Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test

By SANFORD BYRON GABIN*

While scholarly controversy over the role of the Supreme Court in American government continues unabated, recent studies tend to minimize and misunderstand, if not ignore or reject, the "reasonable doubt" test as a valid standard of judicial review. Some observers even consider it futile to search for standards by which to evaluate constitutional adjudication.[1] Raoul Berger is an exception. He suggests that the scope of judicial review was intended to be limited by the reasonable doubt test, that "the Framers refused to allocate a larger role to the judges than annulment of laws that plainly went out of bounds."[2]

James Bradley Thayer would have roundly applauded Berger's hypothesis. Professor of law at Harvard University from 1874 until his death in 1902, Thayer published *The Origin and Scope of the American Doctrine of Constitutional Law*,[3] a major attempt to define the proper scope of judicial review. The essay influenced such judges as Oliver Wendell Holmes, Jr., Louis D. Brandeis, Learned and Augustus Hand, and Felix Frankfurter. Indeed, Frankfurter has stated that if he had to choose only one piece of writing on American constitutional

---

* Assistant Professor of Public Affairs, University of Houston at Clear Lake City.

1. Archibald Cox, for example, believes the pursuit entails "an insoluble dilemma." Given "the need to perform the duty of judicial review without merely second-guessing the legislature in situations where both the wisdom and constitutionality of a statute depend upon an appraisal of the same conflicting interests," Cox concludes that there "is no rule by which a judge may know where to place the emphasis, nor any scale by which the contemporary critic can measure the balance struck." A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 4, 22-23, 106-07 (1968) [hereinafter cited as COX, THE WARREN COURT]. The Framers, Cox flatly asserts, "provided no charter by which to measure the legitimate scope and nature of constitutional adjudication." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 105 (1976).

2. R. BERGER, CONGRESS V. THE SUPREME COURT 343 (1969) [hereinafter cited as BERGER].

3. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) [hereinafter cited as Thayer, *Origin and Scope*].

law it would be Thayer's article, "the most important single essay," which he deemed "the great guide for judges and, therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions."[4]

Thayer's essay, nevertheless, has been largely misunderstood; recurrent attacks on Thayer's thesis have obscured more than clarified his contribution to American constitutional thought. One continuing criticism has been that Thayer's "rule of administration"—his prescription that the judicial abrogation of legislation should be confined to cases in which the challenged statute is unconstitutional "beyond a reasonable doubt"—is "radically incompatible" with democratic theory, which instead requires judicial policy-making even in those instances when the alleged invalidity of a legislative act is manifestly uncertain.[5] Critics also assert that Thayer's rule amounts to an abdication of judicial review;[6] that the mere passage of an act by presumably rational legislators would satisfy the reasonable doubt test;[7] that the distinction between clear and unclear violations of the Constitution is fatuous;[8] that Thayer's rule, taken seriously, would require judges to employ a sanity test to determine the rationality of legislative judgment;[9] that the rule will not resolve the problem of conflicting constitutional values;[10] that Thayer provides nourishment for the "preferred freedoms" doctrine;[11] and that Thayer inconsistently applied his

4. FELIX FRANFURTER REMINISCES 299-300 (H. Phillips ed. 1960). *See also* Frankfurter's tribute to Thayer in West Virginia v. Barnette, 319 U.S. 624, 667 (1943), and Holmes' letter to Thayer, *quoted in* JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANFURTER ON JOHN MARSHALL, at xi (M. DeWolfe ed. 1967) [hereinafter cited as ESSAYS ON MARSHALL].

5. C. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 203-04 (1960) [hereinafter cited as BLACK].

6. *Id.* at 205-10. *See also* P. EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 312 n.4, 314 n.20 (1968) [hereinafter cited as EIDELBERG]; Harris, *Taking the Fifth*, THE NEW YORKER, April 12, 1976, at 68.

7. BLACK, *supra* note 5, at 205. *See also* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 16 (1966) [hereinafter cited as SHAPIRO]; H. DEAN, JUDICIAL REVIEW AND DEMOCRACY 114-15 (1966) [hereinafter cited as DEAN].

8. E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 30, 39, 179 (1962).

9. F. COHEN, *Transcendental Nonsense and the Functional Approach*, in THE LEGAL CONSCIENCE—SELECTED PAPERS OF FELIX S. COHEN 44 (L. Cohen ed. 1960).

10. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 42-43 (1962) [hereinafter cited as BICKEL, LEAST DANGEROUS BRANCH]; A. BICKEL, POLITICS AND THE WARREN COURT 177-81 (1965) [hereinafter cited as BICKEL, POLITICS AND THE COURT].

11. SHAPIRO, *supra* note 7, at 115. Shapiro labels the doctrine as one of "preferred positions."

own rule.[12] Confusion also reigns over the extent to which Thayer's rule applies to state, as opposed to national, legislation.[13] Analysis will reveal, however, that Thayer's "rule of administration" is a logical, workable, and probably necessary limitation on judicial judgment.

I. Judicial Review: Rationale and Scope in Early American Constitutional Thought

Thayer, of course, did not write on a clean slate. Two centuries earlier John Locke,[14] while advocating legislative supremacy within natural law limitations, had unwittingly provided a persuasive rationale for judicial review, which found its way into early American constitutional thought. Locke had argued for the impartial resolution of private disputes in accordance with natural law by judges not party to the dispute.[15] Numerous delegates to the Philadelphia convention also saw the need for impartial, independent judges capable of enforcing constitutional limitations on those members of political institutions whose very participation in law-making made them presumably biased parties to the dispute and therefore unqualified to assess fairly the constitutionality of their own behavior.[16] As Alexander Hamilton emphasized, it could hardly "be expected that men who had infringed the Constitu-

12. BLACK, *supra* note 5, at 198-99, 214; DEAN, *supra* note 7, at 116-18; Thayer, *The Scope of Judicial Review*, in ESSAYS IN CONSTITUTIONAL LAW 60 (R. McClosky ed. 1957).

13. BLACK, *supra* note 5, at 199, 214-15; DEAN, *supra* note 7, at 168.

14. "Locke dominates American political thought," Louis Hartz rightly observes, "as no thinker anywhere dominates the political thought of a nation." L. HARTZ, THE LIBERAL TRADITION IN AMERICA 140 (1955).

15. Government, Locke often asserted, "is to be the remedy of those evils, which necessarily follow from men's being judges in their own cases." J. LOCKE, *Second Treatise on Civil Government*, in SOCIAL CONTRACT 10 (E. Barker ed. 1962). *See also id.* at 9, 52, 73, 76, 80, 84. The fact that Locke confined popular, majoritarian judgment and redress of alleged governmental violations of natural law to cases having no "judicature on earth to decide" them, and "no appeal to a judge on earth" (*id.* at 99, 142) surely belies Willmoore Kendall's claim that "those seeking ammunition with which to defend America's peculiar institution will look in vain for it in the Second Treatise." W. KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE 99 (1965).

16. Refusal by the convention to associate the judiciary with the executive in a council of revision empowered to review the wisdom and the constitutionality of proposed legislation was grounded in the conviction that judicial impartiality required separation of the judicial function from the legislative process. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98, 108 (M. Farrand ed. 1966) [hereinafter cited as RECORDS OF 1787 CONVENTION]; 2 *id.* at 75, 79, 82, 298. *See also* BERGER, *supra* note 2, at 67-68, 183-86; EIDELBERG, *supra* note 6, at 205-07.

tion in the character of legislators, would be disposed to repair the breach in the character of judges."[17]

Nevertheless, while the Framers may have approved judicial review but condemned judicial policy-making,[18] the convention failed to distinguish satisfactorily between the two functions. It thereby left the permissible scope of judicial judgment inadequately defined. This omission prompted Robert Yates, the antifederalist from New York who feared that judicial review would become judicial supremacy, to advocate the other extreme, legislative supremacy. In his *Letters of Brutus*, Yates argued that judicial independence freed the judiciary to manipulate an often ambiguous Constitution in conformity with its own policy preferences; far from securing impartiality, such independence permitted, even encouraged, biased judicial decisions that would usurp the legislative function of Congress.[19] Hamilton, however, believed judicial independence would have the opposite effect; separation of the judiciary from the other two branches of government and from the people would free the judiciary to interpret the Constitution impartially.

Chief Justice John Marshall, whose unpersuasive justification of judicial review in *Marbury v. Madison*[20] is generally interpreted as "thoroughly Hamiltonian,"[21] in fact, overlooked Hamilton's impartiality argument.[22] Furthermore, the chief justice cited hypothetical examples of clear constitutional violations before voiding part of an enactment that was, in fact, not clearly repugnant to the Constitution, thus earning a scathing rebuke from Judge John Bannister Gibson.[23] Un-

17. THE FEDERALIST No. 81, at 412 (Dutton ed. 1948) (A. Hamilton) [hereinafter cited as THE FEDERALIST]. *See also* THE FEDERALIST No. 80, at 407.

18. *See* 1 RECORDS OF 1787 CONVENTION, *supra* note 16, at 97-98, 108; 2 *id.* at 73-76, 80. The author is aware of no Framer who defended judicial policy-making.

19. THE ANTIFEDERALISTS (C. Kenyon ed. 1966).

20. 5 U.S. (1 Cranch) 137 (1803).

21. E. CORWIN, COURT OVER CONSTITUTION 66 (1957). *See* E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 63 (1963).

22. In the Virginia ratifying convention Marshall seems to have recognized the "impartiality" argument. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 552, 559 (J. Elliot ed. 1836). Ronald Dworkin, who considers the "impartiality" argument implicit in Marshall's justification in *Marbury*, thinks that "the principle that no man should be judge in his own cause" is "so fundamental a part of the idea of legality that John Marshall would have been entitled to disregard it only if the Constitution had expressly denied judicial review." Dworkin, *The Jurisprudence of Richard Nixon*, THE N.Y. REVIEW OF BOOKS, May 4, 1972, at 31-32 [hereinafter cited as Dworkin].

23. Gibson's defense of legislative supremacy in his dissenting opinion in Eakin v. Raub, 12 Serg. & Rawl. 330 (Pa. 1825), is not itself impeccable. Moreover, his critique

like Marshall in *Marbury*, Hamilton developed a concept of judicial review that combined a convincing rationale for the power with a plausible, potentially workable definition of its legitimate scope. The possibility of judicial error, even bias, forced Hamilton to concede that judicial fallibility required a limitation on the exercise of judicial discretion.[24] Invalidation of legislation on the mere "pretence of a repugnancy" to the Constitution, Hamilton admitted, would amount to the substitution of judicial policy-making for "the constitutional intentions of the legislature."[25] If, he added, judges "should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body."[26] Violation of the permissible scope of judicial review, Hamilton confessed, would destroy its rationale. But how does one distinguish "judgment" from "will" or from "arbitrary discretion"?[27] Hamilton answered that the judicial duty to void legislation arises only if "an irreconcilable variance"[28] exists between the Constitution and the challenged enactment, implying that in doubtful cases judges should withhold their veto. Hamilton did not, however, elaborate upon the problems implicit in "the faithful performance of so arduous a duty."[29]

John Marshall attempted such an elaboration in *McCulloch v. Maryland*.[30] The first issue in that case, whether Congress had the power to incorporate a national bank, involved interpretation of a constitutional ambiguity; the Constitution did not expressly confer or deny that power, and the necessary and proper clause permitted conflicting interpretations, one supporting and the other precluding the necessity of the bank. Why, then, did Marshall uphold the power of Congress to establish the bank? Edward S. Corwin's explanation attributed Marshall's decision solely to the exercise of judicial will:

> The truth is that the major premise of most of the great decisions of the Supreme Court is a concealed bias of some sort—a highly laudable bias, perhaps, yet a bias. For example, the question at

---

of Marshall's justification, while impressive, overlooks what Marshall himself ignored in *Marbury*, the impartiality argument.

24. THE FEDERALIST No. 78, *supra* note 17, at 398-99 (A. Hamilton).
25. *Id.* at 398.
26. *Id.* at 398-99.
27. *Id.* at 401.
28. *Id.* at 397.
29. *Id.* at 399.
30. 17 U.S. (4 Wheat.) 316 (1819).

> issue in *McCullough v. Maryland* [*sic*] was the meaning of the phrase "necessary and proper": did it mean "absolutely necessary" or "convenient"? Marshall said it meant "convenient." But why, except because he was a nationalist? Now, however, suppose he had decided that the phrase in question had borne the other meaning. His particularistic bias would have resulted in the overthrow of the will of the federal legislature. Or to put the whole matter in a sentence: the real question at issue when the validity of an act of Congress is challenged before the Supreme Court is *not* whether the fundamental Constitution shall give way to an act of Congress, but whether Congress' interpretation of the fundamental Constitution shall prevail or whether it shall yield to that of another human, and therefore presumably fallible, institution,—a bench of judges.[31]

Corwin also insisted that Marshall's famous statement in *McCulloch* —"we must never forget, that it is a *constitution* we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs"[32]—implied the need for judicial law-making, for the statesmanlike exercise of judicial will. But *McCulloch* does not verify that assumption; in that case Marshall clearly indicated that it was the duty of the political branches, not the judiciary, to adapt the "great outlines" of the Constitution to the changing needs of society, and, consequently, that it was the duty of the judiciary to uphold constitutionally permissible legislative will.[33]

In deciding, therefore, whether Congress could establish a national bank, Marshall observed that the enumerated powers of Congress[34] were obviously undefined and hence susceptible of broad construction. Moreover, because the Constitution did not specifically prohibit the creation of a corporation by Congress or "enumerate the means by which the powers it confers may be executed," the Court had to inquire "how far such means may be employed."[35]

Only necessary and proper means could be used, but this phrase had a variety of connotations, including both the restrictive interpretation of absolutely necessary or indispensable and the permissive interpretation of "convenient." Confronted with such exegetical difficulties, Marshall noted that by enacting such legislation the Congress and president thought the means necessary. Because "[i]t would require no ordinary share of intrepidity to assert that [their judgment] was a bold

31. Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 U. MICH. L. REV. 616, 625 (1906) (emphasis in original).

