absolute over the laws, lives and liberties of his people, than that Court has over our laws, lives, and liberties."[421]

And yet, he said, the Court should not have taken this fateful step, as it violated an old, settled rule of restraint. In his first argument on the merits of the decision, Douglass said:

> Now, when a bill has been discussed for weeks and months, and even years, in the press and on the platform, in Congress and out of Congress; when it has been calmly debated by the clearest heads, and the most skillful and learned lawyers in the land; when every argument against it has been over and over again carefully considered and fairly answered; when its constitutionality has been especially discussed, pro and con; when it has passed the United States House of Representatives, and has been solemnly enacted by the United States Senate, perhaps the most imposing legislative body in the world; when such a bill has been submitted to the Cabinet of the Nation, composed of the ablest men in the land; when it has passed under the scrutinizing eye of the Attorney-General of the United States; when the Executive of the Nation has given to it his name and formal approval; when it has taken its place upon the statute-book, and has remained there for nearly a decade, and the country has largely assented to it, you will agree with me that the

417 B., Letter to the Editor, *An Indignant Citizen Expresses His Views on the Repeal of This Famous Bill*, CLEVELAND GAZETTE, Oct. 20, 1883, at 2.

418 *The Color Controversy: An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall*, NAT'L REPUBLICAN (D.C.), Oct. 23, 1883, at 1.

419 Frederick Douglass, Speech at Lincoln Hall (Oct. 22, 1883), *in* PROCEEDINGS OF THE CIVIL RIGHTS MASS-MEETING HELD AT LINCOLN HALL, OCTOBER 22, 1883, at 4 (Washington, D.C., C.P. Farrell 1883).

420 *Id.* at 8.

421 *Id.* at 7.

> reasons for declaring such a law unconstitutional and void, should be strong, irresistible and absolutely conclusive.[422]

Although he did not use the technical phraseology of the presumption of constitutionality, the clear error rule, or the reasonable doubt standard, his argument that a law's unconstitutionality had to be "strong, irresistible and absolutely conclusive" was conceptually indistinguishable from those rules.[423] If an argument was "absolutely conclusive," it had to be *at least* "beyond a reasonable doubt." And Douglass added that his point reflected a broader consensus within the legal community:

> Inasmuch as the law in question is a law in favor of liberty and justice, it ought to have had the benefit of any doubt which could arise as to its strict constitutionality. This, I believe, will be the view taken of it, not only by laymen like myself, but by eminent lawyers as well.[424]

At the time he delivered his speech, Douglass had not yet seen Justice John Marshall Harlan's lone dissent in the *Civil Rights Cases*. Douglass noted that he looked forward to seeing it, though, as Harlan "must have weighty reasons for separating from all his associates, and incurring thereby, as he must, an amount of criticism from which even the bravest man might shrink."[425] But as he would later see, Justice Harlan would make an argument very similar to his own.

In his dissent, Justice Harlan zeroed in on the presumption of constitutionality, clear error rule, and reasonable doubt standard as a fulcrum for his disagreement with the Court. He cited the two most authoritative Supreme Court opinions for these related rules, one before the Civil War, which included the clear error rule, Chief Justice Marshall's 1810 opinion in *Fletcher v. Peck*, and one after the Civil War, Chief Justice Waite's 1878 opinion in the *Sinking-Fund Cases*, which also included the reasonable doubt standard.[426] From *Fletcher*, Justice Harlan drew upon the Court's language regarding the "delicacy" of constitutional questions, the presumption against invalidating a law in a "doubtful case," and the requirement that a judge should feel a "clear and strong conviction" of unconstitutionality before invalidating a law.[427] And from the *Sinking-Fund Cases*, he quoted the Court as saying that a law should never be invalidated except in "a clear case," that "[e]very possible presumption" should be made in favor of the law,

422 *Id.* at 6.
423 *Id.*
424 *Id.*
425 *Id.* at 4.
426 Civil Rights Cases, 109 U.S. 3, 27 (1883) (Harlan J., dissenting).
427 *Id.* (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810)).

that the showing of unconstitutionality must be made "beyond a rational doubt," and that the "safety of our institutions" depends upon "strict observance" of these rules.[428] None of these rules, Justice Harlan inferred, had been followed by the Court in this case.[429]

Justice Harlan's invocation of *Fletcher*'s clear error rule and the presumption of constitutionality in a *dissenting* opinion was a rarity in Supreme Court history. Previously, Chief Justice Marshall's *Fletcher* rule had been used primarily in majority opinions, concurring opinions, and arguments by advocates before the Court.[430]

Its prominent appearance in a dissent in 1883 was, in some ways, a telling sign of things to come.[431] The Supreme Court became more active in the postbellum period, invalidating federal laws passed by the Reconstruction-era Congress to provide legal protections for recently emancipated slaves, and invalidating economically progressive state laws in the name of the Fourteenth Amendment's Due Process Clause.[432] Scholars like Eric Foner have argued that it was this period in Supreme Court history when the Court played a decisive role in the "long retreat from the ideals of Reconstruction," rolling back the promises of the Second Founding, that was the first moment when a more emboldened, "active" Court emerged on the American scene.[433] It was, in some ways, the emergence of the "aggressor court" that state

428 *Id.* at 27–28 (quoting Sinking-Fund Cases, 99 U.S. 700, 718(1879)).

429 *Id.* at 62.

430 Members of Court had cited this *Fletcher* rule in two opinions for the Court in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1871), and in *County of Livingston v. Darlington*, 101 U.S. 407, 410 (1880); in two concurring opinions in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 294 (1827) (opinion of Thompson, J.), and in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 1837 WL 3561, at *165 (1837) (Baldwin, J., concurring); and in a dissenting opinion in *Smith v. Turner*, 48 U.S. (7 How.) 283, 496 (1849) (Daniel, J., dissenting). And advocates cited it before the Court in five other cases, including most famously in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 606–07 (1819).

431 The *Civil Rights Cases*—and Harlan's dissent—appeared to inspire James Bradley Thayer to write an 1884 letter to *The Nation* in which he first previewed the views of judicial restraint that he would later develop in his 1893 article. James B. Thayer, Letter to the Editor, *Constitutionality of Legislation: The Precise Question for a Court*, THE NATION (N.Y.C.), Apr. 10, 1884, at 314. On the influence of the decision on Thayer, see Franck, *supra* note 48, at 414–15, and Moyn & Stern, *supra* note 36 (manuscript at 43–44).

