REASONABLE DOUBT ABOUT JAMES BRADLEY THAYER

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INTRODUCTION

This Article responds to some recent pathbreaking work concerning the real-world justification for James Bradley Thayer's famous 1893 essay *The Origin and Scope of the American Doctrine of Constitutional Law*.[1] Thayer's essay defended the use of a "beyond a reasonable doubt" standard when judges engage in judicial review and additionally claimed the standard was of longstanding and widespread acceptance. Recent scholarship has argued Thayer was justified in this historical claim.[2] I respond by arguing that although the standard was mentioned and praised in a variety of sources, in line with Thayer's claim, when seen in the context of a wider body of caselaw it becomes quite suspect.

I survey how state high courts applied—or, more importantly, did not apply—the reasonable doubt standard during a sample of years shortly before Thayer's essay: 1880 through 1884, inclusive. I find that these courts only mentioned the reasonable doubt standard in a small minority of cases when they exercised judicial review. When courts relied on the standard, they did so haphazardly, and as a practical matter it did little work to affect the outcome of cases. Indeed, these courts seemed to have simply avoided the standard whenever they wanted to. It was exceedingly rare for majority opinions to invoke it when declaring a law unconstitutional, even though the same majorities ruled laws were constitutionally invalid in more than a quarter of the cases in which they exercised judicial review. Further, I argue that none of this should be surprising. Despite what Thayer claimed in his defense of the reasonable doubt standard, the way in which courts of the era actually applied it did not allow it to function as a rule by which they assessed the constitutionality of legislation. Before Thayer the standard was, for the most part, exactly what he claimed it was not: rhetoric.

My conclusion should not take away from the importance of the work I am responding to and building on. It primarily consists of Christopher R. Green's *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*,[3] Hugh Spitzer's *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"*,[4] and Derek A. Webb's *The Lost History of Judicial Restraint*.[5] These scholars

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

[2] *See infra* notes 3–5.

[3] 57 S. TEX. L. REV. 169 (2015) [hereinafter Green].

[4] 74 RUTGERS UNIV. L. REV. 1429 (2022) [hereinafter Spitzer].

[5] 100 NOTRE DAME L. REV. 289 (2024) [hereinafter Webb].

detail a real history of courts applying a "clear error" or "reasonable doubt" standard when evaluating whether legislation is constitutional, particularly in state courts concerning state constitutions. This is a history that Thayer did not robustly cite to in his essay and to some extent had been lost to modern readers. Recovering it has been a great contribution of Green's and Webb's work. At the same time, however, Spitzer has demonstrated that the reasonable doubt standard is not terribly helpful to how courts actually decide cases, does not seem to mean much to courts' actual deliberations, and, indeed, is usually ignored. Spitzer convincingly details that this is true for cases decided in the early twenty-first century.

What I add to this story is to look more granularly at how state courts addressed constitutional challenges during the period before Thayer's essay. Green and Webb are right that, by 1893, many courts had pronounced that they should only declare legislation unconstitutional when they think that it is so "beyond a reasonable doubt."[6] I am not saying the standard was not a "real thing." It was! Indeed, I actually present a few cases where state high courts articulated such a standard *earlier* than Green and Webb found.

But these articulations of "reasonable doubt" turn out to be maxims, at best, not actual standards guiding judicial decision making. My sample period of 1880–84 was not long before Thayer's essay, yet far enough along in American jurisprudence that the reasonable doubt standard had become widely known. I find that, yes, some courts sometimes said they should only declare a statute unconstitutional when their conclusion is "beyond a reasonable doubt." But this was in a small number of all cases out of all those involving judicial review. In most surveyed states the standard was used in less than ten percent of majority opinions when their high courts exercised judicial review.[7] In other states the rate was zero or close to zero.[8] Many state high courts only mention the standard once every few years while at the same time assessing the constitutionality of laws numerous times.[9] This does not demonstrate a standard widely applied in actual judicial decision making, let alone a standard that had been "liquidated" and accepted as Webb argues.[10] Instead, it demonstrates the occasional affirmation of a legal-sounding maxim that emphasizes gentlemanly judicial humility and does little more. While many judges and legal theorists of the time purported that "judicial

[6] *See, e.g., infra* note 136 (itemizing cases from 1880–84 that used the standard).

[7] *See infra* Appendix.

[8] *See infra* note 170.

[9] *See infra* Appendix.

[10] Webb, *supra* note 5, at 370.

restraint" was a virtue, and while courts did conclude laws were constitutional a majority of the time they exercised judicial review, a wide use of the reasonable doubt standard in actual cases did not exist and—unless the period of 1880 through 1884 is a wild aberration—is not evidence of a tradition of judicial restraint in practice for the period before 1893.[11]

But try telling that to James Bradley Thayer.[12] Thayer drew on the rhetorical use of the standard in his essay and helped make it into something more. Readers of the essay may come away with the conviction that because of the reasonable doubt standard hardly any laws should be declared unconstitutional. And Thayer's version of the standard, directly or indirectly, later became the modern rational basis test, which *is* a standard that influences the outcome of cases. But it is not the same thing as the earlier standard. We should not see the nineteenth century use of "reasonable doubt" as inexorably leading to the rational basis test and the maxim's antiquity should not be used to legitimate later standards or traditions of judicial restraint. A tradition of "reasonable doubt" in actual holdings was of limited reality before Thayer. But Thayer is at least partly responsible for the later very robust—but different—reality.

This Article proceeds as follows. Part I outlines Thayer's 1893 essay and then details the work of Green, Spitzer, and Webb, who when taken together examine the reasonable doubt standard both before 1893 and in contemporary times. Part II then details my survey of judicial review and the use of the reasonable doubt standard in state courts during the period of 1880 through 1884. Part III then assesses what Thayer was talking about in light of my findings, how his thesis differed from what courts had said before, and how that should not be surprising given how the reasonable doubt standard functions (or does not function). Part III also looks to Thayer's influence in shaping standards that really do affect the outcome of cases, especially the rational basis test, and why the nineteenth century reasonable doubt standard—as it was actually practiced—was largely only a rhetorical tradition of judicial restraint that Thayer built on and helped make real.

[11] *See infra* note 169 and accompanying text.

[12] If we pretend he's still alive. Just go with it.

I. THAYER AND "REASONABLE DOUBT" BEFORE AND AFTER 1893

We now proceed with background about Thayer and the recent scholarship concerning the reasonable doubt standard. In Part II we dig into my survey.

A. The Urtext of Thayerism

At first blush James Bradley Thayer appears an unlikely progressive hero. A wealthy corporate lawyer who hobnobbed with the Gilded Age's rich and powerful[13] does not recommend himself as the namesake of an "ism," let alone one embraced by many on the self-identified Left. Yet both during his day and now "Thayerism" and allied doctrines calling for a highly circumscribed use of constitutional judicial review[14] have been darlings of both old and modern progressives and their allies.[15] And, of course, it is not just progressives. In advocating for the ideas—at least in spirit—of the New England-born Harvard professor they join post-New Deal conservatives who advocated for judicial minimalism, such as Robert Bork, Lino Graglia, and today's "common good constitutionalists" such as Adrian Vermeule.[16]

[13] For Thayer's place in late-nineteenth century "Boston Brahmin" society, *see* G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. L. REV. 48, 64–67 (1993) (discussing Thayer's social connections in Gilded Age Boston); Anthony B. Sanders, *The Mystery of the Missing Babies* 22, 24 (July 27, 2023) (unpublished manuscript) (examining Thayer's constitutional-drafting work for the Northern Pacific Railroad), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521183.

[14] For brevity's sake, in the rest of this Article when I use "judicial review" I mean "constitutional judicial review," which is the power of courts to declare acts of the political branches, including legislation, unconstitutional.

[15] *See, e.g.*, *Recent Book: Brady Snyder, Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment*, 136 HARV. L. REV. 1244, 1245 (2023) (stating about progressive scholar and later justice, Felix Frankfurter: "Frankfurter was devoted to Professor James Bradley Thayer's theory of judicial restraint, which prevents judges from invalidating democratic legislation even if they believe it might be unconstitutional"); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 621 (2012) (invoking Thayer while critiquing deference to judges on constitutional questions from a modern progressive ideological standpoint).

[16] Stephen G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. L. REV. 1419, 1420 (2019) ("His views show up as well in the writings of Judge Robert H. Bork and Justice Antonin Scalia . . . ."); Lino Graglia, *Creative Constitutional Interpretation as Justification for Rule by the Supreme Court*, 51 ARIZ. ST. L.J. 109, 129 (2019) ("Unless limited as famously advocated by James B. Thayer at the end of the nineteenth century—which would reduce it to a matter of little more than academic interest—judicial review is essentially a prescription for rule by judges inconsistent with the rule of law, representative self-government, separation of powers and

Thayerism, broadly understood, is today better remembered for its later champions on the bench, such as Thayer's friend and colleague Oliver Wendell Holmes, Jr. and Holmes's acolyte Felix Frankfurter.[17] And for a while that was true to an even greater extent than it is today. A 1978 article on Thayer's influence on such legal luminaries claimed that he was "[n]ow almost forgotten."[18] For whatever reason, though, his 1893 essay seems to have found renewed interest in recent years.[19] The new interest has led to more examination of the essay itself, what influenced the essay, how it influenced later jurists and scholars, and whether its conclusions were well-founded.

The timing of the essay is seductive to those who already believe the modern legal academy's conventional wisdom on the history of judicial review.[20] In other words, the timing of 1893 begets belief of the essay's substantive claims if you accept this conventional wisdom. That conventional wisdom—simplified, as is true for any conventional wisdom—goes like this: In the beginning, American courts invented judicial review.[21] But, outside of *Marbury v. Madison*[22] and a few cases in lower courts it was not used all that much. Just before the Civil War, though, *Dred Scott v. Sandford*[23] came along as an early warning of a more robust, imperial, judiciary. A bit later came the *Lochner* era, kicking off in 1897 with

federalism."); ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (Oxford Univ. Press 2009) (appealing to Thayer in arguing for deference to legislatures in constitutional interpretation).

[17] *See* Calabresi, *supra* note 16, at 1420.

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

[19] A search of his essay's title in the LEXIS law reviews database yields over five hundred articles since 2005. Hardly someone who is "almost forgotten."

[20] Please note I am not saying the scholars I am responding to here—particularly Green, Spitzer, and Webb—accept this conventional wisdom nor that, as I say of others generally, these three specifically "want to believe." They are examining Thayer because he is a major figure in constitutional history. What I am saying is that the historical timing of Thayer's essay has likely boosted his popularity among post-New Deal progressives, including many of today's progressives, thus furthering his "major figure" status and giving hope to those who do "want to believe" in the conventional wisdom.

[21] This paragraph of conventional wisdom is cobbled together from many sources and is to be taken with a grain of salt. But for examples of where bits of this "*Lochner* the boogeyman" thinking might be found, *see generally, e.g.*, IAN MILLHISER, INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED (2015); JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865-1900 (2007).

[22] 5 U.S. 137 (1803).

[23] 60 U.S. 393 (1857).

Allgeyer v. Louisiana[24] after a few warm-ups in the state courts.[25] Rampant judicial supremacy then ran roughshod over the political branches for forty years until FDR finally broke the intransigent Supreme Court in 1937.[26] Then, in post-New Deal America we had some judicial review in a few special areas such as free speech and racial discrimination (as laid out in Footnote Four of *United States v. Carolene Products*)[27] but otherwise courts went back to the old ways of judicial restraint. (Well, for a while, at least.)

If you believe that story—even just its broad outlines—and you live in the twenty-first century, Thayer reads like a Cassandra. The essay gives the impression that American courts had only lightly dabbled in judicial review since the Founding but that ominous storm clouds were gathering. And—again, if you believe that story—those clouds burst open just a few years later. It is no wonder today's judicial minimalists find inspiration in his words. They want to believe.

This Article is not an attack on the conventional wisdom itself. Many scholars (including the author) have done that in plenty of other places.[28] It is also not an attempt to *generally* argue that the era before Thayer was one with more judicial engagement, and less judicial restraint, than Thayer believed (although that may be true). What this Article does argue is that Thayer's evidence for that supposed age of judicial restraint—the reasonable doubt standard—does not demonstrate such an age when put in a fuller context.

Even if you buy into Thayer's argument that courts generally applied a reasonable doubt standard—a "rule of administration" as he put it[29]— his own evidence for that history was a bit thin. As Webb details, Thayer cited only about a dozen cases from state courts and a handful of

[24] 165 U.S. 578 (1897).

[25] *See, e.g.*, Godcharles v. Wigeman, 113 Pa. 431, 437 (1886) ("He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."); Commonwealth v. Perry, 155 Mass. 117, 121 (1891) ("The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law.").

[26] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[27] 304 U.S. 144, 152 n.4 (1938).

[28] These critiques come from various corners, even those who think *Lochner* was a bad idea, and we should never go back. *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF *LOCHNER* ERA POLICE POWERS (1993); KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019); JAMAL GREENE, HOW RIGHTS WENT WRONG (2021) (especially chapters 2 & 3).

[29] Thayer, *supra* note 1, at 138, 149.

U.S. Supreme Court decisions while outlining the tradition.[30] To be fair, he also cited his friend Thomas Cooley's well-regarded treatise which, Thayer asserted, had "a long list of citations from all parts of the country."[31] And Thayer thought his evidence was anything but thin, claiming he had "accumulated these citations and run them back to the beginning . . . ."[32] Modern scholars, however—used to gargantuan string cites and exhaustive fifty-state surveys—might find this a bit chintzy.

Setting aside the facts and turning to Thayer's normative claims supporting this supposed long tradition of judicial restraint, even his ideological opponents have to admit he knew what he was dealing with. He fully understood the structural argument for judicial review going back to *Marbury* and did not reject it completely.[33] The argument, of course, is that if we understand a constitution to be "higher law," then when judges are determining "what the law is" they sometimes will find conflicts between the "higher law" and ordinary legislation and must choose the higher over the ordinary.[34] Thayer's response is that even though that, strictly speaking, may be true, in a democracy there is a contrary need to tread extremely delicately down the path to declaring legislation unconstitutional.[35] After all, he recognizes judicial review did not exist under the previous British system due to Parliamentary supremacy, and even was absent from some continental systems such as France, Germany, and Switzerland that actually had written constitutions by his time.[36] In the new world of "higher law constitutionalism," that nevertheless exists within a democracy, the way American courts have found a happy medium between the structural possibility of judicial review and the delicacy it entails is the "rule of administration" of a presumption of constitutionality.[37]

[30] As Webb puts it, "He lined up proof quotes articulating the clear error rule from approximately twelve state supreme court decisions ranging from 1787 to 1876 and added similar quotations from five U.S. Supreme Court decisions over the course of that same period, all in the space of about six pages." Webb, *supra* note 5, at 294.

[31] Thayer, *supra* note 1, at 142 n.1 (citing THOMAS A. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE UNION 216 (6th ed. 1893)).

[32] Thayer, *supra* note 1, at 143.

[33] Otherwise, the "reasonable doubt" standard would be an irrebuttable presumption.

[34] *See* Thayer, *supra* note 1, at 138–39.

[35] *Id.* at 138 ("In order, however, to avoid falling into these narrow and literal methods . . . these literal precepts about the nature of the judicial task have been accompanied by a rule of administration . . . .").

[36] *See id.* at 130–31.

[37] *See id.* at 140.

Of course, there are presumptions and then there are presumptions. As we will see, Green's and Webb's articles demonstrate the use of a "clear error" presumption and also the "beyond a reasonable doubt" presumption.[38] Whether those are all that different is another question, but they and other possible formulations demonstrate that there are different possible strengths of a presumption. Thayer has his own take on what the right presumption actually is.[39] It seems much stronger than other conceptions of "reasonable doubt."