32. 17 U.S. (4 Wheat.) at 407-15 (emphasis in original).

33. *Id.* at 416.

34. *See* U.S. CONST. art. I, § 8.

35. 17 U.S. (4 Wheat.) at 408-09.

and plain usurpation, to which the constitution gave no countenance,"[36] Marshall concluded that the Court should defer to reasonable legislative interpretation of the necessary and proper clause:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding [*sic*] the choice of means to such narrow limits as not to leave it *in the power of Congress* to adopt any which might be appropriate, and which were conducive to the end. *This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.* To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive *the legislature* of the capacity to avail itself of experience, to exercise its reason, and to accommodate *its legislation* to circumstances.[37]

Constitutional creativity, then, was a political, not a judicial, prerogative; "to inquire into the degree of [the law's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." Marshall specifically indicated that the Court should disclaim any such pretensions.[38]

The scope of judicial review, as contemplated by Hamilton's irreconcilable variance test and as exemplified by Marshall's treatment of the first issue in *McCulloch*, is probably tantamount to the scope of judicial review as measured by the reasonable doubt test. Such a limitation on judicial review makes its exercise compatible with three essential components of early American constitutional thought: the rationale for judicial review which rested on the need for impartial and therefore independent judges to resolve constitutional disputes; the nature of the Constitution, often silent or ambiguous, and therefore often permitting differing rational interpretations; and the realistic admission that even impartial judges are not infallible.

Confining the scope of judicial review to the veto of clearly unconstitutional acts also permits reconciliation of conflicting strains in

36. *Id.* at 402.
37. *Id.* at 415-16 (emphasis added).
38. *Id.* at 423.

early American constitutional thought. For if judicial review was regarded by its defenders as a means for checking unconstitutional legislative and executive power, then the "irreconcilable variance" test may well have been regarded by Hamilton and others as a means for checking what Yates, and later Gibson, feared would (or had) become unbridled judicial power. If this is so, then the reasonable doubt test may be viewed as a vital mechanism for maintaining a middle ground between legislative and executive supremacy on one hand, and judicial supremacy on the other.

II. James Bradley Thayer and the Dimensions of Judicial Judgment: The "Reasonable Doubt" Test Versus "Independent Judgment"

It remained for James Bradley Thayer to rationalize further the legitimate dimensions of judicial judgment. Thayer recognized that although judicial review served a legitimate and useful function it was neither the first nor necessarily the last determination of constitutionality; the political branches always had an original constitutional duty to make a preliminary and possibly final judgment of the constitutionality of their own behavior. The constitutional convention, by rejecting the creation of a council of revision, had precluded the judiciary from immediate review of legislation. By requiring all members of the political branches to support the Constitution, the oath provision of article VI imposed on them an obligation to make a preliminary determination of constitutionality; this preliminary judgment might be final because judicial review might not be invoked, and even if it were invoked, it could not always erase or legitimize the prior impact of legislation. Therefore, if one accepts Thayer's rationale, a legislative judgment is constitutionally entitled to judicial respect. To veto a reasonable legislative enactment, handed down by presumably rational men constitutionally entitled to what Thayer called an "independent judgment," on the basis of any judicial standard other than the reasonable doubt test not only would have serious practical consequences for the fate of legislation, but also would amount to the substitution of one independent judgment for another. Thayer's conclusion, therefore, was that the reasonable doubt test implied a partial, not full and complete, power of review.

Not surprisingly, Thayer, like most commentators, overlooked the impartiality argument for judicial review. He agreed with Gibson that Marshall's justification for judicial review in *Marbury* was wholly

inadequate[39] and assumed that Marshall had simply followed Hamilton. Thayer argued, moreover, that Marshall's decision begged the key issue, whether the constitutionality of an act of Congress can be brought before a given tribunal;[40] this fact alone should have warned Thayer that the rationale of *Marbury* and Hamilton's doctrine of judicial review were not interchangeable.

Despite Thayer's failure to distinguish between Marshall's and Hamilton's positions and thus to acknowledge the latter's more persuasive rationale, Thayer did approve of judicial review[41] and attempted to delineate its legitimate scope. Constitutional adjudication, in his view, did not consist merely of

> construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation,—an ordinary and humble judicial duty, as the courts sometimes describe it.[42]

This approach to the judicial task easily produced

> the wrong kind of disregard of legislative considerations; not merely in refusing to let them directly operate as grounds of judgment, but in refusing to consider them at all. Instead of taking them into account and allowing for them as furnishing possible grounds of legislative action, there takes place a pedantic and academic treatment of the texts of the constitution and the laws. And so we miss that combination of a lawyer's rigor with a stateman's breadth of view which should be found in dealing with this class of questions in constitutional law.[43]

Because a constitution is a significantly different kind of document from a private contract or will, constitutional interpretation was not an ordinary judicial duty for a constitution need not—in fact, often does not—have a true meaning. Thayer hypothesized:

> If it be said [that the construction of a constitution is ultimately] the construction of a writing; that this sort of question is

39. Thayer called Gibson's dissenting opinion in *Eakin v. Raub* "the ablest discussion of the question which I have ever seen, not excepting the judgment of Marshall in Marbury v. Madison, which, as I venture to think, has been overpraised." Thayer, *Origin and Scope, supra* note 3, at 130 n.1.

40. Thayer, *John Marshall,* in ESSAYS ON MARSHALL, *supra* note 4, at 77, 80. Thayer expressed the same opinion in his 1893 essay: "The reasoning was simple and narrow. Such was Hamilton's method in the Federalist . . . . As the matter was put, the conclusions were necessary." Thayer, *Origin and Scope, supra* note 3, at 138-39. *See also id.* at 130, where Thayer asserted that the constitutional text did not "necessarily" imply judicial review.

41. Thayer, *Origin and Scope, supra* note 3, at 140.

42. *Id.* at 138.

43. *Id.*

> always a court's question, and that it cannot well be admitted that there should be two legal constructions of the same instrument; that there is a right way and wrong way of construing it, and only one right way; and that it is ultimately for the court to say what the right way is,—this suggestion appears, at first sight, to have much force. But it really begs the question.[44]

According to Thayer, then, when the problem is deciding whether a governmental act is legal, the key issue the court needs to decide is not the meaning of any provision of the Constitution but rather whether the act may be sustained as a valid exercise of power.

> It cannot do this as a mere matter of course,—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the *rule of administration* that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply,—*not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it.* This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that *in such cases* the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that *whatever choice is rational is constitutional.* . . .[45]

Too often, Thayer lamented, judges asked the wrong question. As early as 1884 Thayer had formulated the "precise question" that a court faces regarding the constitutionality of legislation:

> Has the legislative department kept within a reasonable interpretation of its power? Can their action reasonably be thought constitutional? Does the question of its conformity to the Constitution fairly admit of two opinions? If it does admit of two opinions, then the legislature is not to be deprived of its choice between them; for this choice is a part of that mass of legislative functions which belong to it and not to the court.[46]

Instead of posing the question in these terms, judges usually asked: Is the law constitutional? This erroneous approach often led judges to substitute their own policy preferences for an exacting scrutiny of the chal-

---

44. *Id.* at 150. *But see* BLACK, *supra* note 5, at 204.

45. Thayer, *Origin and Scope, supra* note 3, at 144 (emphasis added).

46. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, 38 THE NATION 314-15 (1884).

lenged statute in question in order to determine whether the legislature abused its authority and transgressed the limits of reasonable interpretation.

But even Thayer's rule of administration permitted limited judicial involvement in political matters. After all, the reasonable doubt test itself gave judges a certain measure of discretion to interfere in political affairs. Thayer thus firmly broke with Gibson, who had denied the judiciary the power to declare laws unconstitutional.[47] If judicial review existed at all, Gibson had argued, the constitutionality of challenged legislation "would depend, not on the greatness of the supposed discrepancy with the constitution, but on the existence of any discrepancy at all."[48] For Gibson there was no middle ground between legislative supremacy and judicial supremacy, no appropriate rule of administration for confining judicial judgment; either a judge gave the Constitution his independent interpretation of its true meaning, even in unclear cases, or he exercised no power of review at all. Thayer disagreed; whereas Gibson had insisted that judicial review was a dangerous and unnecessary check on legislative power, Thayer insisted that the ultimate arbiter of constitutionality will always be the courts.[49] Thayer explained his view of what really took place in adopting the theory of constitutional law: "[W]e introduced for the first time into the conduct of government through its great departments a judicial sanction, . . .—*not full and complete, but partial.* The judges were allowed, *indirectly and in a degree,* the power to revise the action of other departments and to pronounce it null."[50] The power was indirect because it operated only, if ever, after passage of legislation; it was incomplete because the rule of administration circumscribed its scope.

Had a broader reviewing power been intended, Thayer argued, the judiciary would have been allowed to hand down advisory opinions prior to the enactment of legislation. The Philadelphia convention, however, declined to equate the Court with a council of revision. The absence of an immediate judicial judgment of an act's constitutionality reinforced the legislature's duty, imposed by the oath provision of article VI of the Constitution, to make that original and possibly final judgment. By the time constitutional questions reach the judiciary, the

47. Thayer, *Origin and Scope, supra* note 3, at 145.

48. Eakin v. Raub, 12 Serg. & Rawl. 330, 352 (Pa. 1825).

49. Thayer, *Origin and Scope, supra* note 3, at 152.

50. *Id.* (emphasis added). *See also id.* at 136, where Thayer noted that judicial review was not regarded by the Framers "as the chief protection against legislative violation of the constitution."

legislative decision might have accomplished results of the "profoundest importance" throughout the country. Thayer concluded that a power as momentous as the legislature's primary authority to interpret entitles the actual determinations of the legislature "to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law."[51]

Thayer had effectively reinstated the relevance of the oath provision. Unlike Marshall, who had unsuccessfully used it to justify judicial review, and unlike Gibson, who had successfully used the same provision to undermine Marshall's argument,[52] Thayer employed the oath provision neither to justify nor to challenge judicial review, but rather to aid the judiciary in defining its legitimate scope. Illustrating the relationship between the reasonable doubt test and independent judicial judgment, Thayer remarked that in *McCulloch* Marshall sought "to establish the court's *own opinion* of the constitutionality of the legislation establishing the United States Bank."[53] Not only had Marshall deferred to a reasonable congressional interpretation of the ambiguous term "necessary," he had also imported the Court's independent judgment of the issue into the decision. Thayer recognized that it "is very often true . . . that where the court is sustaining an Act, and finds it to be constitutional in *its own opinion*, it is fit that this should be said. . . ."[54] Such a declaration, an independent judgment in favor of constitutionality, is all that the case called for; it disposed of the matter. But, Thayer continued, there were "many cases where the judges sustain an Act *because they are in doubt about it*; where they are *not* giving their own opinion that it is constitutional, but are merely leaving untouched a determination of the legislature. . . ."[55]

---

51. *Id.* at 135-37. *See also* J. THAYER, LEGAL ESSAYS 9 n.1 (1908) [hereinafter cited as THAYER, LEGAL ESSAYS], where he quotes with approval the Massachusetts court in Kendall v. Kingston, 5 Mass. 524, 533 (1809): The legislature "must, in the first instance, but not exclusively, be the judge of its powers, or it could not act." Charles Black, however, denies that the oath legislators take to support the Constitution implies any necessary judicial respect for legislative judgment. *See* BLACK, *supra* note 5, at 214.

52. Thayer, *Origin and Scope, supra* note 3, at 145. Chief Justice Marshall's reliance on the oath provision, binding federal judges to support the Constitution, furnished to Gibson "an argument equally plausible against the right of the judiciary" for article six imposes the same oath on "Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States." U.S. CONST. art. VI. The oath provision might obligate each of those officers to support the Constitution as he alone construes it.

53. Thayer, *Origin and Scope, supra* note 3, at 151 (emphasis added).

54. *Id.*

55. *Id.* (emphasis added).

In such cases judges did not import their own opinion of the true meaning of the Constitution into their decision; instead, "the strict meaning of their words, when they hold an Act constitutional, is merely this,—not unconstitutional beyond a reasonable doubt."[56]

An independent judgment in favor of constitutionality was, therefore, *sufficient* but not *necessary* to sustain legislation; for an act stood, even if at variance with the judge's independent judgment, unless it also failed the reasonable doubt test. It followed, then, that an individual legislative judgment against constitutionality would not necessarily compel the same judgment by the same individual in a *judicial* capacity. This seeming paradox, central to a correct understanding of Thayer's rule of administration, had been endorsed by Judge Cooley, whom Thayer approvingly paraphrased:

> [O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.[57]

Although the legislator, exercising an independent judgment, had deemed the act unconstitutional, as a judge he could not allow that opinion to be controlling; for if a reasonable doubt in favor of constitutionality exists, the act must be sustained. Thayer therefore understandably conceded that much legislation "which is harmful *and unconstitutional* may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one."[58] This result was possible for the same reason our system of criminal justice permitted a defendant, *in fact* guilty, to be acquitted: his guilt might not be established beyond a reasonable doubt.

