THAYERISM

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Abstract

In the late nineteenth century, James Bradley Thayer urged that an act of Congress should not be struck down unless the constitutional violation "is so clear as to leave no room for reasonable doubt." Thayer's beyond-a-reasonable-doubt test helped define constitutional understandings for more than a half-century; Oliver Wendell Holmes, Louis Brandeis, Learned Hand, Benjamin Cardozo, and Felix Frankfurter were practicing Thayerians. Thayerism provided crucial orientation for Alexander Bickel's conception of judicial review and his embrace of "the passive virtues," and also for John Hart Ely's democracy-reinforcing approach to constitutional law. But Thayerism seems to have dropped out of contemporary constitutional law. One reason for that is that as a matter of simple psychology, it appears to be extremely difficult for any judge consistently to embrace Thayerism; the temptation to deviate is too strong. Another reason is that Thayer's defense of Thayerism was very thin, and essentially all contemporary Justices reject it; for the most part, Thayer purported to be describing longstanding practice, rather than to be justifying it. But if we make certain judgments about the likely capacities and performance of judges, legislators, and others, Thayerism would make a great deal of sense. If we make contrary judgments, Thayerism would be preposterous. Selective Thayerism, of the sort defended by Bickel or Ely, might follow from yet another set of judgments. The broader lesson is that no approach to constitutional law can be adopted or rejected in the absence of an answer to the question of whether it would make our constitutional order better rather than worse. This, in turn, requires a set of judgments about the likely behavior of various institutions. We might also understand Thayerism as a kind of arms control agreement: I will adopt a Thayerian approach if you will as well. More particularly, left-of-center judges might be willing to be Thayerian if and only if right-of-center judges are willing to be Thayerian as well. The problem, of course, is that unless a strong norm is in place, both sides will be tempted to defect. And that is, in fact, what we observe.

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[B]oth Holmes and Brandeis influenced me in my constitutional outlook, but both of them derived theirs from the same source from which I derived mine, namely, James Bradley Thayer, with whom both had personal relations but whose views influenced me only through his writings, as was indirectly true of the man who taught me constitutional law at Harvard Law School, namely, Professor Wambaugh, a pupil of Thayer. Moreover, Thayer's views were in the air at the Law School while I was there and I undoubtedly imbibed that atmosphere.

–Felix Frankfurter[1]

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.

–Felix Frankfurter[2]

Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake.

–United States Supreme Court[3]

I. A Free Foot

In the late nineteenth century, James Bradley Thayer argued in favor of a sharply limited role for courts in a democratic society.[4] He urged that in the face of a constitutional challenge, all reasonable doubts should be resolved favorably to Congress, in the sense that the Constitution should be interpreted in a way that gives the political

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[1] ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–1945, 25 (Max Freedman ed., 1967).

[2] Dennis v. United States, 341 U.S. 494, 525 (1951).

[3] Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010).

[4] *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For a valuable discussion of Thayer's motivations, emphasizing what he sees as Thayer's political conservatism and desire to activate political focus on combating ill-considered progressivism, see generally Mark Tushnet, *Thayer's Target: Judicial Review or Democracy*?, 88 NW. U. L. REV. 9 (1993).

process maximum room to maneuver.[5] Justice Oliver Wendell Holmes offered one summary of the implications of Thayer's position (and wholeheartedly embraced it): "If my fellow citizens want to go to Hell I will help them. It's my job."[6] But Thayer was less pithy and more optimistic. He did not speak of going to Hell. He had faith in the democratic process.

Thayer began his essay with a large puzzle: "How did our American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?"[7] In Thayer's view, this power cannot be justified by the mere fact that the Constitution is written:

> So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized.[8]

This is, of course, a swipe at Chief Justice John Marshall's opinion in *Marbury v. Madison*,[9] which emphasized the written nature of the Constitution and the importance of the oath. The "remarkable practice" of judicial review, as Thayer called it, was a product not of logic but of experience, and in particular "a natural result of our political experience before the War of Independence."[10] Great Britain had an external sovereign; the United States did not. In the United States, "our own home population in the several States were now their own sovereign. So far as existing institutions were left untouched, they were construed by translating the name and style of the English sovereign into that of our new ruler, —ourselves, the People."[11] For this reason, the new (state) constitutions "were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty

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[5] *See* Thayer, *supra* note 4, at 129.

[6] HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953).

[7] Thayer, *supra* note 4, at 129.

[8] *Id.* at 130.

[9] 5 U.S. 137 (1803).