After citing the evidence for some form of a reasonable doubt standard, Thayer argues that the standard is this: When engaging in judicial review, a court:

> 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.[40]

He then provides some additional reasons for the presumption, mostly normative.[41] Using a few critics of a reasonable doubt standard as foils, such as Daniel Webster, he extols the wisdom of legislatures coming to their own conclusions as to the constitutionality of legislation.[42] He asserts that Webster argued that all constitutional cases "involve some doubt" and that often legislatures vote for a law thinking it is the judges' job, not theirs, to assess constitutionality.[43] In response, Thayer praises judges that have pushed back against Webster's contention, thus firming up a reasonable doubt standard: "A rule thus powerfully attacked and thus explicitly maintained, must be treated as having been deliberately meant, both as regards its substance and its form."[44] In other words, we must presume that legislators know what they are doing and what they are talking about, constitutionally.

As to what the reasonable doubt standard means to the courts that have applied it, Thayer does not delve all that deeply. He seems to believe that the different articulations of "reasonable doubt" in constitutional cases are basically all the same thing—that is, basically the same

[38] *See infra* Parts I.B–C.

[39] *See infra* note 40.

[40] Thayer, *supra* note 1, at 144 (emphasis added)

[41] *Id.* at 144–52.

[42] *Id.* at 145–46.

[43] *Id.*

[44] *Id.* at 146.

thing as *his* version. And as to what his version is, he recognizes that "reasonable doubt" is used in other contexts, including "as we all know . . . in the criminal law in questions of self-defense" and in other contexts including tort negligence, military justice, and setting aside civil jury verdicts.[45] And he seems to think when it is used with judicial review it simply is another instance of the same idea. In fact, he analogizes a judge reviewing a civil jury's verdict to judges reviewing the works of legislatures.[46]

Thayer also has a much stronger view of "reasonable doubt," though. He suggests, through a quotation of Cooley, that "reasonable doubt" exists when two people disagree as to the constitutionality of a law.[47] He approvingly quotes Cooley as saying a "court can only arrest the proceedings and declare a levy void when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible *to any mind* at first blush."[48] Thus, it is not just enough that a judge be unsure as to his conclusion on a constitutional question. If he and some other "mind" disag34ree, that is enough to withhold from judicial invalidation. (Soon thereafter, Thayer seems to walk this back a bit, implying what we might call a "reasonable judge" standard, saying reasonable doubt is what "lingers in the mind of a competent and duly instructed person."[49] To the frustration of later scholars, it is unclear which view he settles on. As we will see, my money is on the stronger version.)

Further, in a somewhat breathtaking passage, Thayer admits that actual people in legislative bodies are sometimes "indocile, thoughtless, reckless, [and] incompetent" but that judges must nevertheless assume that they are "competent, well-instructed, sagacious, attentive, intent only on public ends, [and] fit to represent a self-governing people."[50] Essentially, he thinks judges should assume legislators have carefully considered the constitutionality of what they pass, and defer to those judgments, even if legislators do not actually do that.

There is some equivocation for Thayer on federal courts reviewing state laws when inquiring whether they violate the U.S. Constitution. He does not spell out a different standard; he just says that as the federal courts are a branch of the national government, and the national

[45] *Id.* at 147–48.
[46] *Id.* at 149.
[47] *See id.* at 148 n.3.
[48] *Id.* (emphasis added).
[49] *Id.* at 149.
[50] *Id.*

government is supreme over the states, the rest of his concerns may not apply to this exercise of judicial review.[51] Ironically, this is, of course, the lion's share of what federal courts did during the *Lochner* era.[52] But for purposes of this Article, Thayer explicitly says that this does not apply to state courts reviewing state acts for violations of state constitutions.[53] As for state courts reviewing state legislation for violations of the U.S. Constitution he also equivocates a bit, although given that at the time parties could only appeal from state courts to the U.S. Supreme Court when legislation was *upheld* he says "it seems proper" that state courts should apply the same reasonable doubt standard in those cases as well.[54]

Thayer also pointedly asserts that the reasonable doubt standard is a real standard, not just gentlemanly politeness.[55] He emphasized the standard's antiquity and wide acceptance "in order that it may be clear that the rule in question is something more than a mere form of language, a mere expression of courtesy and deference."[56] This is not just judges trying not to offend legislators who sometimes literally work down the hall from them—men who travel in the same social circles, work in the same state government, and occupy offices that judges themselves often have formerly occupied. No, rather, this is a real standard that yields different results than if it did not exist. Or so he claims.

People can argue in good faith whether Thayer actually did believe in an extreme form of judicial deference where if "any mind" thought a law was constitutional then all judges must so conclude, or whether he simply thought the standard was a reminder to judges to go easy and think deeply before ruling a law constitutionally invalid. To my eyes there is enough in the essay to come pretty close to the former view, given his language emphasizing the subject must be "not open to rational question" and similar statements.[57] As we will see in Part III, the spirit of his essay eventually becomes the rational basis test, which often operates

[51] *Id.* at 154–55.

[52] Although a few high-profile *Lochner*-era cases at the U.S. Supreme Court found federal legislation unconstitutional they were quite small in comparison to those involving state laws. *See* Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1057–58 (1997) (noting that a compilation of over 200 cases from the time period where the Court declared state legislation unconstitutional was not complete because seven cases involving federal laws and one territorial law had to be added).

[53] Thayer, *supra* note 1, at 154 ("When the question relates to what is admitted not to belong to the national power, then whoever construes a State constitution, whether the State or national judiciary, must allow to that legislature the full range of rational construction.").

[54] *Id.* at 155.

[55] *Id.* at 143.

[56] *Id.*

[57] *Id.* at 144.

as an "any mind" standard. But whatever his inner thoughts, he certainly led his readers to believe that the standard he advocated for was the *same* standard that courts had—so he claimed—been applying for decades already. It turns out, though, that in the courts, things were decidedly messier, and not because of any Lochnerian storm clouds gathering on the horizon.

B. Green's Clarity and Reasonable Doubt

It is possible that part of the reason why Thayer's essay was "forgotten" in comparison to other manifestos of judicial restraint is because the essay's central focus—the reasonable doubt standard for judicial review—is not terribly familiar to legal scholars. This is because it does not show up where most scholars look: the pages of the U.S. Reports. The U.S. Supreme Court has said plenty of flattering things about judicial restraint over its long history, but for whatever reason it has not paired it with "reasonable doubt" very often. Indeed, when discussing the constitutionality of legislation a Court majority has only used "beyond a reasonable doubt" or "beyond a rational doubt" five times and only twice in a holding.[58] In fact, with this neglect at 1 First Street[59] as background, "reasonable doubt scholars" such as myself got pretty excited in December 2024 when the Court granted certiorari in a case where one of the questions presented was: "In addressing federal constitutional challenges, may state courts require proof of unconstitutionality 'beyond a reasonable doubt?'"[60] Alas, it was not to be. The Court granted cert. on a Friday and clarified on Monday that it only wished to address the first question presented (a religious liberties issue), not the one concerning the reasonable doubt standard.[61]

[58] Petition for Writ of Certiorari at 31–32, Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm. __ U.S. __ (2024) (No. __) [hereinafter Catholic Charities Petition]. As the petition explains, the five cases are Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1870) (dicta); Sinking-Fund Cases, 99 U.S. 700, 718 (1878) (dicta); Powell v. Pennsylvania, 127 U.S. 678, 684 (1888) (holding); Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 91 (1958) (holding); Stanton v. Stanton, 421 U.S. 7, 10 (1975) (dicta).

[59] SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov (last visited Dec. 6, 2025). (The U.S. Supreme Court's address is 1 First Street, NE, Washington, DC 20543).

[60] Catholic Charities Petition, *supra* note 58, at i.

[61] Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm., 2023 WI App 12, 406 Wis. 2d 586 (2023), cert. granted, 145 S. Ct. 980, 220 L.Ed.2d 288 (U.S. Dec. 13, 2024), (No. 24-154); Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm., 2023 WI App 12, 406 Wis. 2d 586 (2023), cert. amended, 145 S. Ct. 1000, 220 L.Ed.2d 372 (U.S. Dec. 16, 2024), (No. 24-154).

But it is not like the evidence was hidden in a corner of a lost Egyptian city. If scholars simply looked at Supreme Court opinions, they would be "digging in the wrong place."[62] As Thayer's own citations indicate, it is in the state courts where the reasonable doubt standard primarily came from.[63]

Scholars finally began digging through state court decisions about a decade ago.[64] Christopher Green's 2015 article was the first to comb through early state court caselaw and broadly survey when various states first articulated two standards: the reasonable doubt standard, and what he calls the "clarity" standard.[65]

Green demonstrates that from an early time state courts realized that judicial review was a power they possessed in the new American system of popular sovereignty and higher-law constitutionalism, but also that with great power comes great responsibility.[66] In figuring out how to handle that responsibility, he argues that courts progressively settled on the need to at least publicly claim that judicial review is a "delicate" situation to be exercised with great caution.[67] But, as Green also emphasizes, this did not mean that courts generally said that they should hardly ever engage in judicial review.[68] It instead more moderately meant that they should presume statutes constitutional and think very carefully about what they are doing—more so than in a typical case.[69]

Green documents various articulations of some kind of constitutional presumption standard in the Republic's early years.[70] Perhaps the earliest, and one of the strongest, is St. George Tucker's argument to the Virginia Court of Appeals in 1782 that only a statute "absolutely & irreconcileably [sic] contradictory to the Constitution" is void.[71] Others were more mild, such as Maryland's highest court requiring "mature consideration" and Indiana's purporting to have "great respect" for the other branches of government.[72] But eventually, Green argues, all state courts,

[62] Christopher R. Green, *Our Bipartisan Due Process Clause*, 26 GEO. MASON L. REV. 1147, 1156 (2019) (quoting RAIDERS OF THE LOST ARK (Paramount Pictures 1981)).

[63] Thayer, *supra* note 1, at 138–42.

[64] *See* Green, *supra* note 3, at 170.

[65] *See id.* at 170, 176–79.

[66] *See id.* at 193 ("Early courts . . . averted to the high stakes in judicial review.").

[67] *See id.* at 192.

[68] *See id.* at 179.

[69] *Id.* at 188.

[70] *Id.* at 172–76.

[71] *Id.* at 172 (quoting PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 313 (2008)).

[72] *Id.* at 175 (quoting Whittington v. Polk, 1 H. & J. 236, 245 (Md. 1802); Hedley v. Bd. of Comm'rs, 4 Blackf. 116, 118 (Ind. 1835) (per curiam)).

at some point, stated that a "clarity" standard should apply in judicial review cases, detailing instances when state high courts did so, from Virginia as early as 1793 to Alaska in 1962.[73] Not all of these cases used the same language, but generally they state something along the lines of an admonition that courts should only declare acts of the legislature unconstitutional if a judge has a "clear and strong conviction"[74] that it is so or that constitutional invalidation "never can be warranted but in a clear case."[75] Most of these instances Green identifies of the first time a state high court applied a clarity standard are from the mid-nineteenth century through the early twentieth.[76] Green also emphasizes that virtually no court—and never a court majority—outright rejected judicial review itself, explaining, "If *Marbury* represented Marshall's sleight of hand, the same trick was performed independently fifty times over."[77]

Slightly behind this trend of courts stating a "clarity" rule were the same courts at times articulating a standard using the phrase "reasonable doubt."[78] The first instance Green identified was Pennsylvania in 1811.[79] Other state high courts were slow to use this terminology in judicial review cases, but by the mid-nineteenth century a few more had, and a large number did in the last couple decades of the century and into the early years of the next.[80] To date, only Alaska's high court has never done so.[81] For the most part "clarity comes first" when a state high court applied either standard.[82] But that is not universal. New Hampshire applied "reasonable doubt" twenty-nine years before applying a clarity rule.[83] Further, according to Green, in seven states the two differently worded standards applied for the first time in the very same case.[84]

This is surprising if one is simply paying attention to the words "clarity" (or "clear and strong conviction" or "clear case" or similar variants) and "reasonable doubt" or other "doubt" variants. The former sounds

[73] *Id.* at 176–78 (chronologically citing cases for all 50 states).

[74] *Id.* at 176 (citing Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 94 (1822)).

[75] *Id.* (citing State *ex rel.* Washington County v. Balt. & Ohio R.R. Co., 12 G. & J. 399, 438 (Md. 1842)).

[76] *Id.* at 176–78.

[77] *Id.* at 179.

[78] *Id.* at 179–82.

[79] *Id.* at 179 (citing Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811)).

[80] *Id.* (chronologically citing cases for all fifty states except Alaska).

[81] *Id.*

[82] *Id.* at 182.

[83] *Id.*

[84] *Id.* at 183 (naming "New York in 1846, Arkansas in 1851, Florida in 1856, Michigan in 1858, Rhode Island in 1889, Idaho in 1891, and Utah in 1908").

like a marginal presumption, the latter a significant hurdle—akin to its criminal jury cousin. Indeed, that is what Thayer seemed to think of reasonable doubt. Yet, Green provides evidence that state courts have not been so literal minded and that many thought of the two standards—whatever they actually mean—as basically the same.[85] Few opinions try and distinguish them, with the few exceptions proving the rule.[86] Also, not only did a number of states apply both standards for the first time in the same case but many courts applying the reasonable doubt standard for the first time claim the standard was already there.[87] This makes sense, he argues, if the earlier clarity cases are seen as doing the same thing.[88] Green also provides evidence that some legal commentators used a clarity standard as interchangeable with reasonable doubt in the criminal conviction context, giving reason to think they would be synonymous in other contexts as well.[89]

Even if these standards are the same, though, what does "the standard" actually *mean*? What are courts supposed to do when they are making a "clearly established" or "reasonable doubt" assessment of a law's constitutionality? For now, we should keep in mind Green's takeaway: The standard requires judges to take seriously all potential arguments in favor of a law's constitutionality, but not to defer to the legislature when they think those arguments are faulty.[90] As he puts it: "What was once unclear can be made clear through the argumentation, research and analysis. Such clarification, however, is not only possible, but also mandatory; courts exercising judicial review shoulder a burden to justify their conclusions against all proffered counterarguments."[91] Green cites numerous courts purporting to endorse something like the clarity/reasonable doubt standard while also emphasizing the need for "careful consideration."[92] He even notes that Thayer misunderstood this aspect of the traditional

[85] *Id.* at 183–88.

[86] *Id.* at 184 (identifying Sadler v. Langham, 34 Ala. 311, 321 (1859), and Varner v. Martin, 21 W. Va. 534, 542–43 (1883), as the only cases noting potential differences). Green even notes that Alabama later applied the reasonable doubt standard without rejecting *Sadler* and later rulings "cited *Sadler* alongside reasonable-doubt formulations without noting the tension." Green, *supra* note 3, at 184–85 n.185 (citing State *ex rel.* Woodward v. Skeggs, 46 So. 268, 270 (Ala. 1908) and Swindle v. State *ex rel.* Pruitt, 143 So. 198, 199 (Ala. 1932), respectively).

[87] Green, *supra* note 3, at 186.

[88] *Id.*

[89] *Id.* at 186–88.

[90] *See id.* at 189–91.

[91] *Id.* at 188.

[92] *Id.* at 189–90 (quoting various cases).

reasonable doubt standard and that it was, in fact, what Webster argued for.[93]

How this requirement to weigh "every possible aspect of a case" should play out in practice, Green continues, can be learned by looking to the application of something similar: the duty of a court to consider and address arguments in administrative law cases such as in the famous "hard look" case of *Overton Park*.[94] He argues the standard demands that "courts exercising judicial review must provide reasoned, satisfying explanations of what precisely is wrong with the arguments in favor of the constitutionality of the statutes they are considering."[95] That certainly is more than is demanded of courts in other cases—whether in private law or public law—but it does not sound nearly as difficult as some of the formulations that Thayer contends the standard means.

Before we move on, I should note something I have done in describing Green's article which I will also do with Webb's. They both discuss when a state high court adopted a clarity standard and/or a reasonable doubt standard.[96] Here I say "applied." That is because, as we shall see, upon inspection these "adoptions" often seem fleeting, at best. Indeed, sometimes when I say a court "applies" a standard, it really just mentions it. We will address this issue more when we come to Spitzer's article. But first we will turn to Webb's.

C. Webb's The Lost History of Judicial Restraint

Giving Green due credit, Webb takes Green's timeline of state high courts applying the clarity standard (which Webb calls "clear error") and reasonable doubt standard and ties it to Thayer's famous article.[97] He argues that although Thayer did himself no favors with his relative lack of citations to support his "rule of administration," his assertion of the standard's wide acceptance was correct.[98] With helpful maps demonstrating geographically and temporally where and when these two standards were applied (using the cases Green identified), Webb also adds the statements of treatise writers such as Thomas Cooley[99] to argue that not only

[93] *Id.* at 190–91.