The rule of administration, while often affirmed by distinguished jurists, had also been attacked. As early as 1817, Jeremiah Mason had denied the propriety of the rule of administration in his argument of the *Dartmouth College* case[59] before the Supreme Court of New Hampshire. The rule, he insisted, really required the court to surrender its jurisdiction because a reasonable doubt could ordinarily be made out in favor of most legislation. Accordingly, courts ought to review legislation with no more than ordinary deliberation, with the un-

56. *Id.*

57. *Id.* at 144. Judge Cooley's remark is quoted in J. THAYER, CASES ON CONSTITUTIONAL LAW 172-75 (1895).

58. Thayer, *Origin and Scope, supra* note 3, at 137-38 (emphasis added).

59. Trustees of Dartmouth College v. Woodward, 1 N.H. 111 (1817).

biased dictate of their understanding—in effect, with an independent judgment instead of the "erroneous" reasonable doubt test. Daniel Webster, Thayer noted, had also denied the validity of the rule. In 1829, arguing the *Charles River Bridge* case[60] before the Massachusetts courts, Webster urged that all cases involve some doubt and suggested that the passage of any act by the majority of a legislature would normally create a reasonable doubt in its favor. Because, however, legislators often were irresponsible, indeed, often depended on the courts to resolve difficult constitutional disputes, Webster thought judges had a duty to exercise an independent judgment.[61]

Thayer demurred to these "ingenious" attempts to turn courts into councils for answering "legislative conundrums."[62] Legislatures, to be sure, were often disloyal to their trust, but "virtue, sense, and competent knowledge are always to be attributed to that body."[63] The question, Thayer explained,

> is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent,—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs,—what such persons may reasonably think or do, what is the permissible view for them.[64]

Even if legislators are inept or corrupt, the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people by undertaking a function not its own.[65]

Thayer's rule of administration, while limiting the scope of judicial judgment, did not imply the abdication of judicial review. Judgment still had to be exercised, and the judicial veto would still be properly invoked when the legislature clearly misinterpreted the scope of its power. Judicial determination of whether a reasonable doubt existed was, therefore, not automatically made by the mere passage of legislation by presumably rational men; for rational men could—and some-

60. Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344 (1829).

61. Thayer, *Origin and Scope, supra* note 3, at 145-46.

62. *Id.*

63. *Id.* at 149.

64. *Id.* Thayer explained: "The reasonable doubt, then, of which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question. The rationally permissible opinion of which we have been talking is the opinion reasonably allowable to such a person as this." *Id.*

65. Thayer, *John Marshall*, in ESSAYS ON MARSHALL, *supra* note 4, at 88.

times did—act irrationally.[66] The question was not whether legislators were in fact rational, but whether their judgment in a particular case *could* have been based on a rational and thus permissible interpretation of the Constitution. This judicial judgment, moreover, turned not only on what legislators in fact believed when they passed a particular act, but also on what they might rationally have believed, as shown during the course of litigation by the quality of arguments for and against the constitutionality of the act.[67]

The fact that reasonable differences of opinion existed over the correct construction of the Constitution often meant that many constitutional issues properly became jury questions—issues on which reasonable men, exercising an independent judgment, could justifiably decide either way. Application of Thayer's rule of administration meant that in such cases a judge had no more power to substitute his independent judgment for that of the legislature than he had to revise a jury verdict when the issue was a jury question. Thayer's definition of the legitimate scope of judicial judgment therefore enabled the results urged by Locke, Yates, and Gibson to prevail in large measure. This was true *not* because, as they had argued, the political branches and ultimately the people were properly the exclusive judge of the constitutionality of their own behavior, but rather because the invalidity of legislative judgment could not always be established beyond a reasonable doubt, even by impartial judges. The rationale behind this limitation on judicial review, sometimes permitting unconstitutional legislation to go unchecked by the courts, was essentially the same as that permitting the acquittal of nine guilty men so that one innocent man would not be convicted: it would be just as dangerous for impartial but fallible judges to give the Constitution a true meaning when it had no clear one as for an impartial but fallible jury to convict a criminal defendant when a reasonable doubt still existed; even the utmost impartiality could not create sufficient certainty to dispel a reasonable doubt.

It followed, then, that the impartiality of judges did not justify a judicial, instead of political, choice between constitutionally permissible alternative policies. Indeed, the impartiality argument justified only

66. As Alexander M. Bickel has rightly observed, "[i]t does not take a lunatic legislature to enact measures that are irrational." BICKEL, LEAST DANGEROUS BRANCH, *supra* note 10, at 39. See Thayer, *Origin and Scope, supra* note 3, at 134, for examples cited by Thayer of clearly unconstitutional acts.

67. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1877). "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." *Id.* at 132.

the final construction of the Constitution by independent judges for the purpose of keeping political judgment within constitutional bounds. Because the exercise of choice between constitutionally permissible alternatives was exclusively a political function, judicial review required application of the reasonable doubt test, not just as a necessary aid in performing the judicial function impartially but also as a necessary aid in reducing the possibility of judicial policy-making.

The justification of judicial review therefore delimited its legitimate scope, and the justification of a broader scope—for example, independent judgment—required a different rationale, one justifying not merely judicial review but judicial performance of a political function. Impartiality alone as a justification for judicial policy-making was insufficient; two further conditions, both categorically rejected by the Framers, were needed: first, the belief that impartiality was a necessary aid in fashioning "good" or "wise" public policy and hence the belief that impartial judges were capable of making better public policy than were legislators; and second, the preference for "wise" public policy made by politically independent judges over the public policy made by legislators. Impartiality justified judicial review, subject to Thayer's rule of administration, but removal from the political process did not justify substitution of politically independent judicial judgment for the constitutional outcome of the political process itself.

Accordingly, Thayer gave no support to the "preferred freedoms" doctrine,[68] for his rule precluded the substitution of independent judicial judgment for rational, and possibly "unwise," legislative choice or accomodation between conflicting constitutional values when neither was clearly constitutionally preferred.[69] But the charge that Thayer's rule does not solve the problem of conflicting constitutional values is simply not true; rather the rule does not solve the problem as some of Thayer's critics would prefer it be solved. If, for example, a constitutional power allegedly conflicted with a constitutional right or re-

68. *See* Thayer, *Origin and Scope, supra* note 3, at 149. Thayer, referring to such constitutional freedoms as the prohibition against ex post facto laws and "the provisions about double jeopardy, or giving evidence against one's self, or attainder, or jury trial," clearly indicates that the reasonable doubt test applies to all constitutional freedoms alike. There is not, the author believes, the slightest suggestion in Thayer's writings supporting the doctrine of "preferred freedoms."

69. Curiously, Learned Hand's approach to the problem of conflicting constitutional values seems to require judges to inquire whether the legislative accommodation was impartially reached. *See* L. HAND, THE BILL OF RIGHTS 65-66 (1958) [hereinafter cited as HAND, BILL OF RIGHTS]. *See also* L. HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 211-12 (I. Dillard ed. 1960) [hereinafter cited as HAND, SPIRIT OF LIBERTY].

straint on that power, or if two constitutionally protected rights allegedly conflicted, application of Thayer's rule would require a judicial determination of whether one constitutional value clearly prevailed over the other. If, by virtue of the reasonable doubt test, a power clearly prevailed over a right, or a right over a power, or one right over another, then that prevalence resolved the issued. Otherwise, reasonable legislative judgment would be sustained, and that resolved the issue too; for nothing but the plainest constitutional provisions of restraint, Thayer insisted, would justify judicial disregard of a reasonable legislative judgment.[70]

To the extent, of course, that the reasonable doubt test yielded a clear constitutional preference for, say, rights involving access to the political process over freedoms protected by the Bill of Rights, judicial review, even limited by Thayer's rule, would enhance the status of such constitutionally preferred freedoms. But Thayer never endorsed the exercise of an independent judicial judgment intentionally aimed at enlarging particular constitutional rights at the expense of rational legislative judgment. Instead, he had enormous respect for the political process and strongly believed that judicial policy-making, in whatever cause, seriously threatened the effective functioning of that process.[71] While courts surely had a duty to protect the constitutional integrity of the political process, no political theories based merely on an independent judgment about the nature of the nation's system of government would justify judicial tampering with the system or with its constitutional outcome, even in the name of wisdom or justice.

Despite his strong and repeated warnings against judicial invalidation of legislation based only on a court's independent judgment, Thayer nevertheless insisted on an important exception to his rule of administration. Whereas courts were obliged to apply the reasonable doubt test when reviewing acts of coordinate branches of government, they might be required to exercise an independent judgment when reviewing acts of subordinate governmental bodies. Thayer, like Gibson, believed that the supremacy clause required the federal courts to main-

70. THAYER, LEGAL ESSAYS, *supra* note 51, at 30 n.2 (emphasis added). *See also* Thayer, *Origin and Scope, supra* note 3, at 148, where Thayer clearly indicates that the reasonable doubt test applies to a potential conflict between power and right: "The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants."

71. Thayer, *Origin and Scope, supra* note 3, at 155-56; Thayer, *John Marshall*, in ESSAYS ON MARSHALL, *supra* note 4, at 87-88.

tain the paramount authority of the national government. Thayer reasoned:

> If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department.[72]

When, however, the issue relates to what is admittedly not a national power, then Thayer urged a different approach:

> [W]hoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction. But when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. *Fundamentally, it involves the allotment of power between the two governments,*—where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in *all* its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.[73]

Whether Thayer intended federal courts to exercise an independent judgment, instead of applying the reasonable doubt test, when reviewing all state legislation allegedly conflicting with the federal Constitution has been a continuing source of puzzlement. Indeed, some of his critics, believing that Thayer did intend the application of an independent judicial judgment to all state legislation, have charged him with inconsistency for approving decisions in which federal courts in fact applied the reasonable doubt test to determine whether state legislation conflicted with the Constitution.[74] Thayer's own language, however, seems to limit the application of an independent judicial judgment to state action allegedly in conflict with the constitutional exercise of national power. Intended to protect national power against state encroachment, the independent judgment standard was, it appears, not meant by Thayer to be applied to state legislation in the absence of a clash with national power.[75]

---

72. Thayer, *Origin and Scope, supra* note 3, at 154.

73. *Id.* at 154-55 (emphasis added).

74. See note 12 and accompanying text *supra.*

75. Thayer's qualifying language supports this interpretation; so does his own application of the "rule of administration." *See also* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943) (Frankfurter, J., dissenting), where Justice Frankfurter rebuked the Court for exercising what he thought was an independent judicial

Thayer could therefore quite consistently approve Marshall's use of a precursor of the reasonable doubt test in the *Dartmouth College* case,[76] as well as Justice Bushrod Washington's reference to the same test in his dissenting opinion in *Ogden v. Saunders*.[77] Both cases held unconstitutional state action that did not conflict with national power. Thayer's approval of the decision in the *Minnesota Rate Cases*[78] also becomes understandable. The constitutional issue there, as Thayer noted, was "whether a statute providing for a commission to regulate railroad charges, which excluded the parties from access to the courts for an ultimate judicial revision of the action of the commission" violated the due process clause of the Fourteenth Amendment.[79] As in *Dartmouth College* and *Ogden*, no state conflict with national power existed. Accordingly, Thayer applied the reasonable doubt test, not an independent judgment, and concluded, like the Court, that the Minnesota statute was clearly unconstitutional:

> [T]here is often that ultimate question, which was vindicated for the judges in a recent highly important case [the *Minnesota Rate Cases*] in the Supreme Court of the United States, viz., that of the reasonableness of a legislature's exercise of its most undoubted powers; of the permissible limit of those powers. If a legislature undertakes to exert the taxing power, that of eminent domain, or any part of that vast, unclassified residue of legislative authority which is called, not always intelligently, the police power, this action must not degenerate into an irrational excess, so as to become, in reality, something different and forbidden,—*e.g.*, the depriving [of] people of their property without due process of law; and

judgment to strike down state legislation in the absence of a clash with national power. And Frankfurter expressly invoked the reasonable doubt test in his attempt to save the legislation. *Id.* at 661-62, 666-67. He also asserted that "since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia." *Id.* at 650. Justice Frankfurter went on to defend the application of the reasonable doubt test because the state act did not conflict with the exercise of national power: "Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government." *Id.* at 667. *See also* Frankfurter's opinion for the Court in Minersville School Dist. v. Gobitis, 310 U.S. 586, 598 (1940), overruled by *Barnette*, in which he also rejected independent judicial judgment.

76. 17 U.S. (4 Wheat.) 518 (1819). Thayer invoked Marshall's statement that "in no doubtful case would [the Court] pronounce a legislative Act to be contrary to the Constitution." Thayer, *Origin and Scope, supra* note 3, at 145.

77. 25 U.S. (12 Wheat.) 213, 270 (1827). Thayer invoked Justice Washington's use of the reasonable doubt test. Thayer, *Origin and Scope, supra* note 3, at 142 n.1.