[10] Thayer, *supra* note 4, at 130.

[11] *Id.* at 131.

of conducting the government."[12] Judges enforced those precepts in the interest of protecting the sovereignty of the people against public officials.

This is what happened, but as Thayer saw it, it was hardly inevitable, and it was not clearly mandated by the Constitution itself. Thayer found it "instructive to see that this new application of judicial power was not universally assented to. It was denied by several members of the Federal convention, and was referred to as unsettled by various judges in the last two decades of the last century."[13] In the founding period, the power of judicial review was sharply disputed. As that power emerged and became entrenched, "its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the constitution."[14] In a crucial passage, Thayer said that such questions

> require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot.[15]

The idea of a "free foot" was supported, in Thayer's account, by an insistence that the legislature *cannot act without initially making its own determination of constitutionality*. Thayer thought it

> plain that where a power so momentous as this primary authority to interpret is given, the actual determinations of the body to whom it is entrusted are entitled to a corresponding respect; and this not on mere grounds of courtesy or conventional respect, but on very solid and significant grounds of policy and law.[16]

Thayer had no patience for the view that courts have

> the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of

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[12] *Id.*

[13] *Id.* at 132.

[14] *Id.* at 135.

[15] Thayer, *supra* note 4, at 135.

[16] *Id.* at 136.

> declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation, an ordinary and humble judicial duty, as the courts sometimes describe it."[17] In Thayer's account, this "way of putting it easily results in the wrong kind of disregard of legislative consideration.[18]

Under the right approach, by contrast, "an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest *as to leave no room for reasonable doubt*."[19] Thayer urged that this idea was established "very early" and in fact became entrenched by 1811.[20] What was necessary, for invalidation, was "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication."[21] As Thayer put it, courts "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."[22] Like any good lawyer, Thayer urged not only that this approach is right but also that it was and had long been, in fact, the prevailing view:

> 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.[23]

On Thayer's account, "virtue, sense, and competent knowledge are always to be attributed to" the national legislature.[24] That means that "whatever choice is rational is constitutional." An "irrational

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[17] *Id.* at 138.

[18] *Id.*

[19] *See id.*, at 140 (quoting Com. v. Smith, 4 Bin 117 (1811)). Note that this claim is not the same as the "rational basis" test for reviewing legislation. The rational basis test is rooted in *the Court's independent interpretation* of the requirements of various constitutional provisions; in the Court's view, what is required is a rational basis (no more and no less). The Court does not say that it adopts the rational basis test because on Congress's view of the Constitution, that test is the right one.

[20] Thayer, *supra* note 4, at 140.

[21] *Id.* at 141.

[22] *Id.* at 144.

[23] *Id.*

[24] *Id.* at 149.

excess" is unacceptable, but the judicial role "is a secondary one."[25] As Thayer had it, "I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one."[26]

Thayer believed that over time, that admitted doctrine would become even more entrenched, for it is "a test, it may be added, that come[s] into more and more prominence as our jurisprudence grows more intricate and refined."[27] (Writing twelve years before *Lochner v. New York*,[28] sixty-one years before *Bolling v. Sharpe*,[29] and 136 years before *Citizens United v. FEC*,[30] Thayer cannot be counted as a prophet.) Thayer was keenly alert to the claim that interpretation of the Constitution is a judicial act, not a legislative one. His response was that "a court cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the constitution."[31] To strike down legislation, courts must be clear that it is invalid "beyond a reasonable doubt."[32]

Thayer concluded with some notes about the beneficial systemic consequences of his approach. One risk of judicial review is that it might tend "to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows."[33] In these circumstances,

> the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.[34]

That is important because "[u]nder no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If

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[25] Thayer, *supra* note 4, at 148.

[26] *Id.* at 155.

[27] *Id.* at 147.

[28] 198 U.S. 45 (1905).

[29] 347 U.S. 497 (1954).

[30] 558 U.S. 310 (2010).

[31] Thayer, *supra* note 4, at 150.

[32] *Id.* at 143.

[33] *Id.* at 155.

[34] *Id.* at 156.

this be true, it is of the greatest public importance to put the matter in its true light."[35] One of Thayer's evident goals was to activate political rather than judicial safeguards—to drive in, so to speak, consideration of justice and right.