432 *See, e.g.*, ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895, at 2 (1960); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 12–13 (2002); Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 583 (2012) (arguing that judicial behavior shifted in a more activist direction in the immediate aftermath of the Civil War).

433 *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 127 (2019).

court judges had first worried about in the 1850s.[434] And it was, in other ways, the precursor of more active courts in the century ahead.[435] It drove those like Harlan and Douglass drawn to the tradition of restraint into a defensive crouch. It forced them to invoke the settled rules of restraint, no longer as an explanation for why the Court seldom invalidated laws, but as the basis for a fundamental critique of the Court itself.

Douglass wrote Justice Harlan a letter the following month to express his "unalloyed satisfaction" with Justice Harlan's dissenting opinion.[436] It was, he said, "absolutely unanswerable and unassailable by any fair argument."[437] "It should be scattered," he said, "like the leaves of Autumn over the whole country, and be seen, read and pondered upon by every citizen of this country."[438]

While Justice Harlan's dissent did get reprinted in many newspapers, the rules of restraint he and Douglass both articulated got scattered even wider all over the country in the second half of the 1880s and into the 1890s. The *Civil Rights Cases*, like the *Dred Scott* decision before it, corresponded with a nationwide uptick in interest in, and reaffirmation of, the traditional rules of judicial restraint among the authors of treatises, dictionaries, legal encyclopedias, and casebooks. As we have seen, from the late 1880s to 1900, treatise writers published works almost annually, all confirming the traditional principles of judicial restraint. And from 1884 to 1900, eight more states[439] formally adopted the clear error rule, and fourteen states[440] adopted the reasonable doubt standard.

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434 *See supra* text accompanying notes 213–18.

435 *See* Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 387, 391 (1969).

436 Letter from Frederick Douglass to Hon. John M. Harlan 3 (Nov. 27, 1883) (on file with the University of Louisville Louis D. Brandeis School of Law Library).

437 *Id.* at 1.

438 *Id.* at 2.

439 State *ex rel.* Perry v. Arrington, 4 P. 735, 737 (Nev. 1884); State v. Marshall, 15 A. 210, 211 (N.H. 1888); State v. District of Narragansett, 16 A. 901, 906 (R.I. 1889); Doan v. Bd. of Cnty. Comm'rs, 26 P. 167, 170 (Idaho 1891); State *ex rel.* McReavy v. Burke, 36 P. 281, 283 (Wash. 1894); State *ex rel.* Stull v. Bartley, 59 N.W. 907, 909 (Neb. 1894); State *ex rel.* Adams v. Herried, 72 N.W. 93, 97 (S.D. 1897); Farm Inv. Co. v. Carpenter, 61 P. 258, 263–64 (Wyo. 1900).

440 Alexander v. People *ex rel.* Schofield, 2 P. 894, 900 (Colo. 1884); Sullivan v. Berry's Adm'r, 83 Ky. 198, 206 (1885); *District of Narragansett*, 16 A. at 906; State v. Morgan, 48 N.W. 314, 316 (S.D. 1891); Cole Mfg. Co. v. Falls, 16 S.W. 1045, 1046 (Tenn. 1891); *Doan*, 26 P. at 170; State *ex rel.* Mack v. Torreyson, 34 P. 870, 871 (Nev. 1893); Sutton v. Phillips, 21 S.E. 968, 968 (N.C. 1895); State v. Gerhardt, 44 N.E. 469, 473 (Ind. 1896); State v. Camp Sing, 44 P. 516, 517 (Mont. 1896); Lommen v. Minneapolis Gaslight Co., 68 N.W. 53, 54 (Minn. 1896); Mayor of Wilmington v. Ewing, 43 A. 305, 309 (Del. 1899); State v. Lubee, 45 A. 520, 521 (Me. 1899); State v. Standard Oil Co., 84 N.W. 413, 414 (Neb. 1900).

But despite this convergence on principles of restraint in the 1890s, the Supreme Court continued to maintain a more "activist" posture in practice.

Supreme Court Justice David Brewer, in a stirring and influential 1891 commencement address at Yale Law School, cheered this on. He argued for a more libertarian reading of the Constitution through the prism of the natural rights philosophy of the Declaration of Independence. "[T]he spirit of 1776," he argued, "was present with and filled the convention of 1787."[441] The purpose of government, he said, was

> to secure the rights of the individual against the assaults of the majority. The wisdom of government is not in protecting power but weakness; not so much in sustaining the ruler, as in securing the rights of the ruled. The true end of government is protection to the individual; the majority can take care of itself.[442]

And, Justice Brewer added, courts would be expected to implement this vision in their decisionmaking. He cited no caselaw for his vision of the role of courts. Indeed, he said that the settled body of constitutional law would need to be reworked around this vision. To build constitutional law around the axiomatic truths of the Declaration of Independence, and to thereby better protect "[p]rivate [p]roperty from [p]ublic [a]ttack," "we must re-cast some of our judicial decisions" or amend the Constitution itself.[443]

It was in response to this provocative challenge to the well-settled rules of judicial restraint, and the rise of a more active and engaged judiciary acting at its behest, that scholars like Thayer took to the pages of leading law reviews in dissent.

Writing in the *Harvard Law Review* in May 1892, just one year before the publication of Thayer's article, Henry Herbert Darling criticized a Massachusetts decision invalidating a state law that prohibited employers from fining their workers for imperfections that arose during the design of a product. In his defense of the law, Darling echoed the views of treatise writers like Mills and Sutherland, stating that "[t]he presumption is always in favor of the validity of the Statute," citing five state supreme court decisions and one U.S. Supreme Court decision.[444] And he added the familiar rule that "if there is any doubt,

441 D.J. Brewer, *Protection to Private Property from Public Attack: An Address Delivered Before the Graduating Classes at the Sixty-Seventh Anniversary of Yale Law School (June 23, 1891), in* 19 NEW ENGLANDER & YALE REV. 97, 98 (1891).

442 *Id.* at 100.

443 *Id.* at 97, 109.