78. Chicago, Minneapolis & St. Paul R.R. Co. v. Minnesota, 134 U.S. 418 (1890).

79. Thayer, *Origin and Scope, supra* note 3, at 148 n.1.

> whether it does so or not, must be determined by the judges. But in such cases it is always to be remembered that the judicial question is a secondary one. The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.[80]

Thayer's commentaries on the constitutional relationship between state power and Congress' commerce power provide further evidence that he confined the independent judgment standard to state action allegedly colliding with the exercise of national power. Thayer believed that Congress and not the judiciary was the primary regulator of this relationship. "It is Congress and not the courts, to whom is intrusted the regulation of that portion of commerce which is interstate, foreign, and with the Indian tribes;" and therefore, Thayer concluded, "primarily, it would appear to be the office of the Federal legislature, and not of the Federal courts, to supervise and moderate the action of the local legislatures, where it touches these parts of commerce."[81] Thus, Thayer endorsed the decision in the leading case of *Cooley v. Board of Wardens*,[82] in which the Court upheld a state pilotage fee against the charge that it unconstitutionally conflicted with the national commerce power. Speaking for the Court, Justice Benjamin Curtis reasoned that subjects national in scope, requiring uniform legislation, must be regulated by Congress, but that subjects local in character, not demanding uniform legislation, could be regulated by the states until

80. *Id.* at 148. Thayer, in approving the *Minnesota Rate Cases*, insisted on application of the reasonable doubt test, which more than preserves the "presumption of constitutionality" in favor of challenged legislation. *See also id.* at 148 n.3, which further confirms that Thayer rejected arbitrary judicial definitions of "reasonableness." It should also be noted that Chief Justice Waite, considered by many to have been a paragon of judicial restraint because of his opinion in Munn v. Illinois, 94 U.S. 113 (1877), elsewhere expressed views on the substantive limits of state power to regulate public utilities, views remarkably similar to those expressed by Thayer in the quoted passage. *See* Railroad Commission Cases, 116 U.S. 307, 331 (1886), in which Chief Justice Waite said: "[I]t is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

81. THAYER, LEGAL ESSAYS, *supra* note 51, at 36 n.1.

82. 53 U.S. (12 How.) 299 (1851).

and unless Congress, by acting on the same subject, displaced state law. In *Cooley*, Congress had determined through legislation that the subject did not require uniform, national regulation and had manifested a clear intent to leave regulation of the subject to the states. No conflict existed, then, between state action and congressional exercise of the commerce power. Justice Curtis' opinion, Thayer thought, correctly implied that Congress, not the courts, was the primary judge of the need for uniform, national legislation:

> Now the question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what, on practical grounds, is expedient, possible, or desirable; . . . It is not in the language itself of the [commerce] clause . . . , or in any necessary construction of it, that any requirement of uniformity is found, in any case whatever. That can only be declared necessary, in any given case, as being the determination of someone's practical judgment. The question, then, appears to be a legislative one; it is for Congress and not for the courts,—except, indeed, in the sense that the courts may control a legislative decision, so far as to keep it within the bounds of reason, of rational opinion.[83]

Thayer believed, then, that if Congress expressly determined, as in *Cooley*, that uniformity was not required and that state legislation should stand, courts could not review state legislation on the issue of uniformity. Indeed, courts were not free to review state legislation on that issue even if Congress had not acted at all. Thayer, therefore, disapproved the Court's decision in *Leisy v. Hardin*,[84] where Chief Justice Melville Fuller, speaking for the Court, struck down a state law prohibiting the sale in the original package of liquors imported from another state. The Court held that the need for uniformity, in the absence of congressional action, barred state regulation of the subject. Thayer disagreed, contending that congressional silence should not be construed as an excuse for judicial policy-making. To the question of

83. THAYER, LEGAL ESSAYS, *supra* note 51, at 36 n.1. Thayer's exception in the last sentence of this passage should not be interpreted to mean that courts, applying the reasonable doubt test, can overturn congressional judgment on the issue of uniformity, for Thayer had earlier correctly indicated that they cannot. Instead, the reasonable doubt test would properly invalidate legislation if Congress, for example, under the guise of "uniformly regulating commerce," clearly violated constitutionally protected rights. *See also* BLACK, *supra* note 5, at 205-07. Black presents many examples of far-fetched but possible legislative violations of the Constitution accomplished by labelling constitutionally proscribed legislation as exercises of expressly granted powers. He might also have listed the commerce power as providing a pretense for the exertion of unconstitutional power.

84. 135 U.S. 100 (1890).

who should say whether one uniform rule is required, Thayer replied: "[T]hat question is for Congress, and the State regulation 'must stand until Congress shall see fit to alter it.' "[85] He conceded that Congress might very likely be dilatory or negligent in enacting legislation on such issues but concluded that it was one consequence of the powers granted by article II of the Constitution. Congressional silence, then, permitted the application of neither an independent judgment nor the reasonable doubt test to state legislation on the issue of uniformity. Instead, state legislation could only be invalidated, Thayer emphasized, if it were *so clearly* unconstitutional for reasons *other* than the need for uniformity that no consent of Congress could save it.[86]

The independent judgment test seems, therefore, not intended by Thayer to be applied to all state action. Even its apparent limitation to state action allegedly in conflict with the constitutional exercise of national power, however, is not justified; for Thayer's insistence on employing independent judicial judgment in the service of national supremacy, in order to vindicate national power at the expense of state power when genuine conflict is doubtful, really amounts to advocacy of a particular political theory in violation of his own warning. After all, although the supremacy clause, without the aid of independent judgment, clearly yields supremacy for constitutional national law over conflicting state law, this fact does not imply a broader scope for judicial judgment, entailing a special judicial duty to protect national power over state power when conflict does not clearly exist. Nor was the in-

85. THAYER, LEGAL ESSAYS, *supra* note 51, at 36 n.1. Interestingly, Justice Frankfurter, who accepted Thayer's exception to the "rule of administration" when federalism was involved (see note 77 *supra*), departed from Thayer's restriction on that exception. Whereas Thayer limited the exercise of an independent judicial judgment to cases in which state action allegedly collided with the exercise of national power and precluded any judicial judgment on the need for uniformity when Congress had not acted under its commerce power, Frankfurter, as well as a majority of the modern Court, felt free to exercise independent judgment to strike down state interference with the national commerce power in the absence of congressional regulation. Justice Black, however, adhered strictly to Thayer's view on this subject. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

86. THAYER, LEGAL ESSAYS, *supra* note 51, at 36 n.1. In the same passage Thayer repeated his insistence that "the courts should abstain from interference, except in cases so clear that the legislature cannot legitimately supersede their determinations; for the fact that the legislature may do this, in any given case, shows plainly that the question is legislative, and not judicial." Thayer added, significantly: "It is also to be remembered that much in State action, which may not be reached by the courts under the present head [commerce], may yet be controlled by them under other parts of the Constitution, as in such cases as Crandall v. Nevada, and Corfield v. Coryell." *Id.* (citations omitted). One must assume that Thayer intended the reasonable doubt test to apply to judicial review of state action allegedly in conflict with these "other parts of the Constitution."

dependent judgment test even needed to protect national power. Thayer himself had correctly recognized that Congress had primary responsibility for regulating state action touching on Congress' commerce power. Rejecting the need for independent judicial judgment in the service of that power, he observed that

> the great thing which the makers of the Constitution had in view, as to this subject [commerce], was to secure power and control to a single hand, the general government, the common representative of all, instead of leaving it divided and scattered among the States; and that this object is clearly accomplished.[87]

If, as Thayer believed, Congress was perfectly able to regulate commerce and thereby control state interference with that subject, then Congress was also able to frame legislation so as clearly to preclude even the slightest state encroachment on the exercise of national power.

It should be recognized that standards do not prescribe solutions in individual cases, and Thayer's rule, like all guideposts, is not self-applying. As Thayer himself admitted, the judicial function allows the judiciary only a secondary role in the political conduct of government. Even circumscribed by the rule of administration, judges, like criminal juries, might differ over what constitutes a reasonable doubt; the possibilities, the stuff of which reasonable doubts are made, do not always strike all men, however reasonable, alike. But even under Thayer's rule of administration the freedom and the burden of decision-making remain, although that freedom is narrowed. Thayer sought to reduce the scope of judicial freedom without diminishing the judicial duty and burden of judging.

III. Footnote Four and "Preferred Freedoms"

Thayer's rule of administration has been honored in the breach as much as it has been faithfully followed. In fact, barely two years after publication of his 1893 article, the Supreme Court, as if in direct defiance of Thayer's admonition to confine judicial judgment to the reasonable doubt test, launched into a new protection of property rights. During this period the Court often invalidated the exercise of Commerce Clause powers, usually on the ground that Congress was attempting to regulate a subject exclusively reserved to the states. The Court also struck down the exercise of states' power, usually on the ground that it violated the due process clause of the Fourteenth Amendment.

87. THAYER, LEGAL ESSAYS, *supra* note 51, at 36 n.1.

Soon after the Court's abrupt withdrawal from the exercise of independent judgment in the service of property rights, the foundations were laid for another reign of judicial supremacy in the service of new preferred freedoms. The origin of this new rationale for judicial activism was Justice Harlan Fiske Stone's famous footnote four to his opinion for the Court in *United States v. Carolene Products Co.*[88] Written during the Court's transition from judicial supremacy in the service of property rights to a similar role in the service of non-property rights, the opinion explicitly advocated that the reasonable doubt test should henceforth be applied to legislative regulation of the economy. Upholding congressional prohibition of the shipment of "filled milk" in interstate commerce on the ground that Congress could reasonably have believed such milk was injurious to health and a fraud on the public, Chief Justice Stone emphasized that regulatory legislation affecting ordinary commercial transactions would generally be assumed to rest upon some rational basis within the knowledge and experience of the legislators. Then came the famous footnote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin, supra*; on interferences with political organizations, see *Stromberg v. California, supra* 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 484, or racial minorities, *Nixon v. Herndon, supra*; *Nixon v. Condon, supra*: whether prejudice against discrete

88. 304 U.S. 144 (1938).

> and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n. 2, and cases cited.[89]

Without even attempting to explain why property rights deserved less judicial protection than non-property rights,[90] Justice Stone asserted that special judicial scrutiny—ultimately involving a reversal of the traditional presumption of constitutionality[91] and thereby permitting the exercise of independent judicial judgment—might be required when First Amendment freedoms are allegedly infringed, when the rights of racial, religious, or national minorities are allegedly violated, or when the political process itself is allegedly impeded. Laying claim to judicial supremacy in behalf of what was later dubbed "preferred freedoms,"[92] the footnote relied on such venerable and imposing authority as certain opinions of Justices Marshall, Holmes, Brandeis, Cardozo, and the then chief justice, Charles Evans Hughes. The problem, however, is that these opinions, while affirming the importance of First Amendment freedoms, the rights of minorities, and an unimpeded political process, lend little support to Justice Stone's suggestion that legislation that allegedly adversely affects rights in these areas might legitimately be subject to a reversal of the presumption of con-

89. *Id.* at 152-53 n.4 (1938).

90. As Learned Hand remarked in 1946: "Just why property itself was not a 'personal right' nobody took the time to explain." HAND, SPIRIT OF LIBERTY, *supra* note 69, at 156. *See also* Frankfurter, *John Marshall and the Judicial Function*, in ESSAYS ON MARSHALL, *supra* note 4, at 159-60. For a thoughtful critique of "the doubtful distinction between economic and civil rights," see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, in THE SUPREME COURT AND THE CONSTITUTION 158-86 (P. Kurland ed. 1960) [hereinafter cited as McCloskey].

91. Robert H. Jackson, soon to join the Court, observed in 1941: "The presumption of validity which attaches in general to legislative acts is *frankly reversed* in the case of interferences with free speech and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 285 (1941) (emphasis added) [hereinafter cited as JACKSON].

92. Chief Justice Stone introduced this expression in Jones v. Opelika, 316 U.S. 584, 600, 608 (1942) (Stone, C.J., dissenting); Justice Douglas invoked it for the majority in Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). For a bitter attack on the idea of preferred freedoms, see Kovacs v. Cooper, 336 U.S. 77, 90-97 (1949) (Frankfurter, J., concurring).

stitutionality; nor do these opinions imply that non-property rights are more important than property rights.