There is a clear link between Thayer's claims here and some famous words from Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[36] Thayer's essay had a large impact on many readers. According to Justice Felix Frankfurter's biographer, "After he had read Thayer's essay, Frankfurter never stopped quoting it," and he "embraced Thayer's theory of limited judicial review and deference to elected officials in all but the most extreme circumstances."[37] According to Frankfurter himself, Thayer's was "the most important single essay" about American constitutional law, and "the great guide for judges."[38]

To be sure, there are lurking questions about the proper *scope* of Thayerism. A judge could be an across-the-board Thayerian, applying the beyond-a-reasonable-doubt test whenever a constitutional challenge is raised. A judge could be a Thayerian for Congress, but not for the executive branch. A judge could be a Thayerian for Congress, but not for the states. In a brief and somewhat puzzling discussion, Thayer himself suggested that Congress, as a coordinate branch of government, should be subject to the beyond-a-reasonable-doubt test, but that states should not be.

> If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department.[39]

But why? Thayer emphasized that in such cases, the federal courts are "representing a paramount constitution and government,"

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[35] *Id.*

[36] LEARNED HAND, "LIBERTY LIES IN THE HEARTS OF MEN AND WOMEN" (1944), *reprinted in* OUR NATION'S ARCHIVES: THE HISTORY OF THE UNITED STATES IN DOCUMENTS 658 (Erik Bruun & Jay Crosby eds., 1999).

[37] BRAD SNYDER, DEMOCRATIC JUSTICE 21 (2022).

[38] *Id.*

[39] Thayer, *supra* note 4, at 154.

and that they must "guard it from any inroads from without."[40] Fair enough, but why does that call for something other than the beyond-a-reasonable-doubt standard? In what sense are states "from without"? Thayer did not answer these questions, and Thayer's followers, including Holmes, Brandeis, and Frankfurter, generally did not distinguish between federal and state legislation.

For present purposes, I will bracket Thayer's suggestion to this effect, and treat Thayerism as an across-the-board idea.

II. Thayerian Plus, or Plus Thayerism

For all its importance, the Thayerian approach is radically incomplete. To know whether a constitutional violation is clear, we need a theory of interpretation to help us to understand what the Constitution means. We could imagine Thayerian textualists, who would uphold statutes and regulations against constitutional challenge unless there is, beyond a reasonable doubt, the violation of the text of the founding document. Under Thayerian textualism, it would be unconstitutional for Congress to enact a law establishing that the nation will have two presidents, or four, or twelve; the Constitution unambiguously creates "a" president. But under Thayerian textualism, it would not be unconstitutional to create independent agencies, whose heads could be discharged by the president only "for cause"; the text of the Constitution is not unambiguous on this question.[41] Under Thayerian textualism, Congress could certainly discriminate on the basis of race and sex; that is straightforward. Under Thayerian textualism, the legislative veto would be constitutional; that is also straightforward.[42]

We could also imagine Thayerian originalists, who would uphold statutes and regulations against constitutional attack unless the violation of the document, on the correct originalist reading, was clear. To be sure, originalists would want to ask some hard questions about Thayerism, above all this one: Is it part of, or consistent with, the original public meaning? For originalists, Thayerism would seem to stand or fall on the answer to that question. While it might be challenging to answer as a matter of history, the consequences of Thayerian originalism are not obscure. Under Thayerian originalism,

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[40] *Id.* at 155.

[41] *See generally* Myers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[42] Of course the Court ruled otherwise in *INS v. Chadha*, 462 U.S. 919 (1983). The only point is that under a beyond-a-reasonable-doubt standard, the Court would have had to have gone the other way.

Congress could not impose prior restraints on speech, at least as a general rule; the original understanding of the First Amendment is (clearly) inconsistent with prior restraints.[43] Under Thayerian originalism, the First Amendment would not forbid blasphemy laws.[44] Under Thayerian originalism, there would be no substantive due process under either the Fifth or Fourteenth Amendments.[45] (This conclusion depends on the more-than-plausible claim that that even if there is an originalist argument in favor of substantive due process, it is not clear beyond a reasonable doubt.)

We could easily imagine nonoriginalist Thayerians, who might (for example) believe that the Constitution should be given a moral reading,[46] but also that courts should uphold the decisions of the democratic branches unless the violation of the (best) moral reading was very clear. For example, nonoriginalist Thayerians might believe that the best moral reading of the Equal Protection Clause forbids affirmative action, but also that the issue is not straightforward, which would mean that affirmative action programs should be upheld. We could imagine Thayerian common good constitutionalists,[47] who would insist that the Constitution should be understood in light of principles associated with the common good, but who would uphold legislation unless the transgression of those principles is entirely clear. Common good constitutionalists might believe, for example, that the best reading of the founding document does not allow states to authorize abortion, but also that reasonable people can disagree with that reading, which means that states can authorize abortion.