444 Herbert Henry Darling, *Legislative Control over Contracts of Employment: The Weavers' Fines Bill*, 6 HARV. L. REV. 85, 96 n.2 (1892).

however slight, that doubt must be resolved in favor of the Legislature."[445]

Writing in January 1893 in the *American Law Register and Review*, Philadelphia lawyer Richard McMurtrie penned an article entitled *A New Canon of Constitutional Interpretation*, in which he also pointed out the rise of a more active judiciary emboldened by Justice Brewer's libertarian philosophy. "[H]ow invariably have the courts fallen into the snare of substituting the question of right for the question of power, thus converting themselves into a legislature!"[446] The new canon, he explained, was "that a statute interfering with 'natural rights' must be shown to be authorized, not that it must be shown to be prohibited."[447] The old canon that the unconstitutionality of laws had to be clearly demonstrated beyond a reasonable doubt was slowly being eclipsed, in practice, by a new canon that inverted that presumption.

In an 1898 article in the *American Law Review* entitled *The Judiciary—Its Growing Power and Influence*, Boyd Winchester both amplified and tried to mollify these concerns.[448] "[N]o more serious evil," he said, had developed in America's constitutional history "than the growing tendency of the courts to stretch the powers devolved upon them . . . and usurp the functions of the political departments of the government."[449] Anticipating language that could be plucked from contemporary discussions, Winchester said, "[T]he courts have, in many instances, undertaken to legislate; thus tending to obliterate in the popular mind the distinction between judicial and legislative functions."[450] But he reassured his readers that there were limits to just how far courts could go in this direction. "[W]e know that the courts must encounter inseparable [sic] obstacles in any attempt 'to lay all things at their feet' . . . ."[451] And foremost among these obstacles was the traditional standard of review for constitutional cases. "To justify the judicial nullification of an act of the legislature there must be a clear, open, palpable violation of the constitution."[452]

Likewise, Supreme Court Justices continued to refer to the "old canon" and "settled practice" for courts—but increasingly in dissent. When the Supreme Court held the federal income tax to be

445 *Id.* at 96.

446 Richard C. McMurtrie, *A New Canon of Constitutional Interpretation*, 41 AM. L. REG. & REV. 1, 5 (1893).

447 *Id.* at 9 (emphasis omitted).

448 Boyd Winchester, *The Judiciary—Its Growing Power and Influence*, 32 AM. L. REV. 801 (1898).

449 *Id.* at 807.

450 *Id.*

451 *Id.* at 809.

452 *Id.*

unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, four Justices dissented, including Justice Harlan.[453] Justice Harlan wrote that the decision would be a "disaster to the country" that "impairs and cripples the just powers of the National Government in the essential matter of taxation."[454] And he added that it could only be fixed by a return by the Court to "the old theory of the Constitution," or constitutional amendment.[455] It was that latter course that eventually abrogated *Pollock*.[456]

Another one of the dissenters, Justice Howell Jackson, a Justice who served on the Court for only two years and would pass away from tuberculosis just three months after the decision, wrote in his dissent that the Court had again contravened settled rules of judicial restraint.[457] "The decision," he wrote, "disregards the well-established canon of construction . . . that an act passed by a coordinate branch of the government has every presumption in its favor, and should never be declared invalid by the courts unless its repugnancy to the Constitution is clear beyond all reasonable doubt."[458] He said that "[n]o rule of construction [was] better settled than" that rule of restraint.[459] And he reiterated, apparently coughing while reading his final dissent from the bench,[460] "It is not a matter of conjecture; it is the established principle that it must be clear beyond a reasonable doubt."[461]

In perhaps a symbolically fitting coda, strained by his participation in the *Pollock* case, Justice Jackson would pass away just months after the decision, leaving his plea for restraint his final words from the bench, as the Court would soon shift towards a more active jurisprudential orientation in the early twentieth century, which would soon prompt the "cycles of restraint" in the twentieth and twenty-first centuries. But by the end of the nineteenth century, the restrained standard of review that Thayer famously highlighted in his article, and which would later be referred to as distinctively "Thayerian," had been broadly accepted and preached by treatise writers and jurists throughout the country as the law of the land, even if increasingly honored more in the breach than in the observance.

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453 *See* Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 638, 686, 696, 706 (1895).

454 *Id.* at 684–85 (Harlan, J., dissenting).

455 *Id.* at 685.

456 *See* U.S. CONST. amend. XVI.

457 *See* Irving Schiffman, *Escaping the Shroud of Anonymity: Justice Howell Edmunds Jackson and the Income Tax Case*, 37 TENN. L. REV. 334, 347–48 (1970).

458 *Pollock*, 158 U.S. at 705 (Jackson, J., dissenting).

459 *Id.* at 699.

460 Schiffman, *supra* note 457, at 348.

461 *Pollock*, 158 U.S. at 705 (Jackson, J., dissenting).

III. CONCLUSION: BEYOND JAMES BRADLEY THAYER—LIQUIDATING JUDICIAL RESTRAINT IN NINETEENTH-CENTURY AMERICA

Looking out from his office at Harvard Law School, Thayer saw a country that had, from 1780 to 1893, slowly but surely converged around the principles of judicial restraint that he attempted to highlight in his essay. As this Article has attempted to show, the most prominent treatises, legal encyclopedias, legal dictionaries, manuals for federal practice, and casebooks in the second half of the nineteenth century acknowledged the "leading rule" that courts would invalidate a law only if its unconstitutionality was clear, manifest, and beyond a reasonable doubt. Thayer spoke from within an overwhelmingly broad consensus of treatise writers on this point, with nary a dissenting view among any such writers. But he also now wrote *in dissent* from the emerging *practice* of the post-Reconstruction Supreme Court.

But that broad consensus of treatise writers sat atop an even broader and arguably more impressive consensus of state supreme courts, in tandem with the U.S. Supreme Court. Indeed, these treatise writers mostly mirrored that broad state-court-level consensus by citing and reporting upon their decisions and synthesizing them into rules for their readers.

The second edition of *The American and English Encyclopædia of Law*, published in 1898, would powerfully illustrate this point. It collected in support of the three distinct rules of restraint—presumption of constitutionality, clear error, and reasonable doubt—approximately 150 Supreme Court and state supreme court decisions.[462] For the presumption of constitutionality, it cited three U.S. Supreme Court decisions and fifty-three decisions by twenty-four different state supreme courts.[463] For the clear error rule, it cited one Supreme Court decision and thirty-one decisions by twenty-one different state supreme courts.[464] And for the reasonable doubt rule, it cited four Supreme Court decisions and sixty-four decisions by twenty-two state supreme courts.[465] And it gave no indication of any contrary authority in the federal or state courts.