The first paragraph of footnote four refers to *Stromberg v. California*[93] and *Lovell v. Griffin*,[94] both opinions for the Court written by Chief Justice Hughes that involve no reversal of the presumption of constitutionality and provide no basis for the preferred freedoms doctrine. *Stromberg* simply struck down a state law prohibiting the display of a red flag "as a sign, symbol, or emblem of opposition to organized government" on the ground that it violated freedom of speech as protected by the Fourteenth Amendment; the statute could clearly be construed, the Court held, as embracing conduct that the state could not constitutionally prohibit, *i.e.*, peaceful and orderly opposition to government by constitutionally protected means.[95] *Lovell* invalidated a city ordinance barring the distribution of any kind of literature without a permit as clearly a prior restraint on freedom of speech and of the press; *Near v. Minnesota*[96] was controlling precedent. Both *Stromberg* and *Lovell* involved legislation the Court found clearly unconstitutional "on its face" and *Stromberg* stressed that enjoyment of First Amendment freedoms was a prerequisite for participation in the political process; but neither decision reversed the presumption of constitutionality or indicated that First Amendment freedoms held preferred constitutional status.[97]

In the second paragraph of footnote four, the references to opinions condemning unconstitutional restrictions on the political process likewise give no support to Justice Stone's inferences. In fact, Justice Holmes' opinion in *Nixon v. Herndon*,[98] in which a unanimous Court struck down a Texas statute forbidding Negroes the right to vote in the Democratic Party primary election, twice invoked the reasonable doubt test as the controlling judicial standard.[99] Relying on *Herndon*, Justice Cardozo's opinion for the Court in *Nixon v. Condon*[100] invalidated a similar resolution by the State Executive Committee of the Texas Democratic Party acting under authority of statute. Neither opinion

93. 283 U.S. 359 (1931).
94. 303 U.S. 444 (1938).
95. 283 U.S. at 369.
96. 283 U.S. 697 (1931).
97. *See* Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 580 n.28 (1948) [hereinafter cited as Braden], in which the author calls *Stromberg* and *Lovell* "only vaguely relevant" to paragraph one of footnote four.
98. 273 U.S. 536 (1927).
99. *Id.* at 540-41.
100. 286 U.S. 73 (1932).

accorded preferred status to rights relating to the political process.[101] Even Justice Brandeis' famous concurring opinion, joined by Justice Holmes, in *Whitney v. California*,[102] in which the Court upheld a conviction for advocating unlawful force in violation of a state criminal syndicalism act, disavows rather than supports the notion of preferred freedoms. "The power of the courts to strike down an offending law," Justice Brandeis said, "is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly."[103] Despite Justice Brandeis' strong affirmation that First Amendment freedoms are crucial to the political process, he did not suggest that judicial power to protect these rights was any greater than judicial power to protect property rights. Indeed, both Justices Brandeis and Holmes upheld Miss Whitney's conviction on the basis of the reasonable doubt test. Both thought that a trial court or jury could reasonably have found that her activity constituted a "clear and present danger" to the security of the state, and both accordingly refused to exercise independent judgment to overrule the verdict.[104]

Justice Stone's references in paragraph three of footnote four to opinions invalidating legislation prejudicial to minorities suffer from the same defects. Justice McReynolds' opinion for the Court in *Pierce v. Society of Sisters*,[105] holding an Oregon law requiring compulsory public school education unconstitutional as a violation of the liberty of parents and guardians to direct the education of children under their control, neither reverses the presumption of constitutionality nor embodies any suggestion of preferred freedoms. Furthermore, the opinion relies heavily on *Meyer v. Nebraska*,[106] Stone's other reference, in which Justice McReynolds' opinion for the Court twice invoked the reasonable doubt test to strike down a state law forbidding the teaching of any modern language other than English to any pupil who had not passed the eighth grade. Knowledge by a child of some language other than English was not "so clearly harmful,"[107] Justice McReynolds held, as to

101. Justice Stone did *not* rely on Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 325-28 (1937), where the latter asserted that a theory of preferred freedoms was mandated by the due process clause of the Fourteenth Amendment. Significantly, Justice Cardozo did not support reversing the presumption of constitutionality; rather, he believed that the reasonable doubt test controlled judicial judgment.

102. 274 U.S. 357 (1927).

103. *Id.* at 374.

104. *Id.* at 379.

105. 268 U.S. 510 (1925).

106. 262 U.S. 390 (1923).

107. *Id.* at 403.

justify the plain interference with the right of a foreign language teacher to teach and the right of parents to engage him to instruct their children.[108] It should also be noted that Justice Holmes, joined by Justice Sutherland, dissented in *Meyer* on the express ground that, in their opinion, the statute was saved by the reasonable doubt test.[109] Appealing to the test three times, Justice Holmes was "not prepared to say that it is unreasonable" to provide that children shall hear and speak only English at school, especially if there were areas of the state where they would hear only a foreign language at home. While Justice Holmes appreciated the objection to the law, it nevertheless presented to him "a question upon which men reasonably might differ."[110]

Paragraph three of footnote four closes with reference to the authority of John Marshall in *McCulloch v. Maryland*,[111] where the chief justice repudiated the suggestion that every argument that would sustain the right of the national government to tax banks chartered by the states would equally sustain state taxation of national instrumentalities. The analogy did not stand up, as Marshall explained:

> The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents . . . . But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.[112]

Marshall's statement was thought by some students of the Court to be Justice Stone's most impressive support for the *Carolene Products* ideas contained in both paragraphs two and three.[113] Justice Stone inferred

108. *Id.* at 402.
109. *Id.* at 403.
110. *Id.* at 402.
111. 17 U.S. (4 Wheat.) 316 (1819).
112. *Id.* at 435-36.
113. *See, e.g.*, Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 403-04 (1969) [hereinafter cited as Mason, *Judicial Activism*]; Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942) [hereinafter cited as Lusky]; Letter from Justice Stone to Chief Justice Hughes, April 19, 1938, *quoted in* A. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 155 (1962).

that the Court might have a special duty to correct the outcome of an impeded political process, as in the case of state taxation of national instrumentalities, when political restraints on state action were not available,[114] and furthermore that the Court might have a similar duty to purify the political process so as to minimize dependence on a judicial remedy.[115]

Louis Lusky has commented on the last two paragraphs:

> [They embody] a frank recognition that the Court feels a special responsibility for the protection of the "political processes," because, unless some non-political agency intervenes, interferences with the corrective mechanism may well perpetuate themselves. The Court thus performs an important part in the maintenance of the basic conditions of *just* legislation. By preserving the hope that bad laws can and will be changed, the Court preserves the basis for the technique of political obligation, minimizing extra-legal opposition to the government by making it unnecessary. . . . Where the regular corrective processes are interfered with, the Court must remove the interference; where the dislike of minorities renders those processes ineffective to accomplish their underlying purpose of holding out a real hope that unwise laws will be changed, the Court itself must step in.[116]

Marshall's dictum in *McCulloch*, however, implied nothing of the sort; this observation was simply his own justification of the concept of national supremacy contained in the supremacy clause. An argument for the supremacy of the constitutional outcome of the national political process over the conflicting outcome of any state's political process, it implied nothing about the purity of *either* political process; still less did it suggest a special judicial duty to revise the constitutional outcome of either political process in the service of a more desirable outcome or a special judicial duty to remove constitutionally imposed or constitutionally permitted antidemocratic impediments to the pure functioning of either political process. The issue in *McCulloch* was *which* political

114. At the end of paragraph three, Chief Justice Stone cited his own opinion for the Court in South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938), in which the Court struck down state legislation affecting interstate commerce on the ground that "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interest within the state." *Id.* at 184-85 n.2. Yet political restraint—action by Congress—was available; that it was not (yet) forthcoming does not necessarily justify a judicial "remedy." *See also* Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 46 n.2 (1940); Helvering v. Gerhardt, 304 U.S. 405, 416 (1938).

115. *See, e.g.*, Mason, *Judicial Activism*, *supra* note 113, at 394; COX, THE WARREN COURT, *supra* note 1, at 94-95.

116. Lusky, *supra* note 113, at 20-21 (emphasis added).

process, however pure or impure, democratic or antidemocratic, was constitutionally entitled to prevail. That the national political process emerged triumphant was, of course, in part a function of Marshall's belief that the action of the state of Maryland clearly violated the supremacy clause.

Scantily supported by the references Justice Stone invoked, footnote four additionally suffers from serious logical deficiencies. Paragraphs two and three suggest that because a "dependence on the people" through the political process is, as James Madison put it, the "primary control" on government,[117] the Court, as an auxiliary check, therefore has a special duty to undo the undesirable outcome of an impure political process. This implies that the Court, despite the constitutionally intended nature of the political process, should rewrite the Constitution. The political process argument, then, proves either too little or too much: too little because it begs the question why the Court should exercise its independent judgment to determine the character of the political process and of its outcome when the Constitution prescribes its own procedures for change; and too much because the political process argument alone might well justify the judicial exclusion from the American political system of such antimajoritarian, yet clearly constitutional, institutions as the United States Senate, the electoral college, even the Supreme Court itself. To the extent that First Amendment freedoms are protected constitutionally, their judicial enforcement does not depend on the political process argument any more than did Chief Justice Marshall's invalidation of the Maryland tax in *McCulloch*. Moreover, to the extent that freedoms are not protected constitutionally, the justification for judicial expansion or contraction of their scope depends on whether the Court is empowered to rewrite the Constitution in the service of judicially desired constitutional change.

Finally, the corollary suggestion in paragraphs two and three, that the Court has a special duty to enable particular "discrete and insular" minorities, vulnerable to majoritarian prejudice, to undo or attempt to undo undesirable legislation through the political process, involves similar logical difficulties. Why, for example, only religious, national, and racial minorities? Why not economic minority groups, too?[118] Why should any minority that loses in the political process, but that has not had any constitutional rights clearly infringed, enjoy an appeal to

117. THE FEDERALIST No. 51, *supra* note 17, at 264 (J. Madison).

118. *See, e.g.*, Braden, *supra* note 97, at 581; Murphy, *Deeds Under a Doctrine: Civil Liberties in the 1863 Term*, 59 AM. POL. SCI. REV. 64, 72-74 (1965).

the judicial process either to expand those constitutional rights that affect participation in the political process or to reverse the outcome of that process? Plainly, whatever the nature of the political process, however unimpeded, minorities inevitably lose, in the sense of not prevailing politically. Given, therefore, a political system in which, for example, all members of the body politic could exert equal influence on the decision-making processes, would the losing minorities still deserve special protection beyond judicial enforcement of clear constitutional guarantees?

Perhaps so, defenders of footnote four suggest; for they argue that for the sake of peaceful societal change, instead of violent revolution, all minorities must be able to believe that the political process truly permits the repeal of "undesirable" legislation and that, consequently, judicial review exercised for this purpose becomes a surrogate for revolution.[119] To recognize, however, that judicial enforcement of Bill of Rights limitations on government would be a valuable aid in helping to domesticate revolution is not to concede a broad scope for judicial judgment.[120] Nor does it follow that the judiciary has a special duty to undo the allegedly undesirable, albeit constitutional, outcome of the political process simply because a disgruntled minority fought the good battle and lost. For what of the potentially even more disgruntled ma-

119. *See, e.g.*, Lusky, *supra* note 113, at 20-21; Mason, *Understanding the Warren Court: Judicial Self-Restraint and Judicial Duty*, 81 POL. SCI. Q. 523, 560-61 (1966).

120. Opposing legislative supremacy in Virginia, Jefferson called for "the proper remedy; which is a convention to fix the constitution, . . . to bind up the several branches of government by certain laws, which, when they transgress, their acts shall become nullities; to render unnecessary an appeal to the people, or in other words a rebellion, on every infraction of their rights, on the peril that their acquiescence shall be construed into an intention to surrender those rights . . . ." 8 THE WRITINGS OF THOMAS JEFFERSON 371-72 (H. Washington ed. 1856). Often interpreted as an argument for judicial review, this passage nowhere mentions that institutional innovation. During the struggle over ratification of the Constitution Jefferson did, of course, alert Madison to an argument in favor of a Bill of Rights which had "great weight" with Jefferson, namely, "the legal check which it puts into the hands of the judiciary." But even this endorsement of judicial review is hedged by Jefferson's next sentence: "This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." Letter from Jefferson to James Madison, March 15, 1789, in THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed. 1958). The qualifier seems much more consistent with Jefferson's later defense of "departmental construction" of the Constitution than with support of judicial review. Furthermore, when Madison, apparently persuaded by Jefferson concerning the need for a Bill of Rights, proposed the Bill of Rights amendments to the House of Representatives in 1789, Madison noted that judicial review would be limited to the protection of "rights expressly stipulated for . . . by the declaration of rights." 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789) (emphasis added).

jority that also fought the good battle in the political process only to have its hard-won victory, obtained without any clear violation of the constitutional rights of the minority, upset in the judicial process? Such a majority, or as Dahl would have it, a transiently united group of minorities, might well have more cause than the defeated minority, now victorious in the judicial process, to be impatient with the likelihood of getting peaceful change through either the political or the judicial processes. Indeed, why should the Court have any power to invalidate so-called undesirable legislation over which reasonable men regularly and justifiably disagree?

At bottom, then, footnote four contained suggestions lacking in authority and logic and thoroughly incompatible with the traditional scope of judicial review as articulated by James Bradley Thayer. Justice Stone, as we look upon him with hindsight, was breaking new legal ground and intimating the use of new constitutional doctrine. Not surprisingly, the influence of the footnote was quickly felt by both Court and country. Barely two years after it was written, footnote four divided the Court in *Minersville v. Gobitis*,[121] in which Justice Frankfurter, writing for the Court with only Justice Stone dissenting, upheld state power to require the flag salute of children in public schools in violation of the religious scruples of Jehovah's Witnesses. Three years later, when the Court reversed itself in *West Virginia v. Barnette*,[122] Justice Frankfurter was the dissenter and Stone, now chief justice, joined in Justice Jackson's majority opinion.

Justices Stone and Jackson, urging the unconstitutionality of the flag salute requirement, eschewed the political process argument so prominent in footnote four. The argument was irrelevant, they thought, for participation of minorities in the political process did not thereby render their constitutional rights vulnerable to the will of the majority; however democratic the political process might be, judicially enforced constitutional limitations would prevail. Accordingly, Justices Stone and Jackson relied strongly on other facets of footnote four: the fact that Jehovah's Witnesses were not only a minority but also a small religious minority; their belief that First Amendment freedoms, which Jackson expressly accorded preferred constitutional status, were infringed; and the Court's willingness to exercise independent judgment in behalf of preferred freedoms. Justice Frankfurter, however, found the political process argument quite relevant; it was for him the core

121. 310 U.S. 586 (1940).
122. 319 U.S. 624 (1943).

of footnote four. But precisely because the Jehovah's Witnesses were *not* excluded from the political process and were free to oppose the flag salute requirement, Justice Frankfurter thought the political process argument unavailing. Like Justices Stone and Jackson, then, Justice Frankfurter apparently would have voted to strike down unconstitutional obstructions of the political process; but unlike his colleagues, Justice Frankfurter rejected the constitutional relevance of the Jehovah's Witnesses' status as a small minority and refused to exercise an independent judgment in behalf of preferred freedoms. That the Jehovah's Witnesses were a religious group was, of course, constitutionally relevant to Justice Frankfurter, but the only issue for him was whether, according to the reasonable doubt test, the flag salute requirement violated their free exercise of religion.