We could easily imagine Thayerian or Thayer-inspired minimalists, who would emphasize the importance of leaving things undecided, perhaps by using the passive virtues,[48] perhaps by ruling

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[43] Jud Campbell, *Natural Rights and the First Amendment,* 127 YALE L.J. 246, 263 (2017).

[44] Note, *Blasphemy Laws and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 691 (2021).

[45] Max Crema & Lawrence Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447 (2022).

[46] *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1997).

[47] *See generally* ADRIAN VERMEULE, COMMON-GOOD CONSTITUTIONALISM (2021).

[48] *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1965).

narrowly and shallowly.[49] Alexander Bickel, a champion of the passive virtues, did not embrace Thayerism, but he was evidently influenced and even haunted by it.[50] His great book on judicial review contains an entire section on Thayer's essay, which he calls "a singularly important piece of American legal scholarship, if for no other reason than that Holmes and Brandeis, among modern judges, carried its influence with them to the Bench, as more recently did Mr. Justice Frankfurter."[51] Bickel's enthusiasm for judicial silence, maintained by use of justiciability doctrines, has a distinctly Thayerian feel.

We could also imagine Thayerians of a more extreme sort, who would uphold legislation if, under *any* reasonable theory of constitutional interpretation, it is not unconstitutional beyond a reasonable doubt. For such Thayerians, the best approach would be to use the most permissive theory of interpretation and to ask if the relevant legislation is unambiguously inconsistent with that theory. In general, textualism might well be the most permissive approach to interpretation, in the sense that the constitutional text, by itself, often allows reasonable doubts with respect to a very wide range of possible understandings.

What is clear is that to operate at all, Thayerism must build on some independent theory of interpretation. What is also clear is that after it is thus built, we will find three categories of cases. In countless cases, Thayerism will offer a bright green light; the argument for constitutional invalidation will be preposterous. In a few cases, Thayerism will offer a red light; the constitutional violation is unambiguous. In a few cases, reasonable people will disagree about whether Thayerism authorizes or compels invalidation; there will be reasonable disagreement about whether the violation can be shown beyond a reasonable doubt.

III. Neutrality

For contemporary constitutional law, and indeed for the constitutional law of the last century, the implications of Thayerism are not obscure. Suppose that a state prohibited abortion or same-sex marriage, required affirmative action, or imposed the death penalty. Thayerians would uphold those actions. Or suppose that Congress granted open-ended discretionary authority to regulatory agencies, enacted some successor to the Patient Protection and Affordable Care

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[49] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME (1999).

[50] *See* Bickel, *supra* note 48.

[51] *Id.* at 35.

Act[52] under the Commerce Clause, or protected or prohibited abortion under Section 5 of the Fourteenth Amendment. Thayerians would not be at all sympathetic to constitutional objections.

As these examples suggest, Thayerism has a kind of neutrality, which might well be taken as a point in its favor. It calls for judicial modesty whether the measure in question is challenged by the left or the right. But it is revealing that in the long history of American law, it is exceedingly difficult to find across-the-board Thayerians. Holmes might have been the closest.[53] He voted consistently in favor of minimum wage and maximum hour laws, and other regulations involving the labor market. In his celebrated words, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[54] He also voted in favor of compulsory sterilization laws. In his notorious words, "Three generations of imbeciles are enough."[55] The only clear exception to Holmes's Thayerism involves free speech,[56] and even there, he was a complex figure, shifting away from First Amendment Thayerism over time.[57] We have seen that Justice Felix Frankfurter, who idolized Holmes, also idolized Thayer, and he understood himself as a Thayerian.[58] Indeed, there is an argument that Frankfurter was the last Thayerian on the Supreme Court.[59]

During his time on the Court, Frankfurter's Thayerian inclinations created a great deal of tension with the legal and political left (he agreed with the latter as a matter of policy).[60] At the same time, Frankfurter's complex record, and his important departures from Thayerism, raise numerous questions. Frankfurter was an architect of

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[52] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[53] *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Adkins v. Child.'s Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting); Coppage v. Kansas, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting).

[54] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[55] Buck v. Bell, 274 U.S. 200, 207 (1927).

[56] *See* Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[57] *See generally* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND–AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013).

[58] *See generally* SNYDER, *supra* note 37.

[59] This is one reading of SNYDER, *supra* note 37.