But if anything, the encyclopedia *undercounted* the authorities. Between 1880 and 1893, six additional states, namely Oregon, West Virginia, Nevada, New Hampshire, Rhode Island, and Idaho, had all

462 Charles Sumner Lobingier, *Constitutional Law*, 6 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 882, 1085–86 (2d ed. 1898).

463 *Id.* at 1086 n.1.

464 *Id.* at 1085 n.6.

465 *Id.* at 1085 n.7.

adopted the clear error rule.[466] When Thayer took up his pen to draft his essay in 1893, thirty-eight out of forty-four states (86%) then in the Union, along with the U.S. Supreme Court, had formally adopted the clear error rule.[467]

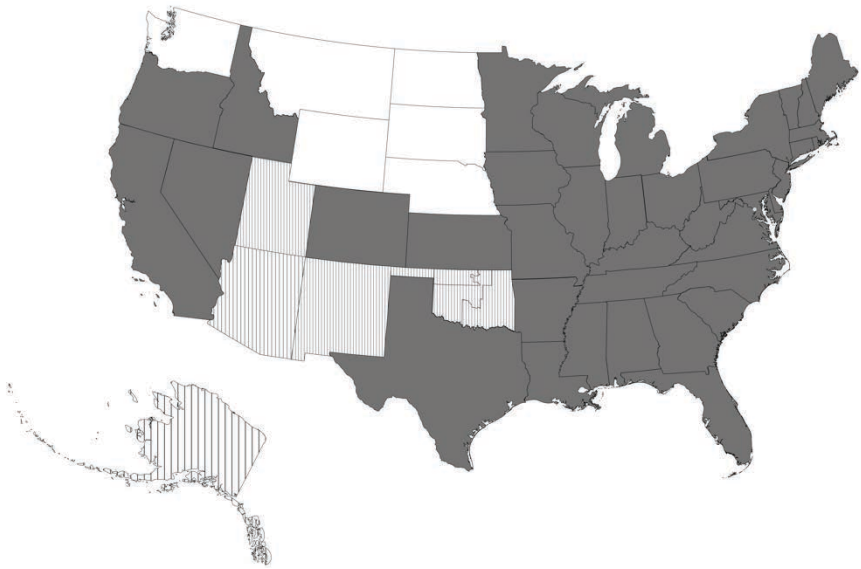

Figure 11. States that adopted a clear error rule by 1893

By 1900, another four state supreme courts—Washington, Nebraska, South Dakota, and Wyoming—had recognized the rule, bringing the total to forty-two out of forty-five (93%).[468] By 1921, as three more territories (Oklahoma, New Mexico, and Arizona) became states in the early twentieth century, all forty-eight state supreme courts within the contiguous United States—including Montana, Utah, Oklahoma, New Mexico, North Dakota, and Arizona—had adopted the rule.[469]

466 Cline v. Greenwood, 10 Or. 230, 241 (1882); Varner v. Martin, 21 W. Va. 534, 543 (1883); State *ex rel.* Perry v. Arrington, 4 P. 735, 737 (Nev. 1884); State v. Marshall, 15 A. 210, 211 (N.H. 1888); State v. District of Narragansett, 16 A. 901, 906 (R.I. 1889); Doan v. Bd. of Cnty. Comm'rs, 26 P. 167, 170 (Idaho 1891).

467 *See supra* notes 181, 238, 313, 355, 439, 466.

468 State *ex rel.* McReavy v. Burke, 36 P. 281, 283 (Wash. 1894); State *ex rel.* Stull v. Bartley, 59 N.W. 907, 909 (Neb. 1894); State *ex rel.* Adams v. Herried, 72 N.W. 93, 97 (S.D. 1897); Farm Inv. Co. v. Carpenter, 61 P. 258, 263–64 (Wyo. 1900); *see also supra* notes 181, 238, 313, 355, 439, 466.

469 W. Ranches, Ltd. v. Custer County, 72 P. 659, 661 (Mont. 1903); Blackrock Copper Mining & Milling Co. v. Tingey, 98 P. 180, 185 (Utah 1908); Anderson v. Ritterbusch, 98 P. 1002, 1017 (Okla. 1908); State *ex rel.* Lucero v. Marron, 128 P. 485, 488 (N.M. 1912);

Here, in graphical form, is when the clear error rule was first explicitly embraced, decade by decade, in state supreme courts throughout American history, from 1800 to 1921:

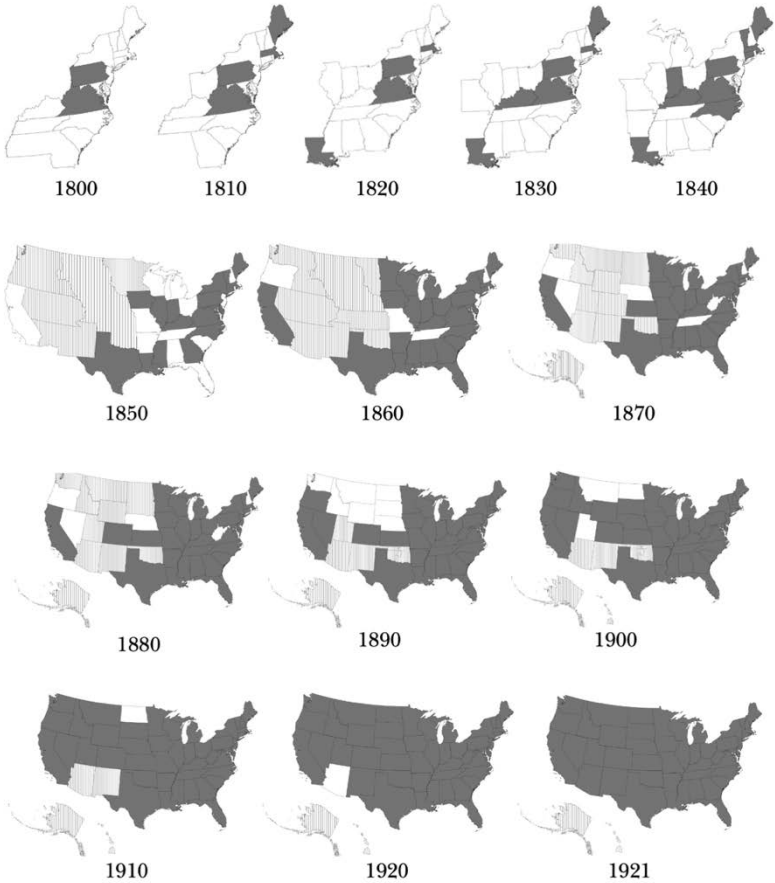

Figure 12. Clear error rule adoption, 1800–1921

And by 1962, after the addition of Hawai'i and Alaska as states, all fifty state supreme courts had settled upon the clear error rule as the proper standard.[470] As far as can be ascertained, no state ever squarely reconsidered or reversed that standard.