What really divided Justices Stone and Frankfurter in the first flag salute case, was not, then, the political process argument but the legitimate scope of judicial review. The political process argument was inapplicable, Justice Frankfurter urged, because the remedial channels of the democratic process were open and unobstructed and all the effective means of inducing political changes were left free from interference.[123] Justice Stone agreed, but he was not persuaded that the Court "should refrain from passing upon the legislative judgment" simply because the political process was unimpeded. Such restraint seemed to Justice Stone to be "no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."[124] Justice Stone concluded that the flag salute requirement operated to repress "the religious freedom of small minorities."[125]

Twice rejecting the independent judgment test, in his opinion for the Court and again in a letter to Justice Stone,[126] Justice Frankfurter instead applied the reasonable doubt test. "The mere possession of religious convictions which contradict the relevant concerns of a political society," he held, "does not relieve the citizen from the discharge of political responsibilities."[127] Surely, Frankfurter thought, the legislative end—the promotion of good citizenship and patriotism—was legitimate; the crucial question was whether the means, however un-

123. 310 U.S. at 599-600.

124. *Id.* at 605-07.

125. *Id.* at 607.

126. *Id.* at 596, 598; Letter from Frankfurter to Stone, May 27, 1940, *reprinted in* A. MASON, SECURITY THROUGH FREEDOM 218 (1955) [hereinafter cited as MASON, SECURITY THROUGH FREEDOM].

127. 310 U.S. at 594-95.

wise, were irrational. The issue, he concluded, was highly debatable, for the means for attaining the legislative end were "still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power."[128] The wisdom of training children in patriotic impulses, Justice Frankfurter believed, is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality.[129]

Any doubt over the real rift between Justices Stone and Frankfurter in *Gobitis* disappeared when Justice Jackson, speaking for the Court in the second flag salute case,[130] explicitly affirmed the implications of Justice Stone's earlier dissent. Again the political process argument did not divide the justices; rather Justice Jackson's categorical insistence on the Court's special duty to exercise independent judgment in the service of preferred freedoms provoked Justice Frankfurter's strident dissent. Rejecting the relevance of the political process argument, Justice Jackson pointed out that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . ."[131] These rights, he added, may not be submitted to vote; they depend on the outcome of no election. Certain of these rights, moreover, deserved greater judicial protection than others:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.[132]

Since "the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs," changed conditions had thrust upon the justices necessary reliance upon their own judgment in enforcing such non-property rights as First Amendment freedoms.[133] How-

128. *Id.* at 598.

129. *Id.* at 595, 598. *See also id.* at 599, where Frankfurter refused to strike down legislation "[e]xcept where the transgression of personal liberty is too plain for argument."

130. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

131. *Id.* at 638.

132. *Id.* at 639.

133. *Id.* at 638-40. *See also id.* at 654-55.

ever doubtful the alleged violation of First Amendment freedoms, and however much reasonable men might differ over the issue, the presumption of constitutionality in favor of legislation allegedly infringing those freedoms was, as Jackson wrote shortly before joining the Court, "frankly reversed."[134] Justice Jackson declared in *Barnette* that the justices had a corresponding if unwelcome duty, earned not by any marked competence but imposed by force of their commissions, to exercise an independent judgment on behalf of religious freedom.[135]

To Justice Frankfurter, neither history nor changed conditions regarding increased governmental regulation of property rights, nor especially the force of his commission, implied any such duty. Inveighing against the Court's rejection of the reasonable doubt test in favor of the exercise of independent judgment, he lamented that he knew of no standard other than the reasonable doubt test that the Court could justifiably apply.[136] The only issue properly before the court, he urged, was its opinion whether legislators could *in reason* have enacted such a law.[137] But the Court had demanded *more* than a rational basis for the flag salute requirement; by exercising its own independent judgment the Court had denied state legislatures *their* independent judgment between alternative rational means for attaining a legitimate legislative end.

Not only had the Court distorted the intended constitutional relationship between religious freedom and political obligation; it had also distorted, Justice Frankfurter argued, the intended constitutional relationship between majority rule and minority rights. By attaching unwarranted significance to the fact that Jehovah's Witnesses were a small minority, the Court had, in effect, lost sight of the truism that the right to participate in the political process did not imply the right to prevail; that while the majority is limited by the right of minorities peacefully to oppose, the majority has a right to prevail so long as its choice is not clearly unconstitutional. Because the Jehovah's Witnesses were not barred access to the political process, and all channels of affirmative free expression remained open to them, their status as a losing minority in the political process was, Justice Frankfurter insisted, constitutionally irrelevant; their claim could rest only on a clear violation of their religious freedom. But as no inroads were made upon the actual exercise

134. JACKSON, *supra* note 91, at 285.
135. 319 U.S. at 640.
136. *Id.* at 666.
137. *Id.* at 647.

of religion by the minority, Justice Frankfurter concluded that "to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority."[138] Justice Frankfurter ended his long dissent in *Barnette* by quoting extensively from James Bradley Thayer, whose thesis, Frankfurter observed, was "as wise as any that I knew in analyzing what is really involved when the theory of this Court's function is put to the test of practice."[139]

Justice Frankfurter's plea for judicial restraint—for application of the reasonable doubt test—went unheeded by the Court in *Barnette.* With the casualness of a footnote, as Justice Frankfurter once regretted,[140] Justice Stone in the *Carolene Products* case had suggested a rationale for judicial supremacy—for the exercise of independent judicial judgment in the service of preferred freedoms, the rights of certain minorities, and of a purified political process. Adopted by the Court in Justice Jackson's opinion in the second flag salute case, that rationale would flower, even flourish, under the Warren Court.

IV. The Warren Court and the Exercise of "Independent Judgment" in Behalf of "Preferred Freedoms"

A. Racial Equality

The era of the Warren Court opened with a decision later considered by the chief justice as his Court's second most important, *Brown v. Board of Education.*[141] Appropriately enough, Justice Jackson,

138. *Id.* at 662.

139. *Id.* at 667.

140. Dennis v. United States, 341 U.S. 494, 526-27 (1951) (Frankfurter, J., concurring). Chief Justice Stone, too, may have regretted the footnote. *See* Letter from Stone to Irving Brant, August 25, 1945, *quoted in* Mason, *Judicial Activism, supra* note 113, at 425. Jackson, once a leading defender of the footnote, also expressed doubts. *See* R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57-58, 80-82 (1955).

141. 347 U.S. 483 (1954). In a news conference held on July 5, 1968, Warren acclaimed the reapportionment decisions of 1962 and 1964—Baker v. Carr, 369 U.S. 186 (1962), Wesberry v. Sanders, 376 U.S. 1 (1964), and Reynolds v. Sims, 377 U.S. 533 (1964)—as his Court's major contribution to the solution of the problems confronting America. Next in importance he cited Brown v. Board of Education, 347 U.S. 483 (1954), and third on his list was Gideon v. Wainwright, 372 U.S. 335 (1963), which extended the right to counsel in state courts to all indigent defendants in serious criminal cases. N.Y. Times, July 6, 1968, at 1, col. 8.

author of the opinion of the Court a decade earlier in the second flag salute case, set the tone for the Warren Court's approach to school desegregation. During oral argument over *Brown* in 1953, Justice Jackson addressed Assistant Attorney General J. Lee Rankin, arguing for the United States as *amicus* in support of the Negro plaintiffs: "I suppose that realistically the reason this case is here is that action couldn't be obtained from Congress."[142] Indeed, action could not be obtained from Congress. Although explicitly empowered under section five of the Fourteenth Amendment "to enforce, by appropriate legislation," the provisions of the amendment, including the equal protection clause, Congress had failed to outlaw segregated public schools. Had Congress so acted, its legislation would surely have been constitutional under the reasonable doubt test even in the face of a judicial determination that the history of the Fourteenth Amendment was inconclusive with respect to its intended effect on segregated public schools. Unless the amendment were intended to exclude such congressional enforcement, an independent congressional judgment that segregated schools violated the equal protection clause would not be unreasonable.

The Court would not invalidate segregated public schools under the reasonable doubt test since the intended effect of the Fourteenth Amendment on segregated schools was, by the admission of a unanimous Court, inconclusive. Exhaustive examination of the relevant sources did cast some light, Chief Justice Warren wrote, but "not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . ."[143] Yet this judicial finding, at odds with Justice Black's later statements that he joined the opinion because the Thirteenth, Fourteenth, and Fifteenth Amendments conclusively barred racial segregation,[144] did not deter the Court; its unanimity was perhaps best explained by Wallace Mendelson's suggestion that "no Justice was prepared to face history with the albatross of racialism upon him."[145] Past history for the Warren Court proved, as Edmond Cahn has observed, "an element far too ambiguous to be considered very important, much less decisive."[146] Accordingly, the Warren Court refused to "turn the clock back to 1868 when the Amendment was

142. 22 U.S.L.W. 3161 (1953).

143. 347 U.S. at 489.

144. *See* Harper v. Virginia, 383 U.S. 663, 670 n.7 (1966) (Black, J., dissenting).

145. W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 76 (1961).

146. Cahn, *A Dangerous Myth in the School Segregation Cases*, 30 N.Y.U.L. REV. 150, 152 (1955).

adopted, or even to 1896 when *Plessy v. Ferguson* was written."[147] Instead, the chief justice insisted, the Court "must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in the public schools deprives these plaintiffs of the equal protection of the laws."[148]

As early as *Brown*, then, Chief Justice Warren had adopted a creative approach to constitutional adjudication. This approach, which involved the exercise of independent judicial judgment in the service of constitutional change, was candidly acknowledged by the chief justice a decade later when he joined with Justice Douglas in Justice Goldberg's concurring opinion in *Bell v. Maryland*.[149] Arguing that the equal protection clause guaranteed equal access to places of public accommodation, Justice Goldberg urged that "even if the historical evidence were not as convincing as I believe it to be, the logic of *Brown* . . . , based as it was on the fundamental principle of constitutional interpretation proclaimed by Chief Justice Marshall" in *McCulloch*, required the Court to update the Fourteenth Amendment.[150] Although disavowing any judicial duty to rewrite or amend the Constitution,[151] Justice Goldberg nevertheless implored the Court in *Bell* to "assess the status of places of public accommodation 'in the light of' their 'full development and . . . present place' in the life of American citizens,"[152] just as the Court in *Brown* had considered public education in the light of its full development and its present place in American life.

B. Voting Rights

Two years after *Bell* the *Brown* approach was again explicitly affirmed, this time by Justice Douglas in *Harper v. Virginia*,[153] in which the Court struck down a state poll tax for violating the equal protection clause. Speaking for five other members of the Court, including the chief justice, Justice Douglas invoked *Brown* as leading precedent for judicial updating of the Fourteenth Amendment.[154] Like Justice Goldberg in *Bell*, Justice Douglas denied any judicial duty to rewrite

147. 347 U.S. at 492, *referring to* Plessy v. Ferguson, 163 U.S. 537 (1896).
148. *Id.* at 492-93.
149. 378 U.S. 226 (1964).
150. *Id.* at 316.
151. *Id.* at 288.
152. *Id.* at 316.
153. 383 U.S. 663 (1966).
154. *Id.* at 669-70.

or amend the Constitution. "Our conclusion," he insisted, "is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires."[155] But what the equal protection clause required depended on the Court's independent judgment:

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.[156]

Justice Black dissented. He accused the majority of exceeding its limited power to interpret the original meaning of the equal protection clause by giving that clause a new meaning that the Court believed represented a better governmental policy.[157] The majority had consulted its own notions, Justice Black charged, on the untenable ground "that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightening theories of what is best for our society."[158] Repudiating judicial creativity in the service of desirable constitutional change, he claimed that when a political theory embodied in the Constitution becomes outdated, a majority of the Court is not only without constitutional power but is far less qualified to choose a new constitutional political theory than the electorate proceeding in the manner provided for by article V.[159]

Justice Black, of course, shared the Court's antagonism toward making payment of a tax a prerequisite to voting,[160] but, like the other dissenters, Justices Harlan and Stewart, he could not conclude that a state poll tax, however unwise, was clearly irrational. The basis for such a tax—the state's desire to collect revenue and its belief that voters who pay a poll tax will be interested in furthering the state's welfare when they vote—was not unreasonable. Certainly it is rational to believe, Justice Black thought, that people may be more likely to pay taxes if payment is a prerequisite to voting.[161] Justice Harlan agreed and in his dissent, joined by Justice Stewart, he pointed out that

155. *Id.* at 670.
156. *Id.* at 669.
157. *Id.* at 672.
158. *Id.* at 677.
159. *Id.* at 678.
160. *Id.* at 677.
161. *Id.* at 674.