[60] *See, e.g.*, *id.*, at 406–29.

both *Brown v. Board of Education*[61] and *Bolling v. Sharpe*[62]; his commitment to Thayerism was qualified by his commitment to racial equality.[63] Pointing to the traditions of English-speaking people, Frankfurter also embraced a "shock the conscience" test for due process violations, which consistent Thayerians would almost certainly reject. (Frankfurter called this the "make me puke" test, and connected it with Holmes's own views.[64]) Still, Frankfurter's strong Thayerian inclinations led to sharp and pervasive disagreements with Justices William O. Douglas and Hugo Black.[65]

It is more than intriguing that after the demise of Lochnerism in the late 1930s,[66] and the rise of what seemed to be general enthusiasm for Thayerism in the 1940s and after,[67] New Deal participants and enthusiasts, once on the bench, quickly departed from Thayerism in the interest of values and principles prized by the left. Focusing on free speech, race discrimination, voting rights, and criminal justice, Justice Douglas did so regularly and without the slightest hesitation; Frankfurter did so less frequently and with considerable soul-searching and agitation. We might even say that there was a window of opportunity, in the late 1930s and early 1940s, for a kind of entrenchment of Thayerism on the Supreme Court. For reasons that include (but are not limited to) the selection process and a degree of serendipity, that particular window closed fairly rapidly.[68]

IV. Two Owls of Minerva, Flying at Night

As a matter of principle, Alexander Bickel and John Hart Ely offer some clues about why the closing of that window was not much lamented at the time. Writing in 1962, and with *Brown*, *Bolling*, and McCarthyism evidently on his mind, Bickel noted Felix Cohen's suggestion that Thayer's approach would make "of our courts lunacy

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[61] 347 U.S. 483 (1954).

[62] 347 U.S. 497 (1954).

[63] *See* SNYDER, *supra* note 37, at 430–57.

[64] *See id.*

[65] *Id.* at 406–29. A key example is Justice Frankfurter's dissenting opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[66] *See generally* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see generally also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[67] *See generally W. Coast Hotel Co.*, 300 U.S. 379; *see generally also Williamson,* 348 U.S. 483.

[68] Some of the tale is told illuminatingly in SNYDER, *supra* note 37.

commissions sitting in judgment upon the mental capacity of legislatures."[69] Bickel did not endorse that characterization, but he was affected by it, and he responded that Thayer's approach "is not addressed . . . to all the problems faced by the process as it has operated in our day. Not nearly."[70] Bickel believed that "Thayer's rule tends to break down" when individual rights were at risk.[71]

One reason is that it "does not take a lunatic legislature to enact measures that are irrational"; a legislature that is "more than normally whipped up" might do the same.[72] In any case the question may not be whether a legislative "accommodation is rational. The question may be whether it is good."[73] Pointing to restrictions on the use of birth control within marriage, Bickel said that the legislative judgment in favor of such restrictions "cannot be deemed irrational."[74] But because it applies to "conjugal privacy," Bickel suggested agreement with Justice John Marshall Harlan's suggestion that rationality was not enough; an "additional judgment to the one opened up by the rule of the clear mistake is called for."[75] On Bickel's account, Thayerism is "simply not enough."[76]

We can easily see why Bickel, writing in the early 1960s, would think that. In the end, Bickel insisted that judges "have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government," which is "crucial in sorting out the enduring values of a society."[77] Bickel thought that the distinctive judicial role was to discern and insist on principles, because courts have "the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."[78] To say the least, Bickel did not contemplate a beyond-a-reasonable-doubt standard here, and he did not claim that the relevant

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[69] BICKEL, *supra* note 48, at 37.

[70] *Id.*

[71] *Id.* at 39.

[72] *Id.*

[73] *Id.*

[74] BICKEL, *supra* note 48, at 42.

[75] *Id.* at 42–43.

[76] *Id.* at 45.

[77] *Id.* at 26.

[78] *Id.*

principles were in any simple sense "in" the Constitution. The judges' task was to identify (or construct or specify) them.[79]

Writing in 1981, with a lot more non-Thayerian water under the constitutional bridge (or over the constitutionalism dam), Ely dedicated his book to Chief Justice Earl Warren: "You don't need many heroes if you choose carefully."[80] Chief Justice Warren was not a Thayerian by any means. But on Ely's account, he was committed to democracy, and he understood the role of the Supreme Court by reference to that commitment. Ely's view can easily be seen as an elaboration of the most famous footnote in all of American constitutional law—footnote four in *United States v. Carolene Products*[81], which said, in relevant part:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation [referring to "restrictions upon the right to vote"; "restraints upon the dissemination of information"; "interferences with political organizations"; and "prohibition of peaceable assembly"].
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> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[82]

To say the least, that is a serious qualification of Thayerism. In Ely's view, the Constitution should be interpreted in a way that makes the democratic process work as well as possible, and that makes up for deficits in it. Above all, Ely urged that courts should vigorously protect

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[79] Bickel's general approach was, in my view, a clear precursor of Dworkin's. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L REV. 469, 516 (1981).