Likewise, when Thayer published his article in 1893, twenty-four out of forty-four state supreme courts (55%), along with the U.S.

O'Laughlin v. Carlson, 152 N.W. 675, 677 (N.D. 1915); Smith v. Mahoney, 197 P. 704, 705 (Ariz. 1921); *see also supra* notes 181, 238, 313, 355, 439, 466, 468.

470 Koike v. Bd. of Water Supply, 352 P.2d 835, 837–38 (Haw. 1960); DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 724–25 (Alaska 1962); *see also supra* note 469.

Supreme Court, had accepted the reasonable doubt standard for constitutional cases.[471] Between just 1880 and 1893, ten additional states—South Carolina, Illinois, West Virginia, Colorado, Kentucky, Rhode Island, South Dakota, Tennessee, Idaho, and Nevada—had announced for the first time the reasonable doubt standard.[472] Here is a picture of how the country looked at that moment.

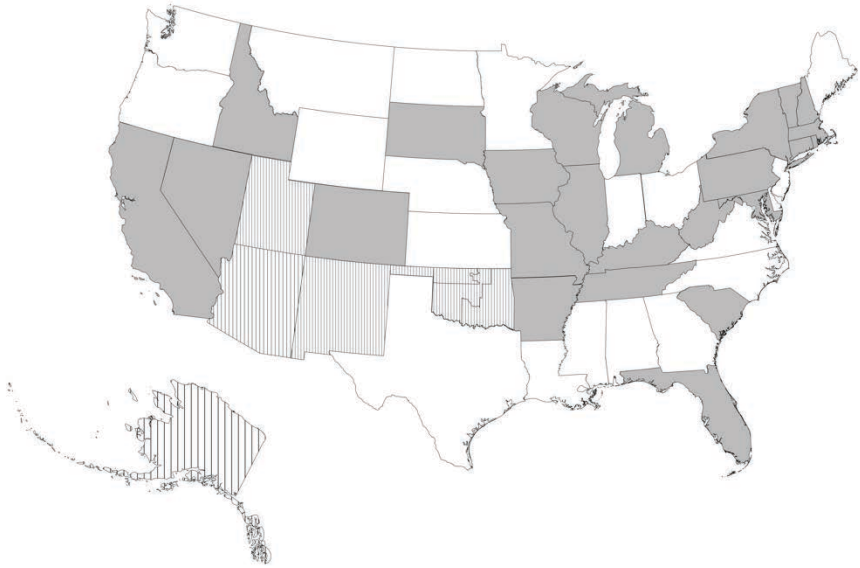

Figure 13. States that adopted a reasonable doubt standard by 1893

As we have seen, the reasonable doubt standard took longer to develop, both at the Supreme Court and among the states. Indeed from 1787 to 1856, the year before *Dred Scott*, only six states had recognized the reasonable doubt standard.[473] But by 1870, within thirteen years of that decision, seven more states quickly came onboard, more than doubling that number.[474] By 1900, an additional eighteen states had joined, bringing the total to thirty-one.[475] And by 1933, every state

471 *See supra* notes 182, 239, 312, 356, 440.

472 Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881); Home Ins. Co. v. Swigert, 104 Ill. 653, 669 (1882); Chesapeake & Ohio Ry. Co. v. Miller, 19 W. Va. 408, 422 (1882); Alexander v. People *ex rel.* Schofield, 2 P. 894, 900 (Colo. 1884); Sullivan v. Berry's Adm'r, 83 Ky. 198, 206 (1885); State v. District of Narragansett, 16 A. 901, 906 (R.I. 1889); State v. Morgan, 48 N.W. 314, 316 (S.D. 1891); Cole Mfg. Co. v. Falls, 16 S.W. 1045, 1046 (Tenn. 1891); Doan v. Bd. of Cnty. Comm'rs, 26 P. 167, 170 (Idaho 1891); State *ex rel.* Mack v. Torreyson, 34 P. 870, 871 (Nev. 1893).

473 *Cf. supra* notes 182, 239.

474 *See supra* note 312.

475 In addition to Vermont, which adopted this standard in 1877, *see supra* note 356, and the ten states that adopted this standard between 1880 and 1893, *see supra* note 472,

in the contiguous United States had ratified the reasonable doubt standard.[476]

Here, in graphical form, is the story of the slower rise and then rapid acceptance by state supreme courts in the latter half of the nineteenth century of the reasonable doubt standard for constitutional cases in American history.

seven states announced this standard between 1894 to 1900: North Carolina, Indiana, Montana, Minnesota, Delaware, Maine, and Nebraska. Sutton v. Phillips, 21 S.E. 968, 968 (N.C. 1895); State v. Gerhardt, 44 N.E. 469, 473 (Ind. 1896); State v. Camp Sing, 44 P. 516, 517 (Mont. 1896); Lommen v. Minneapolis Gaslight Co., 68 N.W. 53, 54 (Minn. 1896); Mayor of Wilmington v. Ewing, 43 A. 305, 309 (Del. 1899); State v. Lubee, 45 A. 520, 521 (Me. 1899); State v. Standard Oil Co., 84 N.W. 413, 414 (Neb. 1900).