[94] *Id.* at 191 (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

[95] *Id.* at 192.

[96] *See* Green, *supra* note 3, at 185; Webb, *supra* note 5, at 313.

[97] Webb, *supra* note 5, at 301–02.

[98] *Id.* at 302.

[99] *Id.* at 331–37 (detailing various statements by Cooley); *id.* at 346–53 (detailing various other writers discussing the clear error and reasonable doubt rules in the 1880s and 1890s).

did state high courts adopt these rules as Green had shown, but that they did so in a way that "liquified" the rule in a similar way to how James Madison argued that the meaning of constitutional text can be "liquified" with experience.[100] Thus, although at the founding of the Republic judicial review was brand new and without much to guide it, by the time Thayer wrote his essay, clear error and reasonable doubt had become the liquidated standards for judicial review in the United States.[101] This was despite some pushback by a few judges and scholars around the time of Thayer's essay.[102] This pushback, continued Webb, later burst forth with the *Lochner* era.[103] But that era was a departure from a previously well-established practice.

More specifically, Webb claims that state high court adoption of the standards seems to have followed in a few waves, one of them as a reaction against that most divisive instance of judicial review: the 1857 *Dred Scott* decision.[104] He also goes into detail on what various judges—state and federal—said about the standards, where the judges generally praised them in different ways.[105] He also notes, as Green did, that most courts did not reflect on the finer points of these standards, finding only the same two cases—from 1859 Alabama and 1883 West Virginia—where a state high court rejected the reasonable doubt standard because they considered it too strong.[106]

Webb adds much to Green's work, particularly the details of treatise writers and other legal authorities of the nineteenth century that paint the picture of two widely praised standards of a deferential outlook on judicial review.[107] His conclusion is that Thayer's factual thesis about a tradition of judicial restraint based around a reasonable doubt standard was more or less accurate.[108] He claims that if we were to follow that tradition today:

[100] *Id.* at 370. Much has been written recently on constitutional liquidation. If you are going to dive in, start with William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

[101] Webb, *supra* note 5, at 307.

[102] *Id.* at 358–59 (identifying, among other evidence, an 1891 speech by Justice David Brewer calling, as Webb describes, "for a more libertarian reading of the Constitution").

[103] *Id.* at 360 (stating "the Court would soon shift towards a more active jurisprudential orientation in the early twentieth century . . . ").

[104] *See id.* at 320–30.

[105] *See generally id.*

[106] *Id.* at 368–69 (discussing Sadler v. Langham, 34 Ala. 311, 320–21 (1859), and Varner v. Martin, 21 W. Va. 534, 542 (1883)).

[107] *See, e.g.*, *id.* at 331–37 (detailing Cooley's views on the reasonable doubt standard).

[108] *Id.* at 371–72.

> It would mean that for every constitutional case, in addition to sorting out the semantic meaning of the relevant constitutional provision and asking whether the challenged law was inconsistent with that meaning or could plausibly be read as consistent with that meaning, judges would also be required to impose upon themselves a disciplining evidentiary standard for answering those questions. It would require them to ask not only whether they happened to think the challenged law was inconsistent with the meaning of the Constitution, but whether, after careful study of all the relevant textual, contextual, and historical aids available, it was clearly and manifestly inconsistent with the Constitution, indeed inconsistent beyond a reasonable doubt.[109]

Although Webb investigated when and where the standards were applied by state high courts, he did not investigate *how often* the standards were applied. As we will see, if we do that, then his claim for how the tradition would be implemented today becomes a harder sell. That is because for the most part the tradition was not implemented even then.

Investigating how often the reasonable doubt standard has been applied is something that Spitzer has done.[110] His article on the reasonable doubt standard was published a couple years before Webb's (although for a different time period) and Webb, for whatever reason, does not cite or address it. Nevertheless, it is revealing for how the standard operates. We now turn to Spitzer.

D. Spitzer's Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt"

Green and Webb take the history as they find it and analyze from there without an underlying critique or exhortation of the reasonable doubt standard. Hugh Spitzer takes a more normative approach. After focusing on Thayer's essay, and duly noting Green's piece,[111] Spitzer follows the history of the reasonable doubt standard subsequent to Thayer. His focus is on how the standard has been applied in the twenty-first century in state court. Dovetailing with his empirical findings, he argues that the standard is simply a bad fit for the review of the constitutionality of statutes, as it is an evidentiary standard that does not make much sense when applied to constitutional interpretation.[112]

Most relevant to our purposes, Spitzer demonstrates that state courts may have "adopted" the reasonable doubt standard at various times but often have not been very enthusiastic about applying it afterward,

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[109] *Id.* at 372.

[110] *See* Spitzer, *supra* note 4, at 1440.

[111] *Id.* at 1431–33.

[112] *Id.* at 1459–61.

especially in recent years.[113] When they do use it, state courts sometimes mis-cite cases that do not actually use the standard or miss cases that do, leading to "a netherworld of mis-citations."[114] He surveys state high court cases from 2000 through 2020 that apply a "beyond a reasonable doubt" standard when reviewing the constitutionality of legislation.[115] The survey locates 677 such cases nationwide.[116] From this we can conclude that the standard is used in modern times to a fair degree. But the breakdown of those cases seems to have little rhyme or reason. Only thirteen states did not invoke the standard at all during that period.[117] But only fourteen used the concept more than twenty times, i.e., more than once a year.[118] There is no correlation with a more frequent use of the standard to geography or a state's underlying politics. The standard is applied a bit more in civil cases (sixty-three percent) than in criminal (thirty-seven percent).[119] And, perhaps most tellingly, eighty-three percent of the cases mentioning the standard upheld the constitutionality of a law.[120]

Even more tellingly, Spitzer finds for our modern period something that Green and Webb find for the nineteenth century: that almost no court critically examines what the reasonable doubt standard actually means.[121] There are very few examples; Spitzer identifies around half a dozen opinions.[122] When courts or individual judges do examine the standard they either reformulate it into something like a "clarity" rule or outright reject it.[123]

Spitzer's normative conclusions following from his review of the standard's haphazard use are blunt: "In most states, 'unconstitutional beyond a reasonable doubt' has become a jingle that is dropped into cases when convenient (usually when upholding statutes) and then ignored when it is not convenient."[124] It does not "serve as an honest working doctrine or presumption."[125] Worse, it undermines trust in the courts

[113] *Id.* at 1440–56.
[114] *Id.* at 1446.
[115] *Id.* at 1440–56.
[116] *Id.* at 1440.
[117] *Id.* at 1443.
[118] *Id.* at 1440.
[119] *Id.* at 1442.
[120] *Id.* at 1433.
[121] *Id.* at 1450–51.
[122] *Id.* at 1450–56.
[123] *Id.*
[124] *Id.* at 1433.
[125] *Id.* at 1434.

because it gives the impression that a standard is actually doing something when it is instead simply placating the legislative branch.[126]

One investigation outside of Spitzer's focus would be to conduct a survey, similar to his of 2000–20, during a time period closer to Thayer's. Did courts use the reasonable doubt standard sporadically after "adopting" it? And what is the relationship between applying the standard and their invalidation of statutes? Further, one question Spitzer did not address but that piqued my curiosity: How does the number of times state courts applied the reasonable doubt standard compare to the number of times they engaged in judicial review at all, even in those states that use the standard with some frequency? Is it a majority of the time, a substantial minority, or a tiny minority? We turn to answering those questions now.

II. THE REASONABLE DOUBT STANDARD WAS RARELY USED IN THE YEARS BEFORE THAYER'S ESSAY.

Spitzer's survey demonstrates that in recent years—more than 100 years after Thayer's essay—state courts have not been terribly enthusiastic in applying a reasonable doubt standard for judicial review.[127] A few states stand out—and even there, only a bit for a standard that supposedly applies to any instance of judicial review—but overall the standard comes up haphazardly, to be charitable. Even though every state but Alaska has *some* precedent endorsing some version of Thayer's standard,[128] in practice it is not invoked in many cases, and even when it does arise there is almost never an examination of what it means, other than to tread carefully.

But that is today. What about the use of the reasonable doubt standard in Thayer's day? We know (or think we do from Green's and Webb's work *when* state high courts first applied a reasonable doubt standard. What we want to additionally know, however, is *how often* those courts applied that standard. And not just how often, but how often when compared to courts exercising judicial review without applying the standard. Short of reading every instance of judicial review prior to 1893—a task I do not wish on anybody—how can we figure this out?

[126] *Id.* at 1459–60.
[127] *Id.* at 1443.
[128] *Id.* at 1439 n.62.

A. Methodology for the Survey

We hopefully can get a sense of the frequency of the reasonable doubt standard—that is, both the numerator and the denominator—through a survey of a sample period. Rather than conduct a twenty-year survey of all applications of the standard but not non-applications, as Spitzer did, I surveyed a five-year period that focused on both applications and non-applications. That is to say, within that period I aimed not just to find the examples where courts used a reasonable doubt standard but also all instances of courts engaging in judicial review but *not* using the standard. That would include both when they declare the subject legislation unconstitutional and constitutional, and both while invoking the reasonable doubt standard and while not. Overall, the goal was to find the rate at which courts applied the reasonable doubt standard when they engaged in judicial review.

The period I chose was from 1880 through 1884, inclusive. These five years were not long before Thayer's essay, but far enough along during the "liquidation" process Webb argues for that one would expect to see the standard in most instances of judicial review, if only in certain states.[129] According to Green's and Webb's work, by 1880 fourteen states had "adopted" a reasonable doubt standard and four more would adopt it by the end of 1884.[130] This means over half of the country (there were thirty-eight states from 1880–84[131]) had not, of course. However, as a test of Thayer's claims of a longstanding practice, it still seemed useful to generally survey the standard's popularity in these years, particularly when it came to those fourteen states. And this only became more apparent when I found that Green, and Webb relying on Green, had missed a number of "first" applications of reasonable doubt, growing the number

[129] I am not saying Webb claims the standard was used in "most" cases. However, if it is a standard that courts truly used to adjudicate the constitutionality of legislation—and not just occasional rhetoric—then it is not asking too much to expect most majority opinions involving judicial review to mention it. One could argue judges actually did "apply" it in most opinions, not writing it down because it was just so ingrained in their philosophy. That seems unlikely, though, and, worse, unfalsifiable.

[130] *See* Webb, *supra* note 5, at 345, 364 (in footnote 472 we can see that South Carolina, Illinois, West Virginia, and Colorado joined during this five year period (South Carolina (Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881))); Illinois (Home Ins. Co. v. Swigert, 104 Ill. 653, 669 (1882)); West Virginia (Chesapeake & Ohio Ry. Co v. Miller, 19 W. Va. 408, 422 (1882)); Colorado (Alexander v. People *ex rel.* Schofield, 2 P. 894, 896 (Colo. 1884))).

[131] *See* BEN LEUBSDORF, ET AL., CONG. RSCH. SERV., ADMISSION OF STATES TO THE UNION: A HISTORICAL REFERENCE GUIDE, 3–4 (Dec. 17, 2024), https://www.congress.gov/crs-product/R47747 (identifying the thirty-eighth state, Colorado, as added in 1876, and no more until 1889).

of states that had applied the standard by 1885 to a firm majority.[132] Therefore, I thought examining judicial review cases during this five-year stretch would provide a window into how commonly state courts applied the standard before Thayer's essay, and not just how many states had applied it at some time in the past.

When I began, I had not concluded exactly in which states I would do a "deep dive" of all instances of judicial review. In the end the states I examined for the full universe of all applications of judicial review by their high courts were Arkansas, California, Connecticut, Florida, Iowa, and Missouri. How I got to that list reveals as much, if not more, about the scarcity of the reasonable doubt standard as the actual findings in those states. We first look at how I got to those states and then what the numbers from those states are. The bottom line: almost no states actually used the reasonable doubt standard very much and for most states—even states that had "adopted" the standard in the past—I found no evidence they used it at all during this period.

B. A Twist: More "Reasonable Doubt" and Judicial Review Than Judicial Review with a Reasonable Doubt Standard.

While determining the scope of my survey I found a surprising feature that added a layer to my methodology. This tipped me off that Thayer's standard was not so common after all.

In the LEXIS all-states database I searched "'reasonable doubt' and constitution! OR unconstitutional for the period January 1, 1880 through December 31, 1884." This provided me with all cases that used the phrase "reasonable doubt" plus the words "constitution" and/or "constitutional" and/or "unconstitutional." The results, of course, included cases that did not involve judicial review, such as criminal appeals where the traditional reasonable doubt standard for criminal convictions is being discussed and a mention of the U.S. or a state constitution is made for whatever reason. Figuring out which cases actually involved judicial review and which were some other kind of case required individualized opinion-by-opinion assessment. Overall, the LEXIS search resulted in 251 cases to review.[133] I should note here that later on in the state-focused

[132] *See infra* Part II.B.

[133] I did the same search for the same period but with "rational doubt" instead of "reasonable doubt." This yielded eight cases, four of which involved judicial review. In one, "rational doubt" was applied as a standard of judicial review. *See* Davidson v. Houston, 35 La. Ann. 492, 493 (1883). In the other three, the court was engaged in judicial review, but "rational doubt" came up in a non-judicial review context. *See* Blake v. People, 109 Ill. 504, 519 (1884);

phase of my research in Part II.C. I found a handful of cases that applied a reasonable doubt standard but worded it in such a way that it escaped the search terms "reasonable doubt" or "rational doubt" (such as "beyond all doubt" or similar language). So there likely are other examples of the reasonable doubt standard (1880–84) not contained in this Article. However, it is also likely that there are few.

Going through these 251 cases (plus the eight "rational doubt" cases), I unsurprisingly found that most were criminal conviction appeals that did not involve judicial review. (Of course, a criminal appeal can also involve judicial review, but most do not). Those were set aside. But I also found cases that involved the U.S. or a state constitution but used "reasonable doubt" in a yet further sense. In other words, they did not use the term in the context of a criminal conviction or something like Thayer's standard, but the case still contained "reasonable doubt." Sometimes this was because the dissent discussed the reasonable doubt standard for judicial review. Sometimes it was because an advocate argued it and the reporter included the lawyers' arguments. And sometimes the phrase simply appeared anyway. For example, in *Stephens v. Ballou*, the Kansas Supreme Court examined whether a statute had been amended and said a reasonable doubt standard applied when asking whether the legislature amended a statute implicitly.[134] Yet, the case did not concern the constitutionality of the law. Thayer himself noted that "reasonable doubt" is used in a variety of contexts, so this is not surprising.[135] But what was interesting, and should not have been surprising, was that these other contexts came up in cases that otherwise actually *were* instances of judicial review.

Seeing this phenomenon, when analyzing the 251 hits, I noted both cases where: (1) a court majority invoked the reasonable doubt standard when assessing a law's constitutionality *and* (2) cases where a court assessed a law's constitutionality and the phrase "reasonable doubt" was included somewhere in the reported case, even though the majority did not apply those words as a standard of judicial review. This could be because the standard came up in a dissent or counsel's argument, or simply because of instances like *Stephens v. Ballou*, where the words "reasonable doubt" appeared for non-judicial review reasons. I then tallied all judicial review cases while dividing them into where a majority invokes what later came to be seen as Thayer's standard and where the phrase

State v. Moore, 42 N.J.L. 208, 208 (1880); Wyscaver v. Atkinson, 37 Ohio St. 80 (1881). The four cases are included in the itemizations in this section with "rational doubt" in parentheses.

[134] 27 Kan. 594, 601 (1882).

[135] *See* Thayer, *supra* note 1, at 147–48.

"reasonable doubt" appears otherwise, for whatever reason. I did not include cases where "reasonable doubt" appeared but there was no judicial review (the vast majority, most of which were criminal appeals) or the few cases that were not from the high court of a state.