[80] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, Dedication Page (1981).

[81] 304 U.S. 144 (1938).

[82] *Id.* at 152 n.4 (1938).

democracy itself. One way to do that is to safeguard the franchise.[83] The idea of "one person, one vote" does, on Ely's view, have a solid constitutional justification, whether or not it finds support in any form of textualism or originalism. Ely also believed that courts do well to strike down poll taxes and restrictions on access to the polls.

To protect democracy, Ely argued in favor of an emphatically non-Thayerian judicial role in protecting political speech. For the same reason, he did not believe that the Constitution stands in the way of reasonable restrictions on campaign finance. In his view, such restrictions promote self-government; they do not undermine it.

Ely urged as well that courts should protect those who are at a systematic disadvantage in the political process, including Blacks and noncitizens. This too is, of course, emphatically non-Thayerian. The reason for the protection is to compensate for systematic imperfections or deficits in democratic processes and hence to engage in a kind of democracy-reinforcing constitutional law. Departing dramatically from Thayer, Ely approved of the idea of "strict scrutiny" of any law that discriminates on the basis of race—with the important qualification that he would have no trouble with affirmative action, on the theory that on that issue, the democratic process can be trusted, because whites are not at a systematic disadvantage.

At the same time, Ely would allow the democratic process a great deal of room to maneuver, so long as the process is well-functioning. To that extent, he was a selective Thayerian. Ely had nothing to say in favor of *Roe v. Wade*. In fact he firmly rejected it. He was sharply critical of the right to privacy and of any judicial effort to identify and protect what judges see as "fundamental values."

V. No Thayerians Here

The failure to adopt Thayerism in the 1930s and 1940s finds a parallel with the period from the 1970s to the present, in which Republican presidents, deeply unhappy with the emphatically non-Thayerian approach of the Warren Court, succeeded in appointing a large number of Justices to the Court. It would not be implausible to think that in some of those decades, there was another and perhaps golden window of opportunity for Thayerism, in which the Court might have moved toward something like a beyond-a-reasonable-doubt test for constitutionality. But that did not happen. Strikingly,[84] there was

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[83] *See* ELY, *supra* note 8080; *see generally* STEPHEN BREYER, ACTIVE LIBERTY (2006).

[84] Astonishingly? No. *See* Part IX, *infra*.

no serious effort, on the part of one or more of the Justices, to initiate such a movement.

In the modern era, there are no consistent Thayerians, and with the possible exception of Justice Stephen Breyer, no recent member of the Court can be said to have much (general) sympathy for Thayerism. Some left-of-center Justices are Thayerians with respect to the Second Amendment—but not with respect to sex discrimination.[85] Some right-of-center Justices are Thayerians with respect to abortion—but not with respect to the Second Amendment.[86] The Court's originalists are emphatically not Thayerians[87]; they do not say that acts of Congress

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[85] *Compare, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 679–80 (Stevens, J., dissenting), *with* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732–33.

[86] *Compare, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232, *with* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

[87] For some clues about why contemporary originalists might abhor Thayerism, see Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. L. REV. 1419 (2019). With the reader's indulgence, consider this:

> It is important, in evaluating Professor Thayer, to keep in mind that he was a Progressive Era intellectual who, like most Progressives in the 1890s, probably disfavored the Madisonian system of checks and balances, the original meaning of our written Constitution and Bill of Rights, and judicial review, and who probably favored responsible parliamentary government, which then prevailed in the United Kingdom and which Woodrow Wilson alleged to have been "shown" superior to the American system. Woodrow Wilson was an impractical intellectual who would go on to serve as President of Princeton University, Governor of New Jersey, and, for two terms, President of the United States. Like Wilson, Professor Thayer probably thought the Constitution, as originally designed, was a disguised structure for helping the rich to rob the poor.
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> . . .
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> This ignorance [of the world of the 1890s] led to European colonialism, Jim Crow segregation in the United States, the eugenics movement in the United States and in Germany, the rise of the expert, undemocratic agency, and finally, the move from eugenics to the Holocaust in Germany.