476 The states that announced the reasonable doubt standard in the early twentieth century were Georgia, Texas, Washington, Mississippi, Alabama, Utah, Louisiana, Oklahoma, New Jersey, Kansas, North Dakota, Ohio, Virginia, Arizona, Wyoming, New Mexico, and Oregon. Park v. Candler, 40 S.E. 523, 526 (Ga. 1902); Brown v. City of Galveston, 75 S.W. 488, 494 (Tex. 1903); State v. Ide, 77 P. 961, 962 (Wash. 1904); State *ex rel.* Greaves v. Henry, 40 So. 152, 154 (Miss. 1906); State *ex rel.* Woodward v. Skeggs, 46 So. 268, 270 (Ala. 1908); *Blackrock Copper*, 98 P. at 185; State *ex rel.* Labauve v. Michel, 46 So. 430, 432 (La. 1908); Rakowski v. Wagoner, 103 P. 632, 634 (Okla. 1909); Booth v. McGuinness, 75 A. 455, 461 (N.J. 1910); State v. Sherow, 123 P. 866, 867 (Kan. 1912); State *ex rel.* McCue v. N. Pac. Ry. Co., 145 N.W. 135, 154 (N.D. 1914); Miami County v. City of Dayton, 110 N.E. 726, 728 (Ohio 1915); City of Roanoke v. Elliott, 96 S.E. 819, 824 (Va. 1918); *Smith*, 197 P. at 705; State *ex rel.* Sch. Dist. No. 1 v. Snyder, 212 P. 758, 759 (Wyo. 1923); *In re* Proposed Middle Rio Grande Conservancy Dist., 242 P. 683, 694 (N.M. 1925); Anderson v. Thomas, 26 P.2d 60, 76 (Or. 1933); *see also supra* notes 182, 239, 312, 356, 472, 475.

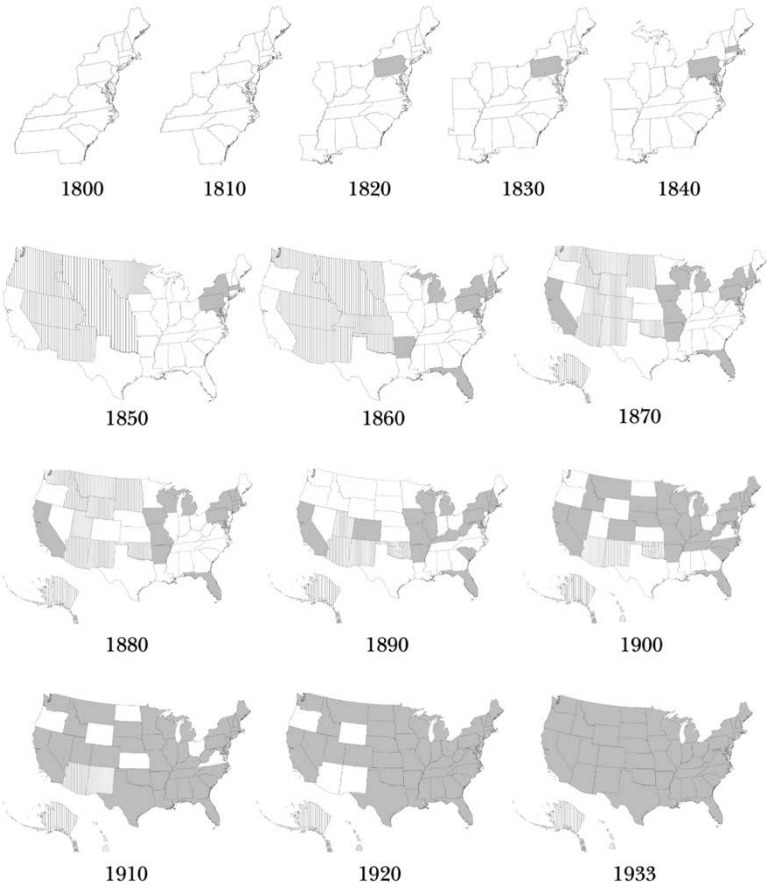

Figure 14. Reasonable doubt standard adoption, 1800–1933

By 1975, the Supreme Court of Hawai'i joined these states embracing the reasonable doubt standard.[477] And in doing so, in a rather fascinating historical detail that only highlights the widespread dissemination of these rules, it ratified what the Supreme Court of the Kingdom of Hawai'i had previously ruled as far back as 1891. In that 1891 decision, writing 5,000 miles away from Cambridge, Massachusetts, in the city of Honolulu on the island of O'ahu, seven years before Hawai'i was annexed by America and two years before the publication

477 State v. Kahalewai, 541 P.2d 1020, 1024 (Haw. 1975). Alaska is the only state that has yet to explicitly embrace this standard, but it has come close. Dunleavy v. Alaska Legis. Council, 498 P.3d 608, 613 (Alaska 2021) ("A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality." (quoting Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 192 (Alaska 2007))).

of Thayer's article, the Chief Justice of the Supreme Court of the Kingdom of Hawai'i Albert Judd wrote, citing Cooley, that it was a "fundamental rule of construction that 'Courts are never to declare an act void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.'"[478]

Over the course of America's first century and a half, the U.S. Supreme Court and all fifty state supreme courts converged on the deferential standard of review of the presumption of constitutionality and clear error. And the U.S. Supreme Court and forty-nine state supreme courts, with the sole exception of Alaska, eventually converged on the "beyond a reasonable doubt" standard as well. Over the course of that time period, it was common for judges to observe just how uniform that practice was among state courts. In other words, state supreme courts did not just cite these rules fleetingly and on single occasions, but regularly observed how "well-established" these rules were. As early as 1811, the Pennsylvania Supreme Court observed that the reasonable doubt rule was "assumed as a principle in construing constitutions, by the Supreme Court of the United States, by this Court, and every other court of reputation in the United States."[479] In 1834, the Massachusetts Supreme Judicial Court remarked that the reasonable doubt rule had "been so often suggested by courts of justice."[480] In 1852, the Ohio Supreme Court spoke of an "unbroken chain of decisions" of state supreme courts on behalf of the clear error rule.[481] In 1856, the Florida Supreme Court remarked that it could cite "any number of decisions by the State courts" on behalf of these rules of restraint, but would only refer to a few of them, noting, however, "that if there be one to be found which constitutes an exception to the general doctrine, it has escaped our search."[482] In 1870, the Iowa Supreme Court remarked that cases have held "with entire uniformity" that judicial review was "never to be exercised in doubtful cases."[483] In 1875, the Virginia Supreme Court of Appeals observed that the clear error rule had "the singular advantage of not being opposed even by a dictum."[484] In 1881, the South Carolina Supreme Court referred to the

478 Hilo Sugar Co. v. Mioshi, 8 Haw. 201, 205 (1891) (Kingdom of Haw.) (quoting COOLEY, *supra* note 274, at 182).

479 Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811) (opinion of Tilghman, C.J.).