"[p]roperty qualifications and poll taxes have been a traditional part of our political structure" and that "it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability."[162] Yet the Court had attributed to the equal protection clause the unsupportable proposition that equal protection simply means indiscriminate equality.[163] To be sure, Justice Harlan admitted, property and poll tax qualifications are not in accord with current egalitarian notions of how a modern democracy should be organized. But while it was entirely fitting that legislatures should modify the law to reflect changes in popular attitudes, it was wrong, Justice Harlan urged, for the Court to adopt the political doctrines "popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process."[164]

Justice Harlan, who succeeded Justice Jackson to the Court and did not participate in the *Brown* decision of 1954, refused to endorse the creative approach taken in *Harper*, but he did not endorse Justice Black's support of *Brown* either. Instead he averred that the equal protection clause, as applied to state discrimination based on race, may embody a particular value in addition to rationality; its historical intent might give racial equality a special status.[165] Justice Harlan reluctantly admitted state discrimination based on race might not be subject to the reasonable doubt test, which he praised in *Harper* because that "standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members."[166]

The demise of the reasonable doubt test under the Warren Court began, therefore, with *Brown*, in which rationality as the measure of equal protection went the way of history. The Court implicitly recognized what Alexander M. Bickel has called the obvious omission in the reasonable doubt test—"namely, the question, not whether a legislative choice is rational . . . but whether it is *good*."[167] Thus the Court called for an additional judgment, and if the political processes failed to make the "good" choice, the Warren Court was often ready to sub-

162. *Id.* at 684.
163. *Id.* at 682.
164. *Id.* at 686.
165. *Id.* at 663, 682 n.3.
166. *Id.* at 681-82.
167. BICKEL, POLITICS AND THE COURT, *supra* note 10, at 179 (emphasis added).

stitute its "independent judgment." When the national political process failed to desegregate the public schools in the District of Columbia and refused to enforce desegregation in twenty-one states[168] the Court intervened. In the District of Columbia case, the Court attempted to legitimize, as footnote four had suggested, the claim of a racial minority subject to prejudice and unable to alter the adverse outcome of the political process. More than that, the Warren Court felt a heightened responsibility[169] to exercise independent judgment when the political processes themselves were too clogged, impure, corrupted, undemocratic, or antimajoritarian[170] to achieve "good" results. Such judgment involved not merely a judicial corrective for the "wrong" outcome of the political processes, as in the desegregation cases, but stronger, surer medicine: judicial reform of the political system itself. The result should be, as Chief Justice Warren announced upon his retirement, that "most of these problems that we are now confronted with would be solved through the political process rather than through the courts."[171]

Chief Justice Warren considered the reapportionment decisions, embodying the one man, one vote doctrine, his most important achievement.[172] If congressional inaction induced the Warren Court to fashion a judicial remedy for the grievance of a racial minority in *Brown*, then congressional failure to reapportion itself equitably and to force equitable reapportionment on the state legislatures seems even more likely to have impelled judicial reform of the political processes. As Justice Clark indicated in his concurring opinion in *Baker v. Carr*,[173] in which the Court entertained jurisdiction over alleged malapportionment of state legislatures under the equal protection clause of the Fourteenth Amendment, "I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee."[174] Challenging dissenting Justice Frankfurter's faith in the ballot box, Justice Clark asserted that "the majority of the people of Tennessee have no 'practical opportunities for ex-

168. By 1954 seventeen states and the District of Columbia required segregation in the public schools and four states permitted segregation at the option of local school districts. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

169. Mason, *Judicial Activism, supra* note 113, at 392.

170. These terms have been used by various writers to describe, however imprecisely, the nature of the political process the Warren Court tried to reform. *See, e.g.*, COX, THE WARREN COURT, *supra* note 1, at 22; A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 32 (1970).

171. N.Y. Times, June 27, 1969, at 1, col. 5.

172. See note 141 *supra.*

173. 369 U.S. 186 (1962).

174. *Id.* at 258.

erting their political weight at the polls' "[175] to correct the existing malapportionment. While conceding that perhaps there may be recourse in Congress, Justice Clark dismissed that remedy as lacking substance. "To date," he concluded, "Congress has never undertaken such a task in any State."[176]

Justice Harlan, dissenting, attributed Clark's rationale to the entire majority in *Baker*. From a reading of the majority and concurring opinions, Justice Harlan thought, one would not find it difficult to catch the premises that underlay the decision. The fact that the appellants had been unable to obtain political redress of their asserted grievances appeared to lead the Court to stretch to find some basis for judicial intervention.[177] In *Wesberry v. Sanders*,[178] in which the Court applied the one man, one vote doctrine to the House of Representatives, Justice Harlan again dissented, repeating the charge: "The unstated premise of the Court's conclusion quite obviously is that the Congress has not dealt, and the Court believes it will not deal, with the problem of congressional apportionment in accordance with what the Court believes to be sound political principles."[179]

The unstated premise was unmistakably confirmed by Chief Justice Warren himself, speaking for the Court, except Justice Harlan, in *Reynolds v. Sims*,[180] in which the one man, one vote doctrine was extended to both houses of all state legislatures. No effective political remedy to obtain relief against the alleged malapportionment, Chief Justice Warren observed, appears to have been available.[181] Legislative inaction, coupled with the unavailability of any political or judicial remedy, had yielded a perpetual scheme of malapportionment that the chief justice called "little more than an irrational anachronism."[182] In short, the political processes having failed to purify themselves, the Warren Court would intervene.

One man, one vote became the judicial remedy for malapportioned state legislatures and the House of Representatives. Voting equality thus joined racial equality as a major goal of the Warren Court. Unlike the Court's approach in *Brown*, however, in which the chief jus-

175. *Id.* at 258-59.
176. *Id.* at 259.
177. *Id.* at 339.
178. 376 U.S. 1 (1964).
179. *Id.* at 42.
180. 377 U.S. 533 (1964).
181. *Id.* at 553.
182. *Id.* at 570.

tice's opinion eschewed history in favor of updating the Fourteenth Amendment, Justice Black's opinion for the Court in *Wesberry*, consistent with his approval of the result in *Brown*, relied solely on history. He announced: "We hold that, construed in its historical context, the command of Art. 1, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[183] The debates at the Convention, Black explained, proved that when the delegates agreed that the House should represent the "people" they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of the state's inhabitants.[184] History makes that fact abundantly clear, but certainly not the conclusion to which Justice Black jumped:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[185]

As Justice Harlan's dissent[186] and the work of other scholars[187] have effectively demonstrated, history weighed more heavily against the Court's result in *Wesberry* than it did in *Brown*. History was merely inconclusive in *Brown*; but in *Wesberry* the record of the past was contrary to the Court's conclusion, and as a result the Court rejected that approach and simply "mangled constitutional history," as Alfred H. Kelly has put it.[188]

Neither history nor the "reasonable doubt" test, however, deterred the Court in *Reynolds*. The *Brown* approach prevailed; indeed, Chief Justice Warren explicitly invoked *Brown* as controlling precedent.[189] Moreover, the chief justice implicitly invoked the heart of the political

183. 376 U.S. at 7-8.

184. *Id.* at 13.

185. *Id.* at 14.

186. Even Justice Clark in his opinion in *Wesberry* agreed that Justice Harlan "clearly demonstrated that both the historical background and language preclude a finding that Art. 1, § 2, lays down the *ipse dixit* 'one person, one vote' in congressional elections." *Id.* at 18 (Clark, J., concurring and dissenting).

187. *See, e.g.*, Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965) [hereinafter cited as Kelly]; McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); R. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964).

188. Kelly, *supra* note 187, at 135.

189. 377 U.S. at 566.

process argument in footnote four of *Carolene Products.* Especially because the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, Chief Justice Warren reasoned, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[190] Careful scrutiny of alleged malapportionment yielded preferred constitutional status for the democratic ideals of equality and majority rule.[191] After all, history had witnessed a continuing expansion of the right of suffrage in this country, the chief justice noted, citing the Fifteenth, Seventeenth, Nineteenth, Twenty-third, and Twenty-fourth Amendments as well as the congressional civil rights legislation of 1957 and 1960.[192] Justice Harlan, the lone dissenter in *Reynolds*, did not overlook the Court's reliance on non-judicial constitutional change.[193]

> If constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for *federal* officers, how can it be that the far less obvious right to a particular kind of apportionment of *state* legislatures . . . can be conferred by judicial construction of the Fourteenth Amendment?[194]

Justice Harlan's question answers itself: the Warren Court felt free, perhaps obliged, to exercise independent judgment in the service of preferred freedoms, in this case "the fundamental principle of . . . equal representation for equal numbers of people."[195] Imposing its own view of how democratic the political process should be, the Court, through its chief justice, declared that the right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. The Court was committed to a particular political philosophy, what Justice Harlan called "a piece of political ideology."[196] Chief Justice Warren reasoned:

> [I]n a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses

190. *Id.* at 562.
191. *Id.* at 566.
192. *Id.* at 555 n.28.
193. Chief Justice Warren also relied on documents having no constitutional relevance—the Declaration of Independence and Lincoln's Gettysburg Address. *Id.* at 558, 568.
194. *Id.* at 612.
195. *Id.* at 560-61.
196. *Id.* at 590.

> any possible denial of minority rights that might otherwise be thought to result.[197]

The fact that less than majoritarian systems of representation might also seem reasonable, for which Justice Harlan in *Baker*[198] found proof in the existence of the United States Senate, was not relevant, much less controlling, in the Court's independent judgment. The Court concluded that our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures.[199]

The Warren Court's creative approach to constitutional adjudication, begun in *Brown* and extended in the reapportionment decisions, suffered a temporary setback two years after *Reynolds* when, in *Fortson v. Morris*,[200] a sharply divided Court upheld Georgia's system of having the state legislature select a governor from the two persons receiving the highest number of votes in a general election in which no candidate obtained a majority. Justice Black's majority opinion relied on history: the Georgia plan, "as old as the Nation itself,"[201] did not violate the equal protection clause. Eschewing judicial updating of the Fourteenth Amendment, Justice Black's opinion, consistent with his approval of *Brown*, his dissents in *Bell* and *Harper*, and his approach in *Wesberry*, drew the wrath of the four dissenters. Justice Douglas, joined by the chief justice and Justices Brennan and Fortas, found the Georgia plan antimajoritarian and contrary to the one man, one vote principle. Justice Fortas, joined by the chief justice and Justice Douglas, objected even more strongly. The Warren Court's understanding and conception of the rights guaranteed to the people by the Fourteenth Amendment, Justice Fortas declared, "have deepened, and have resulted in a series of decisions, enriching the quality of our democracy . . . ."[202] *Baker, Gray v. Sanders*,[203] *Wesberry, Reynolds*, and *Harper*[204] had "reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional ideal."[205] The *Fortson* decision, Justice Fortas la-

197. *Id.* at 565.
198. 369 U.S. 186, 333 (1962) (Harlan, J., dissenting). *See also* Gray v. Sanders, 372 U.S. 368, 387-88 (1963) (Harlan, J., dissenting).
199. 377 U.S. at 566.
200. 385 U.S. 231 (1966).
201. *Id.* at 236.
202. *Id.* at 247.
203. 372 U.S. 368 (1962).
204. 385 U.S. at 247 n.4.
205. *Id.* at 249.

mented, was a startling reversal of the Warren Court's record.[206] By relying on history the Court had departed from the method used in *Reynolds*; history, Justice Fortas urged, was as irrelevant here as it had been in *Reynolds*. Citing Justice Harlan's dissent in *Reynolds*,[207] Justice Fortas noted that in the early days of the nation many of the state legislatures were malapportioned. "Certainly," he emphasized, "the antiquity of the practice did not cause this Court to refrain from invalidating malapportionment under the Equal Protection Clause."[208] In short, the Court had failed in its duty to update the Fourteenth Amendment in the service of majoritarian democracy.

This political process argument reached full bloom under the Warren Court in *Kramer v. Union School District*.[209] Without explicitly acknowledging footnote four of *Carolene Products*, the Court, through Chief Justice Warren, clearly relied on its rationale and even its language to strike down, under the equal protection clause, a section of the New York Education Law that provided that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in school district elections only if they own or lease taxable real property within the district or are parents or guardians of children enrolled in the local public schools. Referring six times to the need for more exacting judicial scrutiny of legislation impairing the purity of the political process,[210] the Court flatly rejected the reasonable doubt test as well as the traditional presumption of constitutionality. In a characteristic display of candor, Chief Justice Warren, speaking for a majority of six, built on paragraphs two and three of footnote four:

> [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. . . . The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which de-

206. *Id.*
207. 377 U.S. at 602-07.
208. 385 U.S. at 247-48.
209. 395 U.S. 621 (1969).
210. *Id.* at 626, 627, 628, 629, 633.