Id. at 1423, 1454. No comment, really, except that there appears to be no evidence in support of these claims about what Thayer "probably" thought (and you can be a progressive, even of the 1890s variety, without hoping for Jim Crow segregation or the Holocaust). See Tushnet, *supra* note 4, on what he sees as Thayer's moderate conservatism; for a valuable discussion, see

will be upheld unless the deviation from the original public meaning is unambiguous, or unless Congress has deviated from it "beyond a reasonable doubt." They ask instead: Did Congress deviate from the original public meaning, on the Court's independent view of the original public meaning? If they were genuine Thayerians, they would have had to agree that the Second Amendment does not protect the right to possess firearms; that restrictions on commercial advertising are not constitutionally vulnerable; that affirmative action programs are constitutionally fine.

Nor can the Court's nonoriginalists be counted as Thayerians. They do not ask: Has there been a clear departure from the First Amendment, the Due Process Clause, or the Equal Protection Clause, given their preferred theory of interpretation? If they were Thayerians, they would have had to agree that the Constitution does not contain a right of privacy; that sex discrimination is constitutionally unobjectionable; that the federal government can engage in racial discrimination, including racial segregation; and that the government does not have to give procedural safeguards to those seeking to retain welfare benefits.

VI. Right and Left

At some points in American history, Thayerism has had a strong appeal to the political right.[88] During the ascendancy of the Warren Court, many conservatives rejected "judicial activism," which they seemed to find in decisions striking down the actions of the democratic branches; consider the desegregation decisions and the idea of one person, one vote. Conservatives wanted courts to be more deferential and hence more Thayerian. In recent decades, the left has shown far more interest in Thayerism or something like it (Thayerism adjacent), in evident response to rulings from the Supreme Court that seem, to the left, to be unfortunate or outrageous.[89] On numerous occasions, the left has explored ways to limit the place of the Supreme Court in American life. One version of left-of-center Thayerism is a belief in "popular constitutionalism," which sometimes takes the form of a

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generally G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. L. REV. 48 (1993).

[88] *See generally* LINO GRAGLIA, COURTING DISASTER: THE SUPREME COURT AND THE DEMISE OF POPULAR GOVERNMENT (1997); ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

[89] *See* Samuel Moyn, *Counting on the Supreme Court to Uphold Key Rights Was Always a Mistake*, WASH. POST (June 17, 2022), https://perma.cc/K9FZ-ZN3F.

rejection of the power of judicial review altogether.[90] In the current period, this kind of Thayerism, or Thayerism on steroids, seems to have considerable appeal in certain quarters.

There is a background point in support of left-wing Thayerism: it is often urged that as a matter of history, and as a matter of the likely future, the Supreme Court will reflect the political views of the powerful and the wealthy (as befits the fact that the Justices are generally members of a political elite, lawyers with a potentially strong interest in the status quo). For those who embrace left-of-center Thayerism—whose extreme version seeks to eliminate the Supreme Court's power to invalidate legislation at all—the emblematic judicial decisions are those that:

- strike down maximum hour and minimum wage laws,[91]
- protect the right to possess guns,[92]
- ban affirmative action programs,[93]
- strike down campaign finance regulation,[94]
- protect commercial advertising,[95]
- jeopardize the Patient Protection and Affordable Care Act,[96] and
- forbid regulation designed to protect safety, health, and the environment.[97]

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[90] *See generally* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000). For an overview and critique, see SCOTT DOUGLAS GERBER, *Popular Constitutionalism: The Contemporary Assault on Judicial Review*, *in* A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, at 345–62 (2011). *See also generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[91] *See generally, e.g.*, *Lochner*, 198 U.S. 45; *Adkins*, 261 U.S. 525.

[92] *See generally, e.g.*, *Heller*, 554 U.S. 570.

[93] *See generally, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003).

[94] *See generally, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[95] *See generally, e.g.*, Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[96] *See generally, e.g.*, California v. Texas, 141 S. Ct. 2104 (2021).

[97] *See generally, e.g.*, West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587 (2022).

If inadequate democracy is the problem, they think, it is absurd to believe, with Ely, that the Supreme Court is the solution. Such Thayerians are deeply skeptical of originalism, which they regard as a mask for political preferences, and also the idea of any kind of free-form constitutional law (think: moral readings), which, they believe, turn out to be reflections, often hidden, of an identifiable political agenda, associated with the political right.

VII. Athens and Babel

Should anyone embrace Thayerism? Today? Tomorrow? The day after?