480 *In re* Wellington, 33 Mass. (16 Pick.) 87, 95 (1834).

481 Cin., Wilmington & Zanesville, R.R. Co. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77, 84 (1852).

482 Cotten v. Cnty. Comm'rs, 6 Fla. 610, 614 (1856).

483 Stewart v. Bd. of Supervisors, 30 Iowa 9, 14 (1870).

484 Commonwealth v. Moore & Goodsons, 66 Va. (25 Gratt.) 951, 954 (1875). At the time of the decision and until 1971, the Virginia Supreme Court was known as the Supreme Court of Appeals.

clear error rule as "an axiom in American jurisprudence."[485] In 1882, the Oregon Supreme Court noted that "[a]ble and learned judges have, with great unanimity, laid down and adhered to a rigid rule on this subject," all affirming the clear error rule.[486] Also in 1882, Chief Justice Sharswood, writing for the Pennsylvania Supreme Court, observed that the clear error rule was "so well settled by authority that it is entirely unnecessary to cite the cases."[487] In 1896, the Indiana Supreme Court noted that the reasonable doubt rule "has been repeatedly affirmed by this court, and by other courts generally throughout the nation."[488] In 1904, the Washington Supreme Court said that the presumption of constitutionality, clear error rule, and reasonable doubt standard were all "settled" and "well-established."[489] And in 1910, the New Jersey Supreme Court said that the clear error rule, what it called "a well-defined though self-imposed limitation of the judicial function," was "now a firmly established rule of judicial policy," which could be shown by citations to federal and state court decisions "which might be indefinitely extended."[490]

There were, it should be noted, a couple rare exceptions to this uniform embrace of restraint, particularly the reasonable doubt standard. Two state supreme courts expressed some early reservations about that high evidentiary standard. In 1859, on the eve of the Civil War, the Alabama Supreme Court noted that it was "[u]nquestionably" the court's duty to presume the constitutionality of statutes.[491] And it agreed that the clear error standard made sense as well.[492] However, it felt that the reasonable doubt standard that courts were starting to adopt was "entirely too strong."[493] Governments existed to protect the rights of citizens, the court said.[494] The reasonable doubt standard, however, "indulge[d] in favor of legislative infallibility" and rendered the presumption in favor of the state too conclusive.[495] And in 1883, the West Virginia Supreme Court of Appeals echoed and even cited the Alabama Supreme Court's hesitation about reasonable doubt.

485 Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881) (quoting Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 673 (1874)).

486 Cline v. Greenwood, 10 Or. 230, 241 (1882).

487 Commonwealth *ex rel.* Wolfe v. Butler, 99 Pa. 535, 540 (1882).

488 State v. Gerhardt, 44 N.E. 469, 473 (Ind. 1896) (first citing Robinson v. Schenck, 1 N.E. 698 (Ind. 1885); and then citing State *ex rel.* Duensing v. Roby, 41 N.E. 145 (Ind. 1895)).

489 State v. Ide, 77 P. 961, 962 (Wash. 1904).

490 Booth v. McGuinness, 75 A. 455, 461 (N.J. 1910).

491 Sadler v. Langham, 34 Ala. 311, 320–21 (1859).

492 *Id.* at 322.

493 *Id.* at 321.

494 *Id.* at 322.

495 *Id.* at 321.

"We cannot raise presumptions in favor of legislative infallibility as strong as those of a jury in favor of the innocence of a prisoner charged with murder."[496] Despite these stated reservations, both Alabama and West Virginia did eventually come to officially embrace this higher standard as well.[497]

Treatise writers and casebook authors from all over the country reflected and distilled that consensus in their own works, and tracked its spread and development throughout the country. From the earliest notice of the clear error rule in Thomas Sergeant's 1822 constitutional law treatise; to the more elaborate articulations of clear error as the "leading rule" in Theodore Sedgwick's 1857 treatise; to the even bolder and influential articulation of the "reasonable doubt" standard in Thomas Cooley's 1868 treatise; to the numerous legal writers from the 1870s to 1900 who recited these rules in treatises, handbooks, manuals for federal practice, legal dictionaries, and encyclopedias, added them to new editions, and kept adding more and more cases in support, there was a vast scholarly chorus observing the same standard of review. As the Louisiana Supreme Court put it in 1908, referring to the reasonable doubt standard, "The law on this point may be taken from any text-book," selecting Henry Campbell Black's *Handbook* to serve that purpose.[498]

Reviewing all this historical data, the case for a nationwide, century-long process of "liquidation" of the proper standard of review for constitutional cases appears overwhelming. The text of Article III of the Constitution does not provide any particular standard of review for such cases. In that respect, the proper standard at the time of the American Founding was, to use Madison's language from *Federalist No. 37*, "more or less obscure and equivocal."[499] And there was some evidence of this "obscurity" during the Founding era. There were during that period *some* early intimations and tentative articulations of the clear error rule by individual jurists in the state supreme courts, and then at the Supreme Court in the 1790s. But as we have seen, American jurists were slow to confidently announce a rule—the Supreme Court did not adopt it as a rule until 1810, and few treatise writers even noticed the existence of such a rule for the first fifty or so years of the country's existence.

But over the course of about a century, judicial restraint was "liquidated" and became deeply rooted. From the earliest articulations of an appropriate standard of review in state supreme court decisions in

496 Varner v. Martin, 21 W. Va. 534, 542 (1883).

497 State *ex rel.* Woodward v. Skeggs, 46 So. 268, 270 (Ala. 1908); Peel Splint Coal Co. v. State, 15 S.E. 1000, 1004 (W. Va. 1892).