The result was astonishing. There were twenty-six cases involving judicial review where the majority applied the reasonable doubt standard.[136] And thirty-four where the court engaged in judicial review and the phrase "reasonable doubt" appeared somewhere but was not mentioned by the majority as a standard of judicial review.[137] That is, there were more instances of judicial review where the court did not apply a reasonable doubt standard but the phrase "reasonable doubt" (or "rational doubt") appeared somewhere in the report anyway—sometimes quite randomly—than there were involving judicial review where the court did apply the standard. Further, of the thirty-four that did not apply

[136] *See* Webster v. Little Rock, 44 Ark. 536, 550 (1884); Univ. of Cal. v. Bernard, 57 Cal. 612, 613 (1881); Alexander v. People, 2 P. 894, 896 (Colo. 1883); State *ex rel.* Andrew v. Lewis, 51 Conn. 113, 127–28 (1883); State *ex rel.* Lanier v. Padgett, 19 Fla. 518, 529 (1882); Wellborn v. Estes, 70 Ga. 390, 396 (1883); Knickerbocker v. People, 102. Ill. 218, 221 (1882); Home Ins. Co. v. Swigert, 104 Ill. 653, 669 (1882); Gates v. Brooks, 6 N.W. 595, 596 (Iowa 1882); Davidson v. Houston, 35 La. Ann. 492, 493 (1883) (using "rational doubt"); State v. W. Union Tel. Co., 73 Me. 518, 526 (1882); Whallon v. Ingham Cir. Judge, 16 N.W. 876, 881 (Mich. 1883); Beck v. Allen, 58 Miss. 143, 171 (1880); State *ex rel.* Att'y Gen. v. Ranson, 73 Mo. 78, 95 (1880); State *ex rel.* Harris v. Laughlin, 75 Mo. 147, 158 (1881); Humes v. Mo. Pac. Ry. Co., 82 Mo. 221, 232 (1884); Ewing v. Hoblitzelle, 85 Mo. 64, 69–70 (1884); St. Louis & S.F. Ry. Co. v. Evans & Howard Fire Brick Co., 85 Mo. 307, 332–33 (1884); Pleuler v. State, 10 N.W. 481, 481 (Neb. 1881); State *ex rel.* Murphy v. Overton, 16 Nev. 136 (1881); North C. R.R. Co. v. Comm'rs of Alamance, 82 N.C. 259, 264 (1880); State v. Powell, 86 N.C. 640, 646 (1882); Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881); *Ex parte* Lynch, 16 S.C. 32, 35 (1881); *Ex parte* Meredith, 74 Va. 119, 134–35 (1880); Chesapeake & Ohio Ry. v. Miller, 19 W. Va. 408, 422 (1882).

[137] *Ex parte* Harty, 68 Ala. 303, 313 (1880); City of Little Rock v. Parish, 36 Ark. 166, 176 (1880); German Bank v. DeShon, 41 Ark. 331, 353 (1883); *Ex parte* Koser, 60 Cal. 177, 196 (1882); Coyle v. Gray, 12 Del. 44, (1884); State *ex rel.* Haley v. Stark, 18 Fla. 255, 259 (1881); State *ex rel.* Arpen v. Brown, 19 Fla. 563, 574 (1883); Ga. R.R. v. Smith, 70 Ga. 694, 700 (1883); Hill v. Mayor of Dalton, 72 Ga. 314, 317 (1884); Falch v. People, 99 Ill. 137, 140 (1881); Blake v. People, *ex rel.* Caldwell 109 Ill. 504, 519 (1884) ("rational doubt"); Koehler v. Hill, 14 N.W. 738, 745 (1883); Louisville Bridge Co. v. City of Louisville, 81 Ky. 189, 211 (1883); Gross v. Rice, 71 Me. 241, 258 (1880); Commonwealth v. Carter, 132 Mass. 12, 13 (1882); Commonwealth v. Bearse, 132 Mass. 542, 545 (1882); State *ex rel.* Att'y Gen. v. Young, 9 N.W. 737 (1881); Fletcher v. State, 60 Miss. 675, 679 (1882); State v. Jennings, 81 Mo. 185, 189 (1883); Washington Cnty. v. Fletcher, 11 N.W. 542, 543 (1882); Esser v. Spaulding, 30 P. 896, 897 (1883); State v. Moore, 42 N.J.L. 208, 211 (1880) ("rational doubt"); Graves v. State, 45 N.J.L. 203, 203 (1883); *In re* Woolsey, 95 N.Y. 135, 136 (1884); Wyscaver v. Atkinson, 37 Ohio St. 80, 91 (1881) ("rational doubt"); State v. Beswick, 13 R.I. 211, 216 (1881); State v. Smyth, 14 R.I. 100, 101 (1883); State v. Mancke, 18 S.C. 81, 85 (1882); City of Nashville v. Linck, 80 Tenn. 499, 504 (1883); State *ex rel.* Gaines v. Whitworth, 76 Tenn. 594, 607 (1881); Truss v. State, 81 Tenn. 311, 314 (1884); Louthan v. Commonwealth, 79 Va. 196, 208 (1884); Varner v. Martin, 21 W. Va., 534, 542 (1883); State v. R.R. Co., 24 W. Va. 783, 786 (1884).

a "reasonable doubt" standard, virtually none applied a "clarity" or "clear error" standard either.[138]

We will look at these two sets of cases before moving on to the original goal: determining how often the reasonable doubt standard was applied out of the universe of judicial review, not just in cases that happen to include the term "reasonable doubt." Before we break down the two sets of cases using the words "reasonable doubt", I should note something else. Although I only found twenty-six instances of a state high court applying a reasonable doubt standard when exercising judicial review during 1880–84, six of those were in states that Green first identified, and Webb then relied on, as not "adopting" such a standard until after those cases came out.[139] One instance, from Illinois, was just a few months before the case Green and Webb used as the first case applying the reasonable doubt standard when exercising judicial review in that state.[140] The rest came many years before the cases that Green and Webb used: Georgia (1883 instead of 1902),[141] Maine (1882 instead of 1899),[142] Mississippi (1880 instead of 1906),[143] Nebraska (1881 instead of 1900),[144] and North Carolina (1880 instead of 1895; Although the "adoption" date is earlier, as the 1880 case in turn quotes from a case from

[138] With one arguable exception, *Ex parte Koser*, 60 Cal. at 189, where the majority quoted language from Cooley that could be read to constitute a version of a clear error standard.

[139] I want to be clear, I do not fault Green or Webb for what appear to be a handful of misses in their research—that happens to all of us. But it does seem that the actual "adoption" dates of these states were earlier than their articles claim.

[140] The case I found was *Knickerbocker v. People ex rel. Butz*, 102 Ill. 218, 221 (1882), which came out just months before *Home Insurance Co. v. Swigert*, 104 Ill. 653, 669 (1882), the case Green and Webb rely on. Green, *supra* note 3, at 180 n.117; Webb, *supra* note 5, at 364 n.472.

[141] *Compare* Wellborn v. Estes, 70 Ga. 390, 396 (1883) ("It must be so apparent as to leave no reasonable doubt as to its existence, upon the judicial mind."), *with* Park v. Candler, 40 S.E. 523, 526 (Ga. 1902) (cited in Green, *supra* note 3, at 181 n.133; Webb, *supra* note 5, at 364–65 n.476).

[142] *Compare* State v. Western Union Tel. Co., 73 Me. 518, 526 (1882) ("[A]ll acts . . . are presumed to be in accordance with the constitution and none will be declared otherwise so long as any reasonable doubt of its violation of the fundamental law remains"), *with* State v. Lubee, 45 A. 520, 521 (Me. 1899) (cited in Green, *supra* note 3, at 181 n.131; Webb, *supra* note 5, at 364 n.475).

[143] *Compare* Beck v. Allen, 58 Miss. 143, 171 (1880) ("It is well settled that courts ought not, except in cases admitting of no reasonable doubt, to take upon themselves to say that the Legislature has exceeded its powers and violated the Constitution . . ."), *with* State *ex rel.* Greaves v. Henry, 40 So. 152, 154 (Miss. 1906) (cited in Green, *supra* note 3, at 181 n.136; Webb, *supra* note 5, at 365 n.476).

[144] *Compare* Pleuler v. State, 10 N.W. 481, 481 (1881) ("[T]o justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is so . . ."), *with* State v. Standard Oil Co., 84 N.W. 413, 414 (Neb. 1900) (cited in Green, *supra* note 3, at 181 n.132; Webb, *supra* note 5, at 364 n.475).

1872).[145] On the one hand, unearthing these cases could be seen to lend greater support to a thesis that the reasonable doubt standard was an established rule of law by 1893. Five states are "on the map" before Thayer's essay instead of after.[146] Of course, there may be others from years outside my survey's five-year period. I contend, however, that when put in context with the rest of the story presented here, these accidental findings actually lend greater support to my own thesis: that applications of the reasonable doubt standard were haphazard and did not affect the outcome of cases.

Table A below breaks down the cases I found from 1880–84 that included the phrase "reasonable doubt" or "rational doubt" and where courts engaged in judicial review. The cases are broken down by state and by the courts' determination of the constitutionality of the underlying law. Further, for states in the right-hand column, if their high courts had adopted a reasonable doubt standard before 1880 (as stated in Green's piece, plus North Carolina), *or* after 1880 but before the case(s) warranting their inclusion in the right-hand column, they are bolded. In other words, in those states I found a case that involved judicial review and did not mention the reasonable doubt standard even though the court had previously applied it:

TABLE A

Category	Cases where the high court applies a reasonable doubt standard when exercising judicial review (multiple cases)	Cases where the court does not apply a reasonable doubt standard when exercising judicial review, but "reasonable doubt" appears in the reported text for other reasons (multiple cases)
States	Arkansas, California, Colorado, Connecticut, Florida, Georgia,	Alabama, Arkansas (2), California, Delaware, Florida (2),

[145] *Compare* N.C. R.R. Co. v. Com'rs of Alamance, 82 N.C. 259, 264 (1880) ("[C]ourts . . . should not declare a statute void unless *the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt*.") (quoting King v. Wilmington & W.R. Co., 66 N.C. 277, 283 (1872)), *with* Sutton v. Phillips, 21 S.E. 968, 968 (N.C. 1895) (cited by Green, *supra* note 3 at 180 n.126; Webb, *supra* note 5, at 364 n.475).

[146] *See supra* notes 141–45.

	Illinois (2), Iowa, Maine, Michigan, Mississippi, Missouri (5), Nebraska, North Carolina (2), South Carolina (2), West Virginia	Georgia (2),[147] Illinois (2),[148] Iowa, Kentucky, Maine, Massachusetts (2), Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Rhode Island (2), South Carolina, Tennessee (2), Virginia, West Virginia (2)
Law found constitutional	22[149]	24[150]
Law found unconstitutional	2[151]	10[152]
Total	24	34

We could split a lot of unneeded hairs dicing up these cases, their timing, and the states they are in. However, I want to highlight two things.

First, there is a messy, sporadic, and almost patternless distribution of majority opinions using a reasonable doubt standard versus those that did not in states that had *already* applied the standard. Every bolded state name in the right-hand column is where a state high court adjudicated whether a law was constitutional without mentioning the reasonable doubt standard when it had already done so at some time in the past.

[147] Only one of the two Georgia decisions was technically after *Wellborn v. Estes*, 70 Ga. 390, 396 (March 11, 1883), which applied a reasonable doubt standard. *Georgia Railroad v. Smith*, 70 Ga. 694 (1883), was decided two weeks prior, on February 27, 1883.

[148] Only one of the two Illinois cases was after the earliest identified case applying the reasonable doubt standard (from the left column).

[149] *See supra* note 136, minus cases listed in *infra* note 151.

[150] *See supra* note 137, minus cases listed in *infra* note 152.

[151] State v. Powell, 86 N.C. 640, 646 (1882); Chesapeake & Ohio Ry. v. Miller, 19 W. Va. 408, 422, 437–38 (1882).

[152] City of Little Rock v. Parish, 36 Ark. 166, 176 (1880); German Bank v. DeShon, 41 Ark. 331, 353 (1883); State *ex rel.* Haley v. Stark, 18 Fla. 255, 259 (1881); Koehler v. Hill, 14 N.W. 738, 745 (1883); Louisville Bridge Co. v. City of Louisville, 81 Ky. 189, 211 (1883); Gross v. Rice, 71. Me. 241, 258 (1880); State *ex rel.* Att'y Gen. v. Young, 9 N.W. 737 (1881); Wyscaver v. Atkinson, 37 Ohio St. 80, 91 (1881); State v. Beswick, 13 R.I. 211, 216 (1881); Louthan v. Commonwealth, 79 Va. 196, 208 (1884).

Remember, this is not the whole universe of cases where judicial review was exercised during 1880–84, just the cases that happened to have the phrase "reasonable doubt" without including the reasonable doubt standard in the majority opinion. And yet, even then there are over a dozen states (again, the bolded states) that "backtrack" on using the standard or simply ignore it. There are even several states that both apply the standard and do not apply the standard during the same five-year period. For example, Arkansas applies it once, but also does not apply it twice.[153] Illinois has two of each.[154]

Second, although the rate at which courts concluded laws were constitutional after subjecting them to judicial review was well over fifty percent for either column, the rate is much higher when the reasonable doubt standard makes an appearance. Some of the cases that found a law unconstitutional without applying the standard are in states where Green concluded that they had not previously applied it. However, Arkansas,[155] Florida,[156] and Iowa[157] are examples of where a court did have the standard from prior cases, did not apply it, and found a law unconstitutional. Even so, ignoring the reasonable doubt standard was not simply a path to a court invalidating legislation. There are plenty of cases of the thirty-four where the standard was not applied even though in-state precedent made the standard available, and yet the law was still upheld.[158]

Although an interesting and unexpected detour in my research, examining "accidental" uses of "reasonable doubt" in judicial review cases was not my focus. My focus was to look at states that had previously applied the standard and then see how it held up when courts conducted judicial review. Yet, this detour hinted at something that I was likely to find when I hit that stage: The vast majority of judicial review in state high courts simply ignored the reasonable doubt standard, even when already in the state's caselaw.

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[153] *Compare supra* note 136, *with supra* note 137.

[154] *Compare supra* note 136, *with supra* note 137.

[155] *Parish*, 36 Ark. 166–167 (concluding legislature's redrawing of city boundaries unconstitutional).

[156] *Stark*, 18 Fla. At 267 (concluding statute regulating municipal incorporation is unconstitutional).

[157] *Koehler*, 14 N.W. at 751 (declaring prohibition amendment to state constitution unconstitutional).

[158] *See supra* note 137 & Table A on pp. 37–38.

C. How Frequently State High Courts Who Already Had Applied the Reasonable Doubt Standard Actually Used It When Engaging in Judicial Review, 1880–84.

Enumerating all instances of judicial review during a given period is a daunting enterprise. A search in the same LEXIS database of "constitution! OR unconstitutional AND NOT 'reasonable doubt' OR 'rational doubt'" (so as to not double count the earlier cases) yielded 6,145 hits.[159] Yikes! Of course, most of these are not instances of judicial review. The word "constitution" can appear in an opinion for all manner of reasons other than the majority of judges assessing the constitutionality of a law. But, as with my preliminary search, this would require individualized assessments of all cases and I did not have the resources to review all of these 6,000 plus hits. But I could for a subset, and here is how I narrowed my target list.

I focused my review on states that: (1) Green and Webb identified as having "adopted" the reasonable doubt rule before 1880 and (2) that I had identified applied the reasonable doubt standard during the 1880–84 period. That is, a state must be included in the middle column of Table A and also have been identified by Green and Webb as having applied the reasonable doubt standard before 1880. I excluded states that Green and Webb so identified but that did not apply the reasonable doubt standard during 1880–84. This is because it might be argued that perhaps some states applied the standard in the past (such as Pennsylvania in 1811) but by 1880 that precedent had been passed by. More bluntly put, it could be argued they were not *ignoring* the standard but just *forgetting* it. To be clear, as a test of Thayer's claims that the reasonable doubt standard was of longstanding and general acceptance, I think it would be entirely fair to include these states—as it would be to include states that had never applied the standard. But as a matter of focusing limited research resources, I thought it a prudent and conservative move. Whatever the finding from the states I did include we would expect the rarity of the reasonable doubt standard in other states to only be higher—by definition, as the total of uses of the standard in those other states for the five-year period is zero.[160]

This led to a review of these states: Arkansas, California, Connecticut, Florida, Iowa, and Missouri. I did not include West Virginia because it is the one state during this period to actually (yet briefly) reject the

[159] The all-states database.