> cides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation.[211]

The Court exercised more exacting judicial scrutiny because the New York statute selectively distributed the franchise in school district elections. The chief justice's opinion held that the classification did not distinguish voters primarily interested in school affairs with sufficient precision to justify denying a voice to Kramer, a non-taxpaying bachelor.[212] Justice Stewart dissented, joined by Justices Black and Harlan, and insisted that the classification was clearly related to a legitimate legislative purpose. New York had rationally concluded that local educational policy was best left to those persons who had direct and definable interests in that policy, either because they carried the local financial burden or because they were parents of school children. That Kramer might personally be as interested in the conduct of a school district's business as a local taxpayer or parent was no more relevant, the dissenters thought, than the fact that commuters from New Jersey might be as genuinely interested in the outcome of a New York City election as New Yorkers. After all, Stewart wrote, "such discrepancies are the inevitable concomitant of the line drawing that is essential to law making."[213]

C. Criminal Justice

More exacting judicial scrutiny, involving the repudiation of historical intent, the reasonable doubt test, and even the presumption of constitutionality, meant also independent judicial judgment in the service of preferred freedoms—equality in the political process, among the races, and, third on Chief Justice Warren's list of major contributions by his Court,[214] in the administration of criminal justice. *Gideon v. Wainwright*,[215] establishing the right to counsel in state courts for indigent defendants accused of serious crimes, took its proper place on the chief justice's roll of honor. Decided in 1963 by a unanimous Court, *Gideon* can be viewed as consistent with the Court's traditional approach to the due process clause of the Fourteenth Amendment as

211. *Id.* at 627-28.
212. *Id.* at 632.
213. *Id.* at 637.
214. See note 141 *supra.*
215. 372 U.S. 335 (1963).

espoused by Justice Cardozo in *Palko v. Connecticut*.[216] There the Court expressly affirmed and applied the reasonable doubt test as controlling judicial determination of which Bill of Rights freedoms the due process clause incorporated and to what extent it did so. Construing due process in *Palko* as protecting only those liberties that have been found to be implicit in the concept of ordered liberty,[217] the Court excluded certain Bill of Rights freedoms precisely because their necessary connection to the very essence of a scheme of ordered liberty could not be established beyond a reasonable doubt. Rights to trial by jury and indictment by grand jury were thus rejected; so too was the immunity from compulsory self-incrimination. In like fashion Justice Cardozo reasoned that the particular kind of double jeopardy involved in the *Palko* case did not clearly violate the due process clause.

Whether the Court in *Gideon* rejected the reasonable doubt test, so prominent in *Palko*, is uncertain; surely the reasonable doubt test would have yielded the same result.[218] More certain, however, is that in companion cases involving criminal procedure under the due process clause, the Warren Court clearly abandoned the reasonable doubt test in favor of the creative approach taken in the segregation and reapportionment decisions. Notable for their reliance on independent judicial judgment in behalf of greater egalitarianism in the administration of criminal justice[219] are *Miranda v. Arizona*[220] and *Duncan v. Louisiana*.[221] Especially revealing are the opinions of Justice White, dissenting in *Miranda* and speaking for the Court in *Duncan*, for they confirm the implications of independent judicial judgment.

Chief Justice Warren, writing in 1966 for the *Miranda* majority of five, held that state courts could not admit as evidence statements stemming from custodial interrogation of the defendant, unless the state demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[222] In a strident dissent, joined by

216. 302 U.S. 319 (1937) (overruled by Benton v. Maryland, 395 U.S. 784 (1969)).

217. *Id.* at 325.

218. *See, e.g.*, 372 U.S. at 352 (Harlan, J., concurring). *See also* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, in THE SUPREME COURT AND THE CONSTITUTION 263 (P. Kurland ed. 1960); A. LEWIS, GIDEON'S TRUMPET 173-81 (1964).

219. *See* COX, THE WARREN COURT, *supra* note 1, at 86. Cox agrees that egalitarianism is the common thread joining the leading decisions of the Warren Court in the areas of race relations, reapportionment, and criminal procedure.

220. 384 U.S. 436 (1966).

221. 391 U.S. 145 (1968).

222. 384 U.S. at 444.

Justices Stewart and White, Justice Harlan faulted both the constitutional foundation and the desirability of the Court's ruling. "Nothing in the letter or the spirit of the Constitution or in the precedents," he insisted, "squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities."[223] Viewed as a choice based on pure policy, Justice Harlan thought these new rules were a debatable appraisal of the competing interests at stake.[224] In short, the dissenters accused the Court of using independent judicial judgment to justify a result that the reasonable doubt test would not—indeed, could not—yield.

In a separate dissent, joined by Justices Harlan and Stewart, Justice White approved the majority's creative approach but not the result. Justice White candidly admitted that the Court does—and should—make policy, presumably on the basis of its independent judgment and not the reasonable doubt test; he merely disagreed with the wisdom of the Court's decision, apparently because it did not square with his independent judgment. Justice White conceded that the Court's holding was compelled neither by the language of the Fifth Amendment nor by American and English legal history. Nevertheless, he insisted that while the Court's approach did not prove either that the Court had exceeded its powers or that it had acted unwisely in reinterpreting the Fifth Amendment, the decision did show that

> the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.[225]

Justice White implied that so long as the majority felt free to exercise independent judgment to create new constitutional law, he was entitled to the same privilege and was prepared to exercise it.

Accordingly, Justice White proceeded to exercise independent judgment in *Duncan v. Louisiana*,[226] this time for a majority, and he thereby parted company with Justice Harlan. Holding that the Sixth Amendment right to jury trial in serious criminal cases is fundamental to the American scheme of justice, the Court incorporated the federal

223. *Id.* at 525-26. *See also* COX, THE WARREN COURT, *supra* note 1, at 84.
224. 384 U.S. at 505.
225. *Id.* at 531 (footnote omitted).
226. 391 U.S. 145 (1968).

guarantee into the due process clause of the Fourteenth Amendment. Despite the acknowledgment of important dicta in *Palko* (Cardozo's "weighty and respectable" conclusion that the right to jury trial is not clearly essential to ordered liberty[227]), despite the concession that jury trial has "its weaknesses and the potential for misuse,"[228] despite the citation of professional criticism that raised serious questions about the fundamental fairness of jury trial,[229] and despite the explicit refusal to assert "that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury,"[230] the Court nevertheless rejected the *Palko* approach in favor of independent judicial judgment.

Justice Harlan, joined by Justice Stewart, dissented. Affirming the *Palko* approach, they accused the majority of making no real analysis of whether the jury trial is critical to procedural fairness.[231] Examining the available evidence, the dissenters concluded that the virtues and defects of the jury system had been hotly debated for a long time, and were hotly debated still, without significant change in the lines of argument.[232] Yet the Court had chosen, through its independent judgment, to impose upon every State one means of trying criminal cases; it is a good means, the dissenters allowed, "but it is not the only fair means, and it is not demonstratably better than the alternatives States might devise."[233]

Jury trial is surely no more—or less—essential to fundamental fairness in criminal due process than the rules mandated in *Miranda.* The implication, of course, is that independent judicial judgment, like reasonable legislative judgment, can go either way. More importantly, the exercise of independent judicial judgment, permitting the exercise of judicial choice between constitutionally permissible alternative policies, calls into question the justification for judicial review. For if judges will not or cannot be held to the rigors of the reasonable doubt test to reduce judicial bias and policy-making, then Hamilton's warning, written in a defense of judicial review, should be considered. If judges "should be disposed to exercise WILL instead of JUDGMENT," he thought, "the consequence would . . . be the substitution of their plea-

227. *Id.* at 155.
228. *Id.* at 156, *quoting* Singer v. United States, 380 U.S. 24, 35 (1965).
229. *Id.* at 156-57 & n.24.
230. *Id.* at 158.
231. *Id.* at 183.
232. *Id.* at 186.
233. *Id.* at 193.

sure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges independent of that body."[234] To the extent that what Hamilton called "will" may be what Thayer called "independent judgment," the Warren Court, like certain of its predecessors, stands indicted.

V. Constitutional Change: Ends and Means

The reasonable doubt test has its limitations, as even Thayer acknowledged. Intended to narrow the scope of judicial judgment to minimize erroneous judicial construction of the Constitution at the expense of reasonable legislative interpretation, it still requires judicial discretion. Like any other guideline, it can be and has been misapplied, ignored, and otherwise abused. However, the reasonable doubt test has often been correctly applied and remains a workable standard in constitutional adjudication.

Alexander Bickel, like a growing number of constitutional scholars, insisted that it has not always been possible to be satisfied that what is rational is constitutional, and that the "real question" may be whether legislation is "good". The answer, he concluded, "may depend on the assignment of preponderant weight to one or another value."[235] Arthur S. Miller and Ronald F. Howell agree. They urge that the search for true neutrality in constitutional adjudication is a bootless quest,[236] that value choices are inevitable,[237] and that therefore the quest for impartiality in the judicial process should be jettisoned in favor of a result-oriented jurisprudence, one purposeful in nature rather than "impersonal" or "neutral."[238] Judicial decisions should be evaluated in terms of their social adequacy, and their realization or non-realization of stated societal values,[239] broadly defined by Miller and Howell as "furthering the democratic ideal."[240] Even Herbert Wechsler, whose support of "neutral principles"[241] in constitutional adjudication had triggered the Miller and Howell thesis, later admitted that the

234. THE FEDERALIST No. 78, *supra* note 17, at 399 (A. Hamilton).

235. BICKEL, LEAST DANGEROUS BRANCH, *supra* note 10, at 39.

236. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960).

237. *Id.* at 671.

238. *Id.* at 684.

239. *Id.* at 691.

240. *Id.* at 689.

241. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter cited as Wechsler, *Neutral Principles*].

application of neutral principles entailed judicial choice between competing values.[242]

More recently, other students of constitutional law have reached similar conclusions. Gerald Garvey has praised the Warren Court for moving toward a jurisprudence of concepts tailored to the realities rather than the shadows of American politics: "wisely and well," he believes, the Court began "to move constitutional interpretation *beyond the Constitution.*"[243] Walter F. Murphy and Joseph Tanenhous also endorse the new political jurisprudence, which envisions judges operating as social engineers, and they regret that "political scientists have made remarkably few efforts to order coherently and then justify a broad set of goals and values that society, *and judges in particular*, should be fostering."[244] Ronald Dworkin concurs. He sharply rebukes lawyers, and by implication all students of public law, for failing to fuse constitutional law and moral theory so that observers of the Supreme Court can better evaluate its decisions in terms of the "good"—the "just"—society, and so that the Court, in fashioning wise public policy, can have resort to better moral justifications. The academic debate, Dworkin charges, "has so far failed to produce an adequate account of where error lies" because the fusion of constitutional law and moral theory he advocates has yet to take place. But, Dworkin cautiously concludes, "better philosophy is now available."[245]

This developing call for social scientists to help equip the Court to rise above the Constitution, to make "good" public law based on compelling moral theory, raises disturbing problems. "There is, of course," Dworkin himself admits, "a very lively dispute in moral philosophy about the nature and standing of moral rights, and considerable disagreement about what they are, if they are anything at all."[246] Dworkin also concedes that a theory of political skepticism would justify a scope for judicial judgment much narrower than he and others advocate, for individuals "have only such *legal* rights as the Constitution grants them, and these are limited to the plain and uncontroversial violations of public morality that the framers had actually in mind."[247]

242. H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW, at iii, xiv (1961). Wechsler's original poisition appears to be identical. *See* Wechsler, *Neutral Principles, supra* note 241, at 15, 20.

243. G. GARVEY, CONSTITUTIONAL BRICOLAGE 156 (1971) (emphasis added).

244. W. MURPHY & J. TANENHOUS, THE STUDY OF PUBLIC LAW 223 (1972).

245. Dworkin, *supra* note 22, at 34-35, *citing* RAWLS, A THEORY OF JUSTICE (1971), which Dworkin calls a work that "no constitutional lawyer will be able to ignore."

246. Dworkin, *supra* note 22, at 29-30.

247. *Id.* at 29. *See also id.* at 30.

Dworkin insists that once one grants the existence of moral rights against the state *beyond* those constitutionally protected, then the reasonable doubt test is an inadequate standard of judicial review. While accepting the impartiality argument as the strongest justification for judicial review,[248] he asserts that the impartiality argument requires that judges be free to exercise a reviewing power broader than the reasonable doubt test, in effect, an independent judgment, in pursuit of the correct moral principles to be incorporated into the Constitution.

Even granting Dworkin's highly dubious assumption that correct moral principles are discoverable, his position is shaky. He admits that those principles have not yet been discovered. That being the case, has not the Court, following Dworkin's own reasoning, been on occasion excessively premature in updating and rewriting the Constitution? Should the Court not have awaited more certain discovery of correct moral principles instead of attempting to foist upon America society values that are, by Dworkin's admission, still uncertified as "morally" good? After all, do we really want the Supreme Court, as Charles P. Curtis once asked, to be the prophet of our natural law?[249]

At bottom, the issue addressed is how constitutional change should occur. The Constitution, of course, clearly provides its own amendment procedure, which, if deemed too difficult, could be formally revised to provide for an easier procedure. Why, then, should the Court act as a continuing constitutional convention? The notion that the Court must be the voice of a "living constitution," so as better to safeguard liberties thought by some to be incompletely preserved by the Constitution, not only runs into the problem that correct moral principles have not yet been discovered, it also permits judicial disregard for constitutional liberties. If the Court, even circumscribed by the reasonable doubt test, has often erred, how much more potential for judicial error exists without that limitation on the scope of judicial judgment?

Like Miller and Howell, like Murphy and Garvey, and like others who urge judicial updating of the Constitution in accordance with correct moral theory, Dworkin advances a position thoroughly at odds with both the impartiality argument for judicial review and the reasonable doubt test. His position admittedly depends on the ability of judges, aided by social scientists, to discover correct moral principles and probably depends on another premise whose truth is not self-evident: that

248. *Id.* at 31-32.

249. C. CURTIS, LAW AS LARGE AS LIFE: A NATURAL LAW FOR TODAY AND THE SUPREME COURT AS ITS PROPHET 102 (1959).

a constitution should require most, if not all, that is "good" and should prohibit most, if not all, that is "bad." Even granting both assumptions, I would urge that fundamentally correct moral principles, when discovered, find their way into the Constitution through article V. Like Curtis, I would leave "our natural law to take its chances without a national prophet."[250]

250. *Id.* at 103.