498 State *ex rel.* Labauve v. Michel, 46 So. 430, 432 (La. 1908).

499 THE FEDERALIST NO. 37, *supra* note 62, at 183.

the 1780s, to the Supreme Court's tentative statements in the 1790s, to its formal adoption of these rules during the Marshall Court era, to the early embrace by state supreme courts of the presumption of constitutionality and clear error rule by the Civil War, to their later embrace of the reasonable doubt standard in the latter part of the nineteenth century, spurred on in part by Thomas Cooley's concerns of "aggressor courts" after *Dred Scott*, American jurists worked out their answers until they became "well established," "uniform" "axioms of American jurisprudence." To use Madison's language, the deferential standard of review for constitutional cases was "liquidated and ascertained by a series of particular discussions and adjudications."[500] Through the "discussions" of treatise writers and the "adjudications" of state supreme courts, judicial restraint was "fixed" or "ascertained" as an essential ingredient of the "judicial power" in the nineteenth century.

It is true that starting with the 1883 *Civil Rights Cases*, this impressive consensus started to move more into a posture of dissent in the late nineteenth century, as the post-Reconstruction Court frequently violated these norms. But the dissenting opinions of Justices like John Marshall Harlan and Howell Jackson and the speech of Frederick Douglass critiqued that practice in the name of the settled rules of restraint. And, notwithstanding Justice Brewer's Yale address, the Supreme Court's majority never rejected the binding force of those restraining rules either, choosing to defy or ignore them rather than deny their validity. They were, as the treatise writers repeatedly indicated, the undisputed rules of the road for courts in the nineteenth century, even if some jurists sometimes ignored them in practice.

Viewed from the perspective of this story of more than a century of liquidation and development of the norms and standards of judicial restraint leading up to 1893, one can see that James Bradley Thayer was no outlier or "lone prophet." He merely noticed, and perhaps gave more theoretical attention to, what many other scholars had already noticed, in some cases decades before him, and what an overwhelming number of courts had already said and done too. What many scholars and lawyers refer to as so-called "Thayerian" rules—the presumption of constitutionality, the clear error rule, and the reasonable doubt standard—were not unique to him, but were the settled rules of the legal road that he tracked.

But we do not tend to look at Thayer from the perspective of the century that preceded him, but rather of the century that followed him. We view him primarily as a leading influence upon some of the larger-than-life Supreme Court Justices, appeals court judges, and legal scholars of the twentieth century, like Oliver Wendell Holmes, Louis

500 *Id.*

Brandeis, Felix Frankfurter, Robert Jackson, Learned Hand, Henry Friendly, and Alexander Bickel, to name just a few.[501] As Charles Black characteristically put it, Thayer's article provided "a solid scholarly basis for the 'judicial restraint' position" that was "the source of a river that flows right by the door of today."[502] From that perspective, it makes sense to see the history of judicial restraint as a series of "patriarchs," typically educated at Harvard Law School, handing down "Thayerian" lessons of restraint from one Boston Brahmin lawyer to the next, all descended from the "Abrahamic" figure of Thayer, conveniently bearded and looking the part.

And from that perspective, it also makes sense to inquire deeply into Thayer's personal background and ideological priors, or to scrutinize his handwritten notes to divine how and why he wrote the generative article that he did in 1893. It makes sense for scholars sympathetic to Thayer like Mark Tushnet,[503] G. Edward White,[504] and Sam Moyn[505] to explain him by reference to idiosyncratic features of his life story, like his allegedly conservative politics, his Boston Brahmin milieu, or his fascination with English legal history.

But that microscopic focus on Thayer in all his generative, groundbreaking richness, for better or for worse, is the result of a form of self-induced amnesia about the constitutional history that preceded him. Judicial restraint did not rest upon the narrow, slender reed of Thayer's insights. There was, as this Article has attempted to show, and contra scholars like Charles Black, David Luban, G. Edward White, and Richard Posner, an extraordinarily broad and diverse consensus upon which Thayer relied. That consensus was reflected in over forty legal treatises, popular constitutional law casebooks, dictionaries, and encyclopedias published in the nineteenth century and hundreds of decisions of *all* fifty state supreme courts throughout the country. So instead of looking at Thayer from the perspective of his twentieth-century students and acolytes, it would be helpful to consider him from the perspective of his eighteenth- and nineteenth-century predecessors like St. George Tucker, James Iredell, John Marshall, Bushrod Washington, Lemuel Shaw, Joseph Story, Theodore Sedgwick, John

501 *See, e.g.*, Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978); Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348 (2017); PORWANCHER ET AL., *supra* note 17.

502 BLACK, *supra* note 45, at 193.

503 Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993).

504 White, *supra* note 46.

505 Moyn & Stern, *supra* note 36.

Bingham, Thomas Cooley, John Marshall Harlan, Frederick Douglass, George Sharswood, and Henry Campbell Black.

According to *that* consensus, courts had both the duty to invalidate laws whose unconstitutionality was clear *and* the duty to forbear from overruling a law in cases of reasonable doubt.

And that has consequences not only for legal history, but for understanding the meaning, scope, and limits of judicial power today. Contra some leading new originalists, the claims of history, tradition, and liquidation point strongly in favor of a restrained judiciary. If it is true, as Justice Breyer put it in *Noel Canning*, that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions,"[506] it would seem to be true not only for the meaning of any single constitutional provision, but also the standards and burdens of proof needed to establish that meaning in court. If history can fix the Constitution's meaning, it can also fix its standard of review as well.

Getting the story of the origins, scope, and development of judicial restraint straight can therefore help us better understand a critical step in constitutional analysis too often overlooked today by jurists and scholars alike. It would mean that for every constitutional case, in addition to sorting out the semantic meaning of the relevant constitutional provision and asking whether the challenged law was inconsistent with that meaning, or could plausibly be read as consistent with that meaning, judges would also be required to impose upon themselves a disciplining evidentiary standard for answering those questions. It would require them to ask not only whether they happened to think the challenged law was inconsistent with the meaning of the Constitution, but whether, after careful study of all the relevant textual, contextual, and historical aids available, it was *clearly* and *manifestly* inconsistent with the Constitution, indeed inconsistent *beyond a reasonable doubt*. And that would likely be a step in the direction of displacing some particularly "doubtful and argumentative"[507] claims about the Constitution, borne out of "slight implication and vague conjecture,"[508] in the name of history itself.

Rediscovering the origin story of judicial restraint in America can thus help us better understand, and perhaps even fulfill, the twin historic obligations of both judicial duty *and* judicial forbearance.

506 NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) (alteration in original) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)).

507 Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.).

508 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810).