[160] Again, fully conceding that I missed a handful of cases that apply a version of the standard without the "reasonable doubt" or "rational doubt" locution. *See supra* pp. 32, 43.

reasonable doubt standard.[161] In the LEXIS database for each state for the period from 1880–84, I used the same search: "constitution! OR unconstitutional AND NOT 'reasonable doubt' OR 'rational doubt.'" I then individually went through each hit to assess whether the court had engaged in judicial review or not and, if so, whether the court had declared a law unconstitutional. In cases where the court upheld one part of a law but not another, I included that as an "unconstitutional" ruling. I also checked whether the court applied the reasonable doubt standard but for whatever reason it was not picked up in the prior targeted search. I did this by a control-F search for "doubt" and then I assessed whether that use of "doubt" was what can be fairly called the reasonable doubt standard for judicial review. (Most of the time they were not—the word "doubt" or "no doubt" or "it is abundantly clear" is extremely popular in adversarial writing. Who knew?) This did yield a few cases to put in the "reasonable doubt" bucket, but not many.[162] I also did the same thing with "clear" to see if some form of a clear error rule was applied and there were a few of those also (eight).[163] I have included those in the "non-reasonable doubt" totals but noted the clear error standard's use in parentheticals nevertheless. All of these cases and findings are in the Appendix.

I did not include examples of judicial review when the court tersely said the issue had already been decided in a prior case and cited to that case without any further explanation. This is because even if a court very much loved applying the reasonable doubt standard, there would be no need for it to mention it in that instance. How terse the opinion needs to be is quite a gray area, so reasonable people could definitely disagree with me on whether a certain case should be included. Often a court will say an issue was decided by a prior case but then it cannot resist giving a few lines of explanation. I included cases like this. Additionally, although in other states this was not a concern, for California I only examined published "in bank" cases (that is, with all judges participating) from its supreme court. The state had a system at the time where some cases were decided by a "division" of three of the court's seven justices, usually for more minor matters.[164]

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[161] As Webb discusses. *See* Webb, *supra* note 5, at 368–69.

[162] They were *Dabbs v. State*, 39 Ark. 353, 355 (1882); *Merchants' Union Barbed-Wire Co. v. Brown*, 20 N.W. 434, 436 (1884); *State v. Stucker*, 12 N.W. 483, 483 (1882); and *State v. Addington*, 77 Mo. 110, 118 (1882).

[163] *See infra* Appendix.

[164] Randall Don Sosnick, *The California Supreme Court and Selective Review*, 72 CALIF. L. REV. 720, 727 (1984).

I should also note that I included determinations that an ordinance of a local government is unconstitutional in addition to that of state legislatures. Although ordinance cases were a minority, I note this simply because the ordinance vs. state legislature dynamic could theoretically make a difference along the lines of Thayer's remarks about a difference between federal courts reviewing acts of Congress vs. acts of state legislatures. However, I saw no signs of any court among these cases noting a difference in any standard of judicial review concerning state vs. local legislation in the constitutional context. I did not include cases involving preemption or the scope of cities' delegated powers, only where ordinances were declared constitutional or unconstitutional under the state or U.S. constitution.

Finally, I added to these cases for the six states cases from those states from the previous section, both cases from the six states that used "reasonable doubt" as a standard of judicial review and cases from the six states that did not. I added the handful of instances of the reasonable doubt standard being used that I found through the state-specific research that I had missed the first time because the exact phrases "reasonable doubt" or "rational doubt" were not used, i.e., majority opinions where the standard was otherwise mentioned such as by saying "beyond any doubt."

And here is the summary of the results by state. The full list of cases is in the Appendix.

TABLE B

State High Court	Cases in 1880–84 where the court applies a reasonable doubt standard when exercising judicial review (in none was a law held unconstitutional)	Cases in 1880–84 where the court does not apply a reasonable doubt standard when exercising judicial review (subset holding a law was unconstitutional)
Arkansas	2	28 (8)
California	1	26 (9)
Connecticut	1	12 (0)
Florida	1	17 (6)
Iowa	3	24 (9)
Missouri	6	29 (7)

Total from these 6 states	14	136 (39)

Let's go through these numbers. The bottom line is that in the high courts of the six states who Green and Webb claim applied the reasonable doubt standard before 1880, and who actually applied it at least once from 1880 through 1884, those courts failed to apply it ninety-one percent of the time (fourteen out of 150 instances). Looking at individual states, Missouri applied it far more than any other—six times—but still only applied it seventeen percent of the time. The next highest rate is Iowa with eleven percent. Both the median and average number of applications of the reasonable doubt standard during this five-year period is two opinions (rounding to the nearest whole number). None of these six states saw an application of the reasonable doubt standard that resulted in the court declaring a law unconstitutional, with a zero for fourteen record. But the unconstitutionality rate in cases where it was not applied was a not insubstantial—some might even say "judicially engaged"[165]—twenty-nine percent (thirty-nine of 136). Indeed, overall, including all instances of judicial review in these six states, the rate of finding laws unconstitutional was twenty-six percent (thirty-nine of 150).[166]

I should add that of the 136 opinions, ten of them included a clear error standard and four of those ten declared a law unconstitutional. These are noted in the Appendix. This is not a huge amount of evidence, but perhaps does demonstrate that judges were a little more comfortable mentioning a "clear error" standard when declaring laws unconstitutional than mentioning a reasonable doubt standard, and perhaps pushes back on Green's suggestion that the two standards were basically the same. Further, reasonable minds can disagree on when a court is

[165] *See generally* CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 3 (Encounter Books 2013) (articulating notion of judicial engagement).

[166] Although Connecticut stands out as a land of judicial restraint, overall twenty-six percent is an intriguing number. Although it is far beyond the scope of this Article, I am sure I am not alone in wondering how that compares to, say, the *Lochner* era, or to the antebellum period, or to the present day, in both state and federal courts for overall rates of judicial review. My speculative guess is that twenty-six percent is a fairly high percentage historically. More surveys of more periods for overall rates would be exceedingly helpful in assessing what courts at what periods have been more "judicially restrained" or "judicially engaged." Various studies like this have been done for the U.S. Supreme Court, but due to its narrow and discretionary docket its numbers will not give the whole story. *See, e.g.*, CLARK NEILY & DICK M. CARPENTER II, GOVERNMENT UNCHECKED: THE FALSE PROBLEM OF "JUDICIAL ACTIVISM" AND THE NEED FOR JUDICIAL ENGAGEMENT 12 (2011) (enumerating Supreme Court declarations of unconstitutionality since 1958).

"applying" a reasonable doubt standard. If the standard was mentioned in a long quotation from another case or from a work of Thomas Cooley, I included it, as it did indicate the court was asserting that it was a legal rule even though, as a practical matter, the court did very little "applying" of the facts or law of the case to the standard.

Again, these are only the six states where, according to Green and Webb, the reasonable doubt standard had been applied before 1880 and my "reasonable doubt"/"rational doubt" inquiry found it was applied again at least once during 1880–84. If we were to include states that did not use the standard during that period but had applied it before, the rate of the standard's use in judicial review cases would, by definition, drop even further. This is because in those states the rate would be zero (or virtually zero), and that would then affect the overall rate. Again, those states, as identified by Green and Webb, are, in order of first application: Pennsylvania, Massachusetts, Maryland, New York, Michigan, New Hampshire, Vermont, and Wisconsin.[167] Additionally, I found North Carolina.[168] With the addition of these states to the six included in the survey, the overall rate of when the reasonable doubt standard is actually used in instances of judicial review might plumet to low single digits.[169]

For this period, use of the reasonable doubt standard is the exception—a small exception—when courts are engaging in judicial review. And it is almost nowhere to be seen in a majority opinion when a court pulls the trigger on declaring a law outright unconstitutional. Looking back at Table A there are literally only two instances nationwide. Yet from these six states alone we have thirty-nine cases where the standard was not applied and the law came out as unconstitutional. Perhaps that was accidental, perhaps it was very purposeful, but either way it demonstrates the "standard" was not a very standard thing.

I have not previously written on the issue of "liquidation," whether it is a viable concept in constitutional interpretation, and what its contours are. And I do not think it necessary to do so here. But whatever

[167] *See* Green, *supra* note 2, at 179–80; Webb, *supra* note 5, at 313–14, 325, 341–42, 344, 346.

[168] *See supra* note 145 and accompanying text.

[169] Again, there would no doubt (pun intended) be a few "reasonable doubt" cases where "doubt" is used in a different way, such as the four cases in the six states that I found after reviewing all judicial review cases in those states, listed *supra* in note 162. For example, I dipped into the small corpus of Vermont cases and found one example, Drew v. Hilliker, 56 Vt. 641, 647 (1884) (fishing law declared constitutional; applied reasonable doubt standard). But the fact that there were only these a few cases in states where we have evidence the courts actually were using the standard (even if rarely) during this period when saying "reasonable doubt" indicates that the rate is likely to be less—perhaps as low as zero—in other states.

"liquidation" means, after looking at these numbers it seems to be that, at least for this five-year period, the reasonable doubt standard was not "liquidated." Or if it had been, that liquidation was now forgotten. The standard does exist in caselaw, but barely. A few courts cite it and, as Webb demonstrates in detail, treatise writers and other legal notables sing its praises.[170] And yet in the period of 1880–84, just a few years before Thayer's essay, what Spitzer found as true in the twenty-first century was also true then. The reasonable doubt standard was a standard that, in the abstract, many, perhaps most, jurists and scholars seemed to agree with. But when the time came to *actually use* it, it was not employed other than to layer on a judge's excuse for upholding the constitutionality of a statute. Laws do not stand or fall based upon whether they fail the standard or not. Perhaps judges have it in the back of their mind in the other ninety-plus-percent of the time they exercise judicial review and it thereby influences how they rule. Perhaps they just don't like stating something so obvious. Perhaps. The more plausible conclusion is that the standard, as a standard—that is, a rule that judges apply facts and law to in order to come to a ruling—is not used when it is not written down. The more plausible conclusion is that the standard is overwhelmingly irrelevant.

Maybe the rate of use could be different in other periods, such as 1885–89 or 1870–74, or what have you. And scholars are welcome to test those waters. But I am doubtful.

III. WHY IS THE REASONABLE DOUBT STANDARD SO ABSENT FROM ACTUAL CASELAW? MAYBE BECAUSE IT ISN'T A "STANDARD."

Even though courts rarely used the reasonable doubt standard in our surveyed slice of the pre-1893 period, giants of the age such as Thomas Cooley supported it and, as Webb documents, very few jurists or scholars criticized it.[171] So why did courts not actually *use* it more? The standard seems a bit like a girlfriend in Canada: much talked about but rarely seen.[172]

I have a theory. It mirrors some of what Spitzer says about the same issue in the twenty-first century but also extends his conclusions. And it is

[170] *See* Webb, *supra* note 5, at 327–29, 331, 335, 339–44, 345–47, 349–53.

[171] A rare example that Webb highlights is a speech by Justice David Brewer in 1891. *Id.* at 358.

[172] THE BREAKFAST CLUB (Universal Pictures 1985) (wherein Anthony Michael Hall's character, Brian Johnson, falsely claims, "She lives in Canada, met her at Niagara Falls. You wouldn't know her.").

this: I think the reasonable doubt "standard," as it is *actually used*, is not really a "standard" at all. So, it is not seen as very useful and therefore does not get used all that much. It *could* function as a real standard, and if it did it might be kind of like the late *Chevron* test.[173] If it were, though, we would see it much more often. As it is actually used, it does not, and cannot, do much to assist courts with judicial review beyond a slight nudge at the edges of adjudication.

However, Thayer's articulation of the reasonable doubt standard may have helped change things. Although the standard as it was before Thayer lived on and remained, an occasional and unhelpful decoration of state constitutional practice into our own times as Spitzer has shown, it separately diverged and evolved into the modern rational basis test. For all its faults, that *is* a standard that courts use to determine the constitutionality of legislation.[174] But it is a different animal from the reasonable doubt "standard" as it existed before Thayer.

To outline this idea, I will first look at how standards are used in judicial review, how the reasonable doubt "standard" worked in the cases from my survey period, and then look at how Thayer and others moved it along into the rational basis test. In short, there was judicial deference to the legislature before Thayer, but it was different from Thayer's version and the deference that was to come. This is simply an overview and perhaps a more detailed exploration would find it is a flawed explanatory narrative. But I think I am on to something.

A. Standards in Judicial Review.

We can start by addressing a basic terminological question: What is a "standard" when it comes to judicial review? There likely are many ways we could define "standard," and it is not worth having that inquiry here. For my purposes, a "standard" assists a court in determining whether a law is constitutional. There are many examples, some of which we will explore below. A few common ones are the strict scrutiny standard, the *Pike* balancing standard used in some dormant Commerce Clause cases,[175] and the rational basis test.

Moving on, how do standards work in constitutional judicial review? Of course, the ultimate standard is the constitution itself, whether that be

[173] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[174] *See infra* Part III.D.

[175] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

the U.S. Constitution or a state constitution. Many examples of judicial review simply involve judges reading the constitutional provision in question, comparing it to the statute and facts, and then deciding if the law transgresses the provision.[176] That sounds much easier than how it actually works, of course. But we should not forget that is at bottom what judicial review is. The "standard" is the constitution.

Sometimes (perhaps most of the time) the constitution is not enough. Consider the multitude of ambiguities inherent in constitutional liquidation: What does "commerce among the several states" mean? "Equal protection of the law" in relation to what? "Cruel and unusual" to whom and when? Then a court needs to turn to something like strict scrutiny or *Pike* balancing. To see how this works, and how it worked during my survey period, we will do a brief case study of *Ex parte Levy*, an 1884 Arkansas case from the Appendix that does not use the reasonable doubt standard.[177] The case uses a couple standards and seeing how it uses them will help us when we look at the reasonable doubt standard itself.

Poor Mr. Levy just wanted to sell liquor.[178] He applied to the local county court for a license as state law mandated.[179] The court denied his application and denied a number of other people's applications as well.[180] At the same time, however, it granted almost as many other applications (eight grants to ten denials) and, Mr. Levy alleged, the denied applicants had "as good moral character as those whose applications were granted."[181] He argued this was an unconstitutionally arbitrary system where judges could hand out or deny licenses at whim.[182]

He claimed the system violated two provisions in the state constitution: a ban on monopolies and a ban on unequally granted privileges or immunities.[183] For the first provision, the court looked at the text and indicated it needed more to guide its analysis.[184] In other words, the court needed something more—constructions, standards, guidance, etc.—because the text did not offer a clear answer.[185] It was particularly

[176] This is arguably what happened in *Marbury* itself, when Marshall interpreted Article III's jurisdictional grant. *See* Marbury v. Madison, 5 U.S. 137, 174 (1803).

[177] *Ex parte* Levy, 43 Ark. 42 (1884).

[178] *Id.* at 47.

[179] *Id.* at 47–48.

[180] *Id.* at 47.

[181] *Id.*

[182] *Ex parte* Levy, 43 Ark. at 46 (argument made by counsel).

[183] *Id.* at 52.

[184] *Id.*

[185] *Id.* at 51–52.

perplexed with how to define "monopoly." Looking to other states with similar provisions, it lamented: "[i]t is to be regretted that the States which have set up the inhibition, have not, with it, given us some more satisfactory definition of a monopoly than can be derived from its literal meaning."[186] But the court nevertheless moved forward and concluded that what the provision forbids is not all literal monopolies, but those that are "detrimental and offensive."[187]

We can call "detrimental and offensive" the "standard" the court devised for helping it interpret the constitutional provision.[188] It then concluded that the liquor licensing system was not a forbidden monopoly.[189] However, the court came to a different conclusion for the ban on unequal privileges or immunities.[190] Going through the various terms of the clause and looking at various sources to find their meaning, it concluded that the handing out of licenses, even for liquor, with no guidelines violated this constitutional inhibition because it gave the county court "the power, arbitrarily to grant licenses to some individuals, and refuse them to others in the same township or ward, equally as competent and as worthy."[191]

Therefore, in Mr. Levy's case the standard for each constitutional claim was, essentially, is there a "detrimental and offensive monopoly" and "does the system grant licenses on an arbitrary basis"?[192] While not the most exact standards, and while the standards themselves raise all kinds of subsidiary questions (What does detrimental mean? How arbitrary is "arbitrary?") these are standards judges can plug facts and statutes into and try to come up with an answer.

The same thing happens today. Let's look at a common example. As the U.S. Supreme Court said in the *Central Hudson* case, when the government regulates "commercial speech," i.e., advertising, the speech is unprotected unless the regulation satisfies a few criteria. First, the speech that is being regulated cannot be misleading and must concern lawful activity.[193] If so, the regulation is unconstitutional unless the government's interest is substantial, the regulation directly advances the

[186] *Id.* at 52.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 52–53.
[190] *Id.* at 61.
[191] *Id.*
[192] *See id.* at 52, 61.
[193] Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

interest, and the regulation is not more extensive than necessary.[194] This is a routine multipart standard that, while in the exciting context of constitutional law, looks like so many incredibly ordinary tests used in law generally. Legal hornbooks are full of them, from negligence to proving criminal liability for specific crimes to evidentiary burdens. A court applying the commercial speech doctrine will analyze the facts, apply them to this checklist, and come up with an answer.

The same "check the boxes" approach arises in all kinds of other areas of constitutional law. For a law that treats members of one race differently than another, the law must pass a version of strict scrutiny.[195] The government must demonstrate that the racial classification (1) is used to further a compelling governmental interest and (2) the use of race must be narrowly tailored.[196] On the other side of the equal protection scale, a law that taxes two similarly situated people differently receives the infamous rational basis test, which simply requires of the government a (1) rational relationship between the disparity of treatment and (2) a legitimate governmental interest.[197] Then there is the wild and changing world of Second Amendment law. Under *New York State Rifle & Pistol Ass'n v. Bruen*, the Court tried to eschew multipart tests and said the standard for a Second Amendment challenge was whether the firearms law is "consistent with the Second Amendment's text and historical understanding."[198] And until it was thrown out in *Dobbs v. Jackson Women's Health Organization*,[199] the standard for challenges to restrictions on obtaining an abortion was the "undue burden standard" where "a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[200]

Famously, all of these standards ask many more questions than they lend answers to, and their elements can spawn multipart sub-tests (and sub-sub-tests) to figure out how to check (or weigh) the boxes on the overall test. But they all look like legal tests that at least give courts a roadmap to address constitutional challenges under either specific provisions of a constitution, such as the Free Speech Clause of the First

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[194] *Id.*

[195] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 306 (2023).

[196] *Id.*

[197] Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012).

[198] N.Y. State Rifle & Pitol Ass'n v. Bruen, 597 U.S. 1, 26 (2022).

[199] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

[200] Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion).

Amendment, or general doctrines, such as separation of powers or the nondelegation doctrine.

Ex parte Levy is no different. The two standards for Mr. Levy's two arguments were in the same species as the more recent methods of applying constitutional text to cases. Elements, tests, standards, and the like were not alien to the 1880s.

B. The Reasonable Doubt Standard Is Not Used as a Standard.

And yet the reasonable doubt standard for judicial review is nothing like any of these other constitutional standards. It is not about any particular text or even a doctrine of any constitution. It purports to concern *all* judicial review.[201] And yet it is hardly anywhere, at least in the early 1880s. But when we compare it with these familiar examples, it is perhaps easy to see why. It is not obviously a standard that a court can actually use when it is looking at facts, constitutional text, and doctrine. If anything, it is a standard about how to think about standards.[202] It could be used as a kind of "meta-standard," but it generally is not.

How would the reasonable doubt standard have added to Mr. Levy's case? The court seemed quite uncertain how to address Mr. Levy's monopoly argument, so perhaps it could have simply said "not a lot of precedent to go on here, we're just going to say the question is not beyond a reasonable doubt." But it did not. And yet, it still upheld the law under the monopoly provision.[203] Moving to the next part of the opinion, perhaps after the Arkansas Supreme Court's long investigation of whether the law violated the bar on special privileges or immunities it should have said "and this law is so arbitrary that there is no reasonable doubt to the contrary." That would have been a bit awkward, though, as in its survey of the caselaw it cited other state high courts that had upheld similar laws, including the high court in Massachusetts, whose reasoning

[201] Thayer gives no limitation to its use other than the context of federal courts reviewing state laws. *See supra* notes 32–55 and accompanying text.

[202] This claim should not be confused with a separate point that Michael Smith recently made about Thayer's reasonable doubt standard: That it concerns adjudication, not interpretation, as it does not tell non-judicial actors how to interpret the Constitution. It is therefore not a theory of constitutional interpretation like originalism or common law constitutionalism. *See* Michael L. Smith, *Thayerian Deference and Constitutional Interpretation*, 103 TEX. L. REV. ONLINE 220, 221 (2025) (arguing that it concerns adjudication, not interpretation, as it does not tell non-judicial actors how to interpret the Constitution. It is therefore not a theory of constitutional interpretation like originalism or common law constitutionalism). I agree with Smith's argument. As hopefully is clear, everything I discuss here regarding Thayer's standard is within the adjudicative context.

[203] *See Ex parte* Levy, 43 Ark. 42, 52–53 (1884).

the Arkansas court characterized as "not very satisfactory, nor easily grasped."[204] As we saw, under Thayer's conception of the standard, the fact that a similar law had been upheld in Massachusetts might have been enough to simply reject the challenge in Arkansas.[205] But, one could counter, perhaps the Massachusetts court was so "unreasonable" that it was outside the buffer zone of the reasonable doubt standard. If the *Ex parte Levy* court had applied the reasonable doubt standard—and taken it seriously—this would be an important question.

What probably would have happened though, is the court would have mouthed the reasonable doubt standard and then simply moved on to rule whichever way it was going to rule anyway. In the very rare case where the standard is actually mentioned and the court concludes a law is unconstitutional, the court can do this tap dance by simply emphasizing this is one of the unusual cases where the law really is beyond any reasonable doubt as to its constitutionality and leave it at that. For example, in *State v. Powell*, one of only two cases in a state high court I found during the 1880–84 period—in *any* of thirty-eight states—to articulate the standard and nevertheless render a law unconstitutional, the court addressed whether a prosecutor could constitutionally appeal a not guilty verdict from a justice of the peace.[206] The court mentioned the reasonable doubt standard but said:

> Reluctant as the court is, and ought to be, to pronounce an act of the general assembly passed with deliberation, void because of its repugnancy to the constitution, and which it will only so declare when the repugnancy is manifest and free from reasonable doubt, the predominant authority of the latter must be maintained when they are irreconcilable, and this we do not hesitate to say of the provision of the act in question upon the suggested interpretation of its intent and meaning.[207]

That is the only mention of the reasonable doubt standard in the entire opinion.[208] Would the analysis of *Ex parte Levy* really have been different if it had added a sentence—a single sentence—like this? There is no reasonable doubt as to the answer.[209]

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[204] *Id.* at 58.

[205] *See* Thayer, *supra* note 1 and accompanying text (discussing the "any mind" standard).

[206] State v. Powell, 86 N.C. 640, 644–45 (1882).

[207] *Id.* at 646.

[208] *Id.* at 642–47.

[209] See what I did there? Of course you did. I added a term that emphasized how right I am, akin to adding "clearly" or "obviously" before the legal conclusion I was advocating. It is not a coincidence that these are terms legal writing instructors try to beat out of their pupils in the first year of law school. *See* Wayne Schiess, *Using Intensifiers: Is it Literally a Crime?*, 84 TEX. BAR J. 596, 596 (2021) ("Doctrinaire adverbs such as *clearly* and *obviously* are perceived as signaling overcompensation for a weak argument." (citing BRYAN GARNER, THE WINNING BRIEF 523 (3d

Further, we can see how haphazard the reasonable doubt standard can be by examining *Gates v. Brooks*, another case that applied the standard but upheld the challenged law.[210] There, to sort out a boundary dispute, one of two sets of Iowa neighbors turned to a statutory system where their dispute went to neutral commissioners who reported their findings to the court without a jury.[211] One side challenged the system as unconstitutional because it lacked a jury and because "they [had] been deprived of their property without due process of law."[212]

Essentially, the court addressed the arguments by saying that the facts of the case did not allow for it to reach them.[213] Although the specifics of the underlying land dispute are a bit befuddling, the court explained that the challengers' essential claim was that the commissioners drew a line incorrectly.[214] But it states that this is based on another claim about the property lines that is not before the court.[215] That does not stop the court, though, from addressing the subject of constitutionality. It tersely concludes that on top of everything else the challengers are "not deprived of property within the meaning of the constitution."[216] Immediately following this, the court quotes *Cooley on Constitutional Limitations* where Cooley says "reasonable doubt must be solved in favor of the legislative action, and the act sustained" calling this "an elementary principle."[217] And then the court says "[s]uch being our view of the nature of the defendant's claim, we cannot properly hold the statute unconstitutional."[218]

That's it. There is no exploration of what a "reasonable doubt" means in this context, whether there might be if the case had come in a different posture, or even what is so "reasonable" about the law. The court does not even intimate that this is a close call where a "reasonable doubt" tiebreaker might make the difference. Why the reasonable doubt

ed. 2014))). Lawyers are taught not to *say*, for example, that their client's opponent is "clearly" liable. Instead, they are taught to *show* it. Even so, these words creep into all of our writing, whether as advocates, judges, or scholars. Perhaps at bottom this is all "reasonable doubt" is to most judges who use it in the constitutional context. Perhaps it is just an example of bad legal writing.

[210] Gates v. Brooks, 6 N.W. 595 (Iowa 1882).

[211] *Id.* at 596.

[212] *Id.* at 513.

[213] *Id.* at 514.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* (citing "Cooley on Const. Lim., 182 and cases cited").

[218] *Id.*

standard is mentioned in this opinion, and not dozens of others from the same sample period by the same court, is anyone's guess.

If the "reasonable doubt" mention had been taken out of *Gates v. Brooks*, the Iowa Supreme Court would have been just as explanatory. The standard simply seems to be there so the court can go a little easier on the losing party, in effect saying, "our hands are tied" and reiterating to everyone else "we're just judges and we're just doing our job." Perhaps one of the judges was a friend of the losing counsel and wanted to go easy on him? Who knows. But it works as an explanation as well as any other.

C. A Chevron for Constitutional Judicial Review? Perhaps in Theory, but not in Practice.

It might be countered that these worries about the reasonable doubt standard are beside the point because it is not a constitutional standard in the usual sense, but a presumption. Maybe we should not compare it to something like *Pike* balancing but to something like the recently defunct *Chevron* test. Under *Chevron*, courts sided with an agency's interpretation of a statute if the statute was ambiguous and the agency's interpretation was "reasonable."[219] In other words, it was a kind of "meta standard" about interpreting statutes. Of course, the reasonable doubt standard is not worded the same way as *Chevron*, so it would function a bit differently. But perhaps it could still function as a "meta standard" that would be used in most cases of its genre: review of statutes for compatibility with a constitution instead of review of regulations/actions for compatibility with a statute. A court would conclude its constitutional analysis under the standards applicable to the constitutional claims, such as *Central Hudson*'s four-step test, the rational basis test, the "detrimental and offensive monopoly" standard, etc., and then step back and ask, "With all that being said, is there any reasonable doubt that this law is unconstitutional?" That, at first glance, seems to be a way "reasonable doubt" could function as an actual standard of judicial review.

Yet that only makes sense if the court is otherwise about to declare the law unconstitutional, not uphold it. If it is going to uphold the law, then asking if there is a "reasonable doubt" is superfluous. We have found, however, that in practice the opposite is the case. When courts actually invoke the standard they overwhelmingly uphold the law at

[219] Chevron U.S.A., Inc v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

issue.[220] Therefore, the standard does not seem to be doing all that much. *Gates*, the Iowa boundary dispute, stands as one example out of many from the 1880–84 period.[221] Indeed, that is what Spitzer found for our present century, where eighty-three percent of the time that the standard appears the law is upheld.[222]

Further, although the survey in this Article is limited to 1880–84, we can get a bit of a sense of how the standard worked at other times before Thayer's essay by looking at the "first" cases that Green and Webb examine before 1893. The first application of a standard by a state high court is not a "routine" application, of course, so we should not rely too much on a review of them, especially considering the period covers eighty years, 1811–91. But nevertheless, looking at those cases does largely conform to both my survey of 1880–84 and to Spitzer's.[223] Green identifies twenty-three cases where state high courts first apply the reasonable doubt standard before 1893.[224] And of those, in only four does the court declare a law unconstitutional.[225] The rate is exactly the same as in Spitzer's survey: eighty-three percent.[226]

Thus, a reasonable doubt standard could function as the "administrative rule" that Thayer claims it is.[227] A final "OK, now let's think

[220] *See supra* Part II.C.

[221] *See* 6 N.W. at 596; *infra* Appendix.

[222] *See* Spitzer, *supra* note 4, at 1433.

[223] *See infra* notes 224–25.

[224] *See* Green, *supra* note 3, at 179–80. Some of these "firsts" may not actually be "firsts", as I found with some of them (mostly from after 1893) above. *See supra* Part II.A. That does not matter for the present analysis, however, which is simply to examine a set of pre-1893 reasonable doubt cases.

[225] The cases in Green, *supra* note 3, at 179–80 are the following, with holdings of unconstitutional noted in bold: Commonwealth *ex rel.* O'Hara v. Smith, 4 Binn. 117, 123 (Pa. 1811); *In re* Wellington, 33 Mass. 87, 95 (1834); Regents of Univ. of Md. v. Williams, 9 G. & J. 365, 383 (Md. 1838) (unconstitutional); Morris v. People, 3 Denio 381, 394 (N.Y. 1846); Eason v. State, 11 Ark. 481, 486 (1851) (unconstitutional); Cotten v. Leon Cnty. Comm'rs, 6 Fla. 610, 612–16 (1856); Sears v. Cottrell, 5 Mich. 251, 255 (1858); Rich v. Flanders, 39 N.H. 304, 312 (1859); Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210, 227 (1860); Cohen v. Wright, 22 Cal. 293, 308 (1863); State *ex rel.* Chandler v. Main, 16 Wis. 398, 399, 415 (1863); Abbott v. Lindenbower, 42 Mo. 162, 168 (1868) (unconstitutional); Stewart v. Bd. of Supervisors, 30 Iowa 9, 15 (1870); Town of Bennington v. Park, 50 Vt. 178, 191 (1877); Pelzer, Rodgers & Co. v. Campbell & Co., 15 S.C. 581, 593 (1881); Home Ins. Co. v. Swigert, 104 Ill. 653, 669 (1882); Chesapeake & Ohio Ry. Co. v. Miller, 19 W. Va. 408, 422 (1882) (unconstitutional); Alexander v. People *ex rel.* Schofield, 2 P. 894, 896 (Colo. 1884); Sullivan v. Berry's Adm'r, 83 Ky. 198, 206 (1885); State v. Dist. of Narragansett, 16 A. 901, 906 (R.I. 1889); Cole Mfg. Co. v. Falls, 16 S.W. 1045, 1046 (Tenn. 1891); Doan v. Bd. of Cnty. Comm'rs, 26 P. 167, 170 (Idaho 1891); State v. Morgan, 48 N.W. 314, 316 (S.D. 1891).

[226] *See* Spitzer, *supra* note 4, at 1433.

[227] Thayer, *supra* note 1, at 139–40.

about this really carefully" where a court is otherwise about to toss a law out. Indeed, that framing is what Green suggests some judges saw the reasonable doubt standard as doing when he compares it to the administrative review doctrine of *Overton Park*.[228] But even if that were true for some judges, its near total absence in this Article's survey, not to mention Spitzer's, demonstrates that it was not a task judges tied to that standard very often, even if that type of review is actually what they occasionally did.

Therefore, as it was actually used, the reasonable doubt standard was by-and-large not an actual standard in the years before Thayer's essay. It was not evidence of actual judicial restraint, other than an occasional splash of rhetoric. Something may have changed after Thayer's essay, though. Not immediately, but eventually.

D. "Not Open to Rational Question" Becomes "No Rational Basis"

The origins, evolution, and justification of the modern rational basis test are far beyond the scope of this modest article. I am not proposing a new theory about where it came from or what it means, and anyone who has read my other work will know I am a savage critic of it.[229] This is not the place to retread those arguments. A short synopsis, however, of its background and purpose can demonstrate how it ties into Thayer's reasonable doubt standard.

You can't swing a cat in law without hitting "reasonable." There are the various forms of "reasonable doubt" we have already discussed. There is that main character of tort law, the "reasonable person."[230] The Fourth Amendment refers to "unreasonable searches and seizures."[231] In constitutional law more generally, a "reasonableness" standard has long permeated analysis.[232] As Alexander Bickle pointed out, *McCulloch v. Maryland* largely concerned whether a bank of the United States was a reasonable means to carry out Congress's ends.[233] Indeed, in that

[228] Green, *supra* note 3, at 191.

[229] *See, e.g.*, ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 135–36 (2023).

[230] Which formerly was known as "the reasonable man." *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 149 (Am. Casebook Series & Hornbook Series eds., 4th ed. 1971) (section in negligence chapter entitled "The Reasonable Man").

[231] U.S. CONST. amend. IV.

[232] *See infra* notes 232–34.

[233] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35–46 (2d ed., Yale Univ. Pres 1986) (1962). Bickel more generally argued

supposed high-water mark of aggressive judicial review, *Lochner v. New York*, the majority asked what seems a modest question: "Is this a fair, reasonable and appropriate exercise of the police power of the State . . ." ?[234] The same was true in many other *Lochner* era cases.[235]

Lochner is particularly appropriate here because it concerned the Fourteenth Amendment's Due Process Clause.[236] The modern rational basis test emerged from litigation concerning challenges to the substantive content of laws via that clause and its twin in the Fifth Amendment—what we today call "substantive due process"—plus the Equal Protection Clause. Cases such as *West Coast Hotel*,[237] *Carolene Products*,[238] and *Williamson v. Lee Optical*,[239] created a reasonable/rational standard that, while sharing similar terminology to the *Lochner* era cases concerning the same constitutional provisions, was actually a standard that made it much easier for the government party to win. As has been said many times, the rational basis test is sometimes interpreted to require proof of virtual insanity on the part of legislators for the government to lose.[240] The Supreme Court has applied versions of the test in other contexts, such as under the Commerce Clause and Public Use Clause.[241] But its home and where it is most identified is in substantive due process and equal protection cases, outside of the few areas of "fundamental rights" or "suspect classifications" where those clauses can bear much bigger teeth.

As we detailed earlier, the rational basis test is an actual standard courts can use, and do use, even though the government almost always

that "reasonableness" was essentially the issue at the heart of most constitutional questions. *Id.* at 35–46.

[234] Lochner v. New York, 198 U.S. 45, 56 (1905).

[235] *See, e.g.*, Truax v. Raich, 239 U.S. 33, 41 (1915) ("It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating . . ."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("Mere knowledge of the German language cannot reasonably be regarded as harmful."); New State Ice Co. v. Liebmann, 285 U.S. 262, 278 (1932) ("Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment.").

[236] *Lochner*, 198 U.S. at 53.

[237] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937);

[238] United States v. Carolene Prods. Co., 304 U.S. 144, 152–54 (1938).

[239] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486–91 (1955).

[240] Michael Bertty, et al., *Civil Rights Law in Transition: The Forty-Fifth Anniversary of the New York City Commission on Human Rights Welcoming Remarks*, 27 FORDHAM URB. L.J. 1105, 1219 (2000) (describing the "you have to show that the state legislature was legally insane in order to win" understanding of rational basis review).

[241] *See*, *e.g.*, Gonzales v. Raich, 545 U.S. 1, 22 (2005); Kelo v. City of New London, 545 U.S. 469, 490 (2005).

wins.[242] In the substantive due process context it is a way of balancing the claimed "non-fundamental" right, such as the right to contract, against the government's justification for infringement.[243] In the equal protection context it is a way of balancing unequal treatment with the government's justification for that treatment.[244] It is unlike the reasonable doubt standard, whether it be the reasonable doubt standard from cases from the 1880s or the twenty-first century. It functions as more than just to emphasize that the court is treading carefully.

Thayer's own articulation of the reasonable doubt standard, however, is more like the rational basis test than the real-life reasonable doubt standard. It is not like the rational basis test, of course, because it is a "meta standard," not a standard for interpreting a particular clause or clauses. But like the rational basis test, Thayer's standard seems to have incredibly hard to satisfy criteria for a conclusion that a law is unconstitutional. This is especially true if we read him less like advocating for an *Overton Park* searching-inquiry standard and one requiring unconstitutionality "so clear that it is not open to rational question."[245] If we take Thayer's logic to its conclusion—something he does not spell out—then in every instance of judicial review a court would utilize something like the rational basis test. That *is* a standard courts could implement. It is also one that most of us, other than true believers in real legislative supremacy such as Lino Graglia,[246] would reject. It is also not what courts did before Thayer's essay.

The rational basis test, like many things, does not have monocausal roots. In some ways it was lying there in the *Lochner* era standards, just with the meaning of "reasonable" turned way up and the deference to legislative findings turned way down. But many have also seen the hand of Thayer in the coming of the rational basis test.[247] And it therefore

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[242] *See*, *e.g.*, Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071–72 (2015) (detailing a win rate of no more than seventeen percent at the Supreme Court). I know of no study that comprehensively looks at rational basis win/loss rates in the lower courts, but in my experience as a scholar and litigator the rate of rational basis victories against the government is lower, perhaps much lower, there.

[243] *Id.* at 2089.

[244] Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012).

[245] *See* Thayer, *supra* note 1, and accompanying text.

[246] *See generally*, Lino A. Graglia, *The Burger Court and Economic Rights*, 33 TULSA L. REV. 41, 42 (1997).

[247] Mark L. Rienzi, *Religious Liberty and Judicial Deference*, 98 NOTRE DAME L. REV. 337, 343 (2022) ("Instead of deploying their own constitutional analysis, Thayer argued that judges should apply a version of what today we might call a 'clear mistake' rule or 'rational basis' test."); Steven G. Calabresi, 57 ALA. L. REV. 635, 642 (2006) ("The New Dealers also were

seems uncontroversial to say that Thayer's advocacy for his "rule of administration," both directly and via Holmes, Frankfurter, and others,[248] led to the judicial restraint of the rational basis test and the push to apply it in various areas.

This is not to say that rational basis-looking adjudication did not take place before the modern rational basis test or before Thayer. There are plenty of examples of courts simply deferring to legislative judgments on questionable matters going back to the origin of judicial review.[249] *Plessy v. Ferguson*, authored just two years after Thayer's essay, is one obvious and infamous example.[250] The *Slaughterhouse Cases*, and Justice Miller's insistence that the Fourteenth Amendment was partly adopted to enable Americans to visit their subtreasuries, is another.[251] Legal historians will each quickly propose their own. Whether Thayer directly inspired the modern rational basis test is not my ultimate point. It is that whatever judicial restraint existed before Thayer's essay was of a different kind than what Thayer advocated for. And that what he advocated for had more in common with the judicial restraint of the modern rational basis test.

CONCLUSION

What I am hoping to add to the recent scholarship on Thayer and the reasonable doubt standard is to push back on the notion that in exploring the reasonable doubt standard specifically, Thayer was merely documenting a practice that went back before him. And I am also pushing back on a possible interference from that scholarship—*not* a conclusion that Green and Webb advocate for, but one I could see others inferring—that since Thayer was rightfully documenting a standard that had been used for decades and decades, with increasing popularity, the rational basis test of later years was rooted in that history and is part of the

influenced in their rejection of substantive due process by the pro-judicial restraint writings of James Bradley Thayer, whose 1893 *Harvard Law Review* article arguing for a Rule of Clear Mistake in American constitutional law inspired Holmes's dissent in *Lochner* and the eventual adoption of the rational basis test in *Carolene Products* and *Williamson v. Lee Optical*."); Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 OKLA. L. REV. 93, 94–95 (1994) ("Thayer's 'rule of the clear mistake' became the rational basis test, and in constitutional cases involving a wide variety of issues, the test became the customary benchmark for analysis.").

[248] *See* Mendelson, *supra* note 18, at 77–78.

[249] *See* Spitzer, *supra* note 4, at 1436.

[250] Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

[251] The Slaughter-House Cases, 83 U.S. 36, 123–24 (1872).

same tradition of judicial restraint. As I have demonstrated, the tradition of a reasonable doubt standard—while real—was mostly rhetorical, sparsely evidenced in actual court cases, and did not affect the outcome of cases. Judges used it when they wanted to show humility, did not use it when they wanted to declare a law unconstitutional, and most of the time upheld laws and simply did not care to mention it. The reasonable doubt "standard" pre-Thayer was different from the standard of reasonableness used in assessing the constitutionality of legislation under specific constitutional provisions, such as that of *Lochner* or *McCulloch*, or what have you. They shared the word "reasonable" and not much else.

In contrast, Thayer's claim that the standard actually did affect the outcome of cases and his ratcheting up of the standard helped create something *new* that would eventually take root at the U.S. Supreme Court and elsewhere in the late 1930s. Thus, we have two traditions: (1) the rhetorical use of "reasonable doubt" that has little to do with constitutional adjudication, stretches back to the early nineteenth century and, as Spitzer documents[252], continues today, and (2) "Thayerism" and the rational basis test. They are not the same.

This does not mean that the judges of the mid-to-late nineteenth century did not *believe* in something like a reasonable doubt frame-of-mind when engaging in judicial review. A "vibe," as we might say today. Most attacks on the constitutionality of legislation failed and there is plenty of language professing judicial humility and deference to judges' colleagues in legislative chambers.[253] But they did this in case-by-case, standard-by-standard adjudication, not through a "rule of administration" that governed all judicial review. There really was a girl in Canada that they sometimes talked about. But she wasn't their girlfriend.

[252] *See* Spitzer, *supra* note 4, at 1430–31.

[253] *See supra* Part II.

APPENDIX

Majority opinions where state high courts reviewed the constitutionality of statutes or ordinances under their state's or the United States' constitutions during the period 1880–84, inclusive. Opinions applying a reasonable doubt standard for constitutionality are listed first, by state, followed by those that did not. Cases where the court found a law unconstitutional have that word in bold.

Care has also been taken to note what majority opinions applied a clear error standard even though there was no reasonable doubt standard.

ARKANSAS (2 with reasonable doubt standard/28 without (of 28, in 8 the court declared a law unconstitutional))

Cases applying the reasonable doubt standard

- Dabbs v. State, 39 Ark. 353, 355, 357 (1882) (act forbidding the sale of certain weapons declared constitutional; "all doubts upon the subject are to be resolved in favor of the statute").
- Webster v. City of Little Rock, 44 Ark. 536, 553 (1884) (act governing city limits declared constitutional).

Cases that do not apply the reasonable doubt standard

- Bagley v. Castile, 42 Ark. 77, 84, 92 (1883) (act regulating land titles declared unconstitutional; doesn't use reasonable doubt but does apply a "clearly erroneous" standard for judicial review).
- Baker v. State, 44 Ark. 134, 138–39 (1884) (upheld tax on sewing machine industry).
- Brizzolari v. State, 37 Ark. 364, 369–70 (1881) (new constitution did not abrogate ordinance in question).
- Bush v. Visant, 40 Ark. 124, 129–30 (1882) (act regulating attachments declared constitutional).
- Chicot Cnty. v. Davies, 40 Ark. 200, 205, 215–16 (1882) (act authorizing counties to buy railroad stock upheld as constitutional).
- Clayton v. Johnson, 36 Ark. 406, 412, 414 (1880) (act regulating probate court declared constitutional; does not use reasonable doubt standard but does apply a "clearly in conflict" standard).
- Coats v. Hill, 41 Ark. 149, 151 (1883) (act regulating tax sales declared constitutional).
- *Ex parte* Batesville & Brinkley R.R. Co., 39 Ark. 82, 86 (1882) (act regulating how appeals of injunctions are reviewed declared unconstitutional).

- *Ex parte* Levy, 43 Ark. 42, 61 (1884) (liquor licensing law declared unconstitutional).
- German Bank v. Deshon, 41 Ark. 331, 340 (1883) (statute giving exception from interest limit for certain contracts declared unconstitutional).
- Green v. Abraham, 43 Ark. 420, 423 (1884) (quieting title law declared constitutional).
- Haile v. State, 38 Ark. 564, 565 (1882) (statute regulating the carrying of guns declared constitutional).
- City of Little Rock v. Bd. of Improvements, 42 Ark. 152, 162 (1883) (tax levy law declared constitutional).
- City of Little Rock v. Parish, 36 Ark. 166, 171 (1880) (act redrawing the boundary of the city of Little Rock declared unconstitutional; does not mention reasonable doubt standard but does allude to clear error—"Does it appear to us, clearly and palpably, that it is in violation of the organic law of the state?").
- McKibbin v. Fort Smith, 35 Ark. 352, 359 (1880) (ordering a property owner to demolish a structure did not violate "the Bill of Rights which declares that no person shall 'be deprived of his life, liberty or property, except by the judgment of his peers, or the law of the land.'").
- Memphis & Little Rock R.R. Co. v. Horsfall, 36 Ark. 651, 653 (1880) (affirming double damages liability for railroads was constitutional).
- Murphy v. State, 38 Ark. 514, 516 (1882) (affirming tax on criminal convictions was not an unconstitutional property tax).
- Oliver v. Martin, 36 Ark. 134, 140–42 (1880) (upholding act granting jurisdiction to certain courts; does not apply, but, in full disclosure, does arguably hint at a reasonable doubt standard by saying "we can not conclude, clearly and undoubtingly, that the act is unconstitutional on this ground" without any other mention).
- Potter v. State, 42 Ark. 29, 343 (1883) (declaring the jury vicinage act constitutional).
- Pulaski Cnty. v. Reeve, 42 Ark. 54, 56 (1883) (declaring act regulating county bonding constitutional).
- Robards v. Brown, 40 Ark. 423, 426–27 (1883) (law regulating mortgages declared unconstitutional).
- Smithee v. Campbell, 41 Ark. 471, 475–76 (1883) (judicial review of act allowing for state purchase of swamp lands).

- State *ex rel.* Marion Cnty. v. Certain Lands, 40 Ark. 35, 36–37 (1882) (act allowing for collection of overdue taxes declared constitutional).
- State v. Marsh, 37 Ark. 356, 359–60 (1881) (wine licensing law declared unconstitutional for favoring in-state wine makers).
- State v. McGinnis, 37 Ark. 362, 363–64 (1881) (peddling licensing law held unconstitutional).
- State v. Waller, 43 Ark. 381, 388–89 (1884) (law making slander a felony declared constitutional).
- Trammell v. Bradley, 37 Ark. 374, 384 (1881) (saloon licensing law declared constitutional).
- Williams v. Pindall, 35 Ark. 434, 437 (1880) (law requiring election challenger to post a bond declared constitutional).

CALIFORNIA (1 / 26 (9))

Cases applying the reasonable doubt standard

- Univ. of Cali. v. Bernard, 57 Cal. 612, 613 (1881) (bonding law declared constitutional)

Cases that do not apply the reasonable doubt standard

- Cal. Fruit & Meat Shipping Co. v. Super. Ct. of S.F., 60 Cal. 305, 307–08 (1882) (appellate jurisdiction statute ruled constitutional).
- Camron v. Kenfield, 57 Cal. 550, 553–54 (1881) (legislation amending the courts' power to issue writs declared unconstitutional).
- Desmond v. Dunn, 55 Cal. 242, 253 (1880) (municipal incorporation law declared unconstitutional).
- Earle v. Bd. of Educ., 55 Cal. 489, 493 (1880) (teacher salary law declared unconstitutional).
- Ewing v. Oroville Min. Co., 56 Cal. 649, 654–55 (1880) (law regulating corporate stock declared constitutional).
- *Ex parte* Ah Toy, 57 Cal. 92, 93 (1880) (peddling ordinance declared constitutional).
- *Ex parte* Burke, 59 Cal. 6, 20 (1881) (Sunday closing law declared constitutional).
- *Ex parte* Casinello, 62 Cal. 538, 541–42 (1881) (dumping law declared constitutional; does not use reasonable doubt standard but does use a clear error standard: "We must hold in favor of the power, unless its unconstitutionality is clear").

- *Ex parte* Koser, 60 Cal. 177, 189, 192 (1882) (Sunday closing law declared constitutional; does not use reasonable doubt standard; arguably does invoke a clear error standard).
- *Ex parte* Westerfield, 55 Cal. 550, 551 (1880) (Sunday closing law for baking declared unconstitutional).
- *In re* Maguire, 57 Cal. 604, 608–09 (1881) (ban on women, but not men, working in a position declared unconstitutional).
- Kalloch v. Super. Ct. of S.F., 56 Cal. 229, 241 (1880) (prosecution by information declared constitutional).
- Longan v. Cnty. of Solano, 3 P. 463, 465–66 (Cal. 1884) (county government statute declared constitutional; uses clear error standard but not reasonable doubt).
- Meredith v. Santa Clara Min. Ass'n, 60 Cal. 617, 620–21 (1882) (civil procedure rule declared constitutional).
- People *ex rel.* Borrell v. Boggs, 56 Cal. 648, 649 (1880) (surveying statute declared constitutional).
- People *ex rel.* Long v. Townsend, 56 Cal. 633, 637–38 (1880) (assessment statute declared unconstitutional).
- People *ex rel.* Pennie v. Ransom, 58 Cal. 558, 561 (1881) (judicial election law declared constitutional).
- People v. Chapman, 61 Cal. 262, 267 (1882) (board management statute declared unconstitutional).
- People v. Martin, 60 Cal. 153, 155–56 (1882) (local tax powers declared unconstitutional).
- People v. Parks, 58 Cal. 624, 643–45 (1881) (drainage law declared unconstitutional; applies clear error rule but not reasonable doubt rule).
- Reclamation Dist. No. 108 v. Hagar, 4 P. 945, 946–47 (Cal. 1884) (assessment statute declared constitutional).
- San Francisco v. Spring Valley Water Works, 54 Cal. 571, 574 (1880) (tax statute ruled constitutional).
- Smith v. Dunn, 28 P. 232, 233 (Cal. 1883) (officer compensation law declared constitutional).
- Spring Valley Water Works v. Bd. of Supervisors, 61 Cal. 3, 8–9 (1881) (state constitutional provision regarding water rights did not violate U.S. Constitution).
- Staude v. Bd. of Election Comm'rs, 61 Cal. 313, 323 (1882) (election law declared constitutional).
- Whiting v. Quackenbush, 54 Cal. 306, 311 (1880) (assessment law declared constitutional).

CONNECTICUT (1 / 12 (0))

Cases applying the reasonable doubt standard

- State *ex rel.* Andrew v. Lewis, 51 Conn. 113, 128 (1883) (statute regulating election challenges declared constitutional).

Cases that do not apply the reasonable doubt standard

- Comstock v. Gay, 51 Conn. 45, 64 (act regulating estates declared constitutional).
- Dibble v. Merriman, 52 Conn. 214, 216 (act prescribing terms of office for town officers declared constitutional).
- Donohue v. Maloney, 49 Conn. 163, 166 (1881) (liquor regulation declared constitutional).
- Griswold v. Bragg, 48 Conn. 577, 582 (1880) (ejectment statute declared constitutional).
- La Croix v. Cnty. Comm'rs of Fairfield Cnty., 49 Conn. 591, 607 (1881) (liquor licensing law declared constitutional).
- La Croix v. Cnty. Comm'rs of Fairfield Cnty., 50 Conn. 321, 328, 330 (1882) (liquor licensing law declared constitutional).
- Levick v. Norton, 51 Conn. 461, 471 (1883) (traffic law declared constitutional).
- McGarty v. Deming, 51 Conn. 422, 423 (1883) (law allowing cases before a justice of the peace declared constitutional).
- Raymond v. Fish, 51 Conn. 80, 100–01 (1883) (public health law declared constitutional).
- Reynolds v. Howe, 51 Conn. 472, 478 (1883) (commitment law declared constitutional).
- State v. Bradley, 48 Conn. 535, 547–48 (1881) (jury selection law declared constitutional).
- State v. Thomas, 47 Conn. 546, 552–53 (1880) (liquor law declared constitutional).

FLORIDA (1 / 17 (6))

Cases applying the reasonable doubt standard

- State *ex rel.* Lanier v. Padgett, 19 Fla. 518, 529 (1882) (statute concerning the fixing of a county seat upheld as constitutional).

Cases that do not apply the reasonable doubt standard

- Blanchard v. Raines' Executrix, 20 Fla. 467, 479 (1884) (law regulating liens for rent declared constitutional).

- Carr v. Thomas, 18 Fla. 736, 747 (1882) (law regulating land conveyances declared unconstitutional).
- Cnty. of Jefferson v. B.C. Lewis & Sons, 20 Fla. 980, 1001 (1884) (probate judge statute declared constitutional).
- Edgerton v. Green Cove Springs, 19 Fla. 140, 145 (1882) (law regulating the creation of streets declared constitutional; no reasonable doubt standard but an indication of a clear error standard with "we should have clear warrant for it in the letter of the fundamental law").
- City of Jacksonville v. Basnett, 20 Fla. 525, 528–29 (1884) (law regulating municipal taxing power declared constitutional)
- City of Jacksonville v. L'Engle, 20 Fla. 344, 351 (1883) (grant of powers to county commissioners declared constitutional).
- Lake v. State, 18 Fla. 501, 511–12 (1882) (act creating boards of health declared constitutional).
- Martinez v. Ward, 19 Fla. 175, 185–186 (1882) (delegation of power to judges over married women's rights declared constitutional).
- Moody v. City of Jacksonville, T. & K.W.R., 20 Fla. 597, 612–13 (1884) (eminent domain law declared unconstitutional).
- Palmes v. Louisville & Nashville R.R. Co., 19 Fla. 231, 264 (1882) (railroad tax exemption upheld as constitutional).
- State *ex rel.* Arpen v. Brown, 19 Fla. 563, 608 (1883) (liquor licensing law ruled constitutional except for two minor provisions).
- State *ex rel.* Chestnut v. King, 20 Fla. 399, 401 (1884) (statute allowing de novo trials of certain matters declared unconstitutional).
- State *ex rel.* Haley v. Stark, 18 Fla. 255, 267 (1881) (state statute regulating municipal incorporation declared unconstitutional).
- State *ex rel.* Markens v. Brown, 20 Fla. 407, 424 (1884) (liquor licensing law declared constitutional).
- State *ex rel.* Moody v. Baker, 20 Fla. 616, 655 (1884) (condemnation law declared constitutional).
- State *ex rel.* Wallace v. Baker, 19 Fla. 19, 28 (1882) (statute governing appeals declared unconstitutional in part).
- Webb v. Dunn, 18 Fla. 721, 732 (1882) (act imposing fees on ships from some states but not others declared unconstitutional).

IOWA (3 / 24 (9))

Cases applying the reasonable doubt standard

- Gates v. Brooks, 13 N.W. 640, 641 (Iowa 1882) (statute governing proceedings for boundary disputes upheld as constitutional).
- Merchants' Union Barbed-Wire Co. v. Brown, 20 N.W. 434, 436 (Iowa 1884) (ruling appropriation to farmers group is constitutional and applying reasonable doubt standard).
- State v. Stucker, 12 N.W. 483, 484 (Iowa 1882) (liquor law upheld as constitutional, applies a "no doubt" standard).

Cases that do not apply the reasonable doubt standard

- Andrews v. Burdick, 16 N.W. 275, 279 (Iowa 1883) (law regulating chancery jurisdiction declared constitutional).
- Bucklew v. Cent. Iowa Ry. Co., 21 N.W. 103, 107 (Iowa 1884) (different liability treatment of railroads declared constitutional).
- John A. Carton & Co. v. Ill. Cent. R.R. Co., 13 N.W. 67, 70 (Iowa 1882) (shipping law declared unconstitutional).
- Cook v. Burlington, 13 N.W. 113, 115 (Iowa 1882) (tax law declared constitutional).
- Cnty. of Black Hawk v. Springer, 10 N.W. 791, 791–92 (Iowa 1881) (civil commitment law declared constitutional).
- Craig v. Fowler, 13 N.W. 116, 117–19 (Iowa 1882) (bar on lawsuits against certain officers declared unconstitutional).
- Drady v. Des Moines & Fort Dodge R.R. Co., 10 N.W. 754, 761–62 (Iowa 1881) (condemnation law declared unconstitutional in part).
- City of Des Moines v. Hillis, 8 N.W. 638, 641 (Iowa 1881) (municipal compensation statute declared constitutional).
- Higgins v. Farmers Ins. Co., 14 N.W. 118, 118–19 (Iowa 1882) (appellate rule declared constitutional).
- Hildreth v. Crawford, 21 N.W. 667, 669–70 (Iowa 1884) (pharmacist regulation statute declared constitutional).
- Indep. Dist. of Union v. Ind. Dist. of Cedar Rapids, 17 N.W. 895, 896–97 (Iowa 1883) (county boundary drawing law declared constitutional).
- Indep. Sch. Dist. of Burlington v. City of Burlington, 15 N.W. 295 (Iowa 1883) (act ratifying city ordinance declared unconstitutional).
- Koehler v. Hill, 14 N.W. 738, 751 (Iowa 1883) (prohibition amendment to state constitution declared unconstitutional as not entered properly in house journal as state constitution requires; does not apply reasonable doubt standard but implicitly applies a clear error standard).

- Mackie v. Cent. R.R. of Iowa, 6 N.W. 723, 724–25 (Iowa 1880) (double damages provision declared constitutional).
- City of Marshalltown v. Blum, 12 N.W. 266, 266–67 (Iowa 1882) (peddling license ordinance declared unconstitutional).
- McKeever v. Jenks, 13 N.W. 295, 298 (Iowa 1882) (statute regulating fences declared constitutional).
- Moore v. Monroe, 20 N.W. 475, 475–76 (Iowa 1884) (statute requiring Bible reading in schools declared constitutional).
- Phillips v. Watson, 18 N.W. 659, 662 (Iowa 1884) (land appropriation statute declared constitutional).
- Reusch v. Chi., Burlington & Quincy R.R. Co., 11 N.W. 647, 648–49 (Iowa 1882) (condemnation law declared constitutional).
- Shiner v. Jacobs, 17 N.W. 613, 613–14 (Iowa 1883) (tax exemption declared constitutional).
- Stange v. City of Dubuque, 17 N.W. 518, 518–19 (Iowa 1883) (statute validating ordinance declared unconstitutional).
- Sunberg v. Babcock, 16 N.W. 716, 717–718 (Iowa 1883) (property recovery law declared unconstitutional).
- Town of Pac. Junction v. Dyer, 19 N.W. 862, 863 (Iowa 1884) (licensing ordinance declared unconstitutional).
- White v. Wabash, St. Louis & Pac. Ry. Co., 20 N.W. 436, 438 (Iowa 1884) (land assessment law declared constitutional).

MISSOURI (6 / 29 (7))

Cases applying the reasonable doubt standard

- Ewing v. Hoblitzelle, 85 Mo. 64, 70–72 (1884) (voting law upheld as constitutional).
- Humes v. Mo. Pac. Ry. Co., 82 Mo. 221, 232–33 (1884) (double damages law upheld as constitutional).
- St. Louis & S.F. Ry. Co. v. Evans & Howard Fire Brick Co., 85 Mo. 307, 333 (1884) (condemnation award law upheld as constitutional).
- State v. Addington, 77 Mo. 110, 118 (1882) (upholding margarine regulation and applying "providing beyond doubt that it is so" as the standard).
- State *ex rel.* Att'y Gen. v. Ranson, 73 Mo. 78, 95 (1880) (act regulating elections for justices of the peace declared constitutional).
- State *ex rel.* Harris v. Laughlin, 75 Mo. 147, 151 (1881) (act moving St. Louis County into a different judicial circuit upheld as constitutional).

Cases that do not apply the reasonable doubt standard

- Blewett v. Smith, 74 Mo. 404, 408 (1881) (law allowing holding of person who damages property until they pay a fine upheld as constitutional).
- Dent v. St. Louis, Iron Mountain & S. Ry. Co., 83 Mo. 496, 499 (1884) (law governing jurisdiction of actions against railroads declared constitutional).
- *Ex parte* Hollwedell, 74 Mo. 395, 400 (1881) (ordinance allowing for imprisonment for not paying a fine declared constitutional).
- *Ex parte* Slater, 72 Mo. 102, 108 (1880) (law regulating procedures for indictments declared unconstitutional).
- Eyerman v. Blaksley, 78 Mo. 145, 148–49 (1883) (sewer construction law upheld as constitutional).
- Farrar v. City of St. Louis, 80 Mo. 379, 393–94 (1883) (road construction ordinance upheld as constitutional; applies clear error standard but does not mention reasonable doubt standard).
- *In re* Apportionment of Railroad Sch. Tax, 78 Mo. 596, 600 (1883) (act regulating how railroad tax is distributed upheld as constitutional).
- River Rendering Co. v. Behr, 77 Mo. 91, 98–100 (1882) (ordinance governing the removal of dead animals declared unconstitutional).
- Rutherford v. Heddens, 82 Mo. 388, 392 (1884) (act regulating construction of sewer systems declared constitutional).
- Spealman v. Mo. Pac. Ry. Co., 71 Mo. 434, 435 (1880) (act allowing for double damages in suits against railroads declared constitutional).
- City of St. Louis v. Bircher, 76 Mo. 431, 433 (1882) (boarding house tax declared constitutional).
- City of St. Louis v. Richeson, 76 Mo. 470, 486–87 (1882) (property tax ordinance declared constitutional).
- State v. Jennings, 81 Mo. 185, 192–93 (1883) (statute regulating continuances when witnesses are not available upheld as constitutional).
- State *ex rel.* Harris v. Herrmann, 75 Mo. 340, 353–54 (1882) (notary statute declared unconstitutional as a special law).
- State *ex rel.* Harris v. Laughlin, 75 Mo. 358, 370 (1882) (statute regulating gambling declared constitutional).

- State *ex rel.* Lionberger v. Tolle, 71 Mo. 645, 650 (1882) (notice-by-publication law declared constitutional).
- State *ex rel.* Prairie Township v. Walker, 85 Mo. 41, 46–47 (1884) (railroad taxation statute declared unconstitutional).
- State *ex rel.* Rolston v. Chappell, 74 Mo. 335, 348–49 (1881) (railroad bonding law declared unconstitutional).
- State *ex rel.* Troll v. Hudson, 78 Mo. 302, 304–05 (1883) (dram shop statute declared constitutional).
- State *ex rel.* Van Brown v. Van Every, 75 Mo. 530, 537–38 (1882) (delinquent tax statute declared constitutional).
- State v. Wabash, St. Louis & Pac. Ry. Co., 83 Mo. 144, 149–51 (1884) (statute requiring railroads to build waiting rooms declared constitutional).
- State v. Briscoe, 80 Mo. 643, 644–45 (1883) (ruling that statute regulating charging of crimes declared unconstitutional).
- State v. Fancher, 71 Mo. 460, 465 (1880) (indictment statute declared constitutional).
- State v. Jackson, 80 Mo. 175, 179 (1883) (ban on interracial marriage declared constitutional).
- State v. Madden, 81 Mo. 421, 423 (1884) (law requiring officiants to return certificates of marriage declared constitutional).
- State v. Persinger, 76 Mo. 346, 346 (1882) (disturbance of the peace law declared unconstitutional).
- State v. Wilforth, 74 Mo. 528, 531 (1881) (regulation on carrying firearms declared constitutional).
- State v. Williams, 77 Mo. 310, 312 (1883) (sentencing statute for fraud declared constitutional).
- Steele v. Mo. Pac. Ry. Co., 84 Mo. 57, 58 (1884) (law giving jurisdiction to justices of the peace declared constitutional).