Thayer understood his approach as an accurate description of practice. To say the least, it is no longer that, and to contemporary readers, Thayer's defense of Thayerism seems shockingly thin. He pointed to the supposed fact that Congress must make a preliminary assessment of the constitutional question in order to enact law. But what does that mean, exactly? Is it an empirical claim, or is it in some sense a logical necessity? If it is seen as a logical necessity, it is not clear why it is relevant. If it is an empirical claim, it is not clear that it was true when Thayer wrote, and it is not at all clear that it is true now. If it is an empirical claim, and if it is true, it is not clear why it is relevant. Suppose that Congress, with all its qualities and imperfections, makes a judgment about the meaning of the Constitution. Why should courts treat Congress as an expert tribunal on questions of constitutional law, subject to something like arbitrariness review? It cannot be because Congress has particular expertise on the meaning of the Constitution, at least if that meaning is thought to be accessible by standard legal means.

Compare *Chevron v. NRDC*,[98] what was for a long period the leading modern case on judicial deference to interpretations of law—in this case, to interpretations of law by administrative agencies. Importantly, the *Chevron* Court made it clear that if Congress has been unambiguous, the agency will not prevail (*Chevron* Step One). But in the face of ambiguity, all that is required is a reasonable interpretation by the agency (*Chevron* Step Two). Here is what the Court said by way of explanation:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of

[98] 467 U.S. 837 (1984). As of this writing, the ultimate fate of *Chevron* is uncertain. *See Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. argued Jan. 17, 2024). *Chevron* can be seen as a kind of Thayerism for the administrative state, and the debates over its soundness mirror debates on the constitutional side.

> the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[99]

There are two points here. The first involves technical expertise; the agency might have expertise that the court lacks. The second involves political accountability; the agency is subject to the president, and the resolution of an ambiguity might present a question of policy. We could imagine a kind of Thayerian Two Step for constitutional law: If the founding document is clear, the question is at an end (as Thayer agreed). If the founding document is unclear, what is required is reasonableness.

But the foundations of *Chevron* do not easily fit constitutional law. Insofar as we are speaking of technical expertise, it would not seem to bear on the question of how best to understand "the executive power," or "the freedom of speech." And insofar as we are speaking of political accountability, it might turn out to be a problem. Why should a politically accountable institution define the meaning of constitutional terms? This is not meant to be a rhetorical question, but it is not clear that accountability is a virtue with respect to definitional questions involving constitutional text. It would take a great deal of work to show how support for Thayerism, or rejection of Thayerism, could be rooted in the foundations of *Chevron*.

Recall that Thayerism would require courts to uphold almost all legislation—including school segregation in the District of Columbia, sex discrimination in federal employment, affirmative action, restrictions on abortion, mandatory school prayer, restrictions on free speech, and much more. To many people, that would not seem to be an appealing set of outcomes. (And if it does, we could come up with another list.) But imagine a society—let us call it Athens—in which democratic processes work exceedingly fairly and well, so that judicial intervention is almost never required from the standpoint of anything that really matters.[100] In Athens, racial segregation does not occur.

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[99] *Id.* at 865–66.

[100] *See generally* Waldron, *supra* note 91. Waldron wrote:

Political processes are fair, and political speech is never banned. The legitimate claims of religious minorities and property holders are respected. The systems of federalism and separation of powers are safeguarded, and precisely to the right extent, by democratic institutions.[101]

Imagine too that in Athens, judges are tyrants, and their judgments are highly unreliable. From the standpoint of political morality, judges make systematic blunders when they attempt to give content to constitutional terms such as "equal protection of the laws" and "due process of law." Resolving constitutional questions without respecting the views of the legislature, courts would make society worse, because their understandings of rights and institutions are so bad.

In Athens, a Thayerian approach to the Constitution would make a great deal of sense, and judges should be persuaded to adopt it. These are extreme assumptions, of course, but even if they are softened significantly, the argument for a Thayerian approach might be convincing, all things considered.

By contrast, consider a society—let us call it Babel—in which democratic processes work poorly, in the sense that they do not live up to democratic ideals, and also in which political majorities invade

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> We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.

Id. at 1360.

[101] I am phrasing all this with a deliberately high degree of abstraction. Different people would have different views about what counts as Athens and what counts as Babel. Religious conservatives might consider Athens to be something that Marxists abhor, and vice versa. In fact different views about different approaches to constitutional law depend (I think) on projections about what judges are likely to do, which helps explain why political conservatives were drawn to Thayerism in the 1960s (but not so much today), and why those on the left tend to like Thayerism a lot more in 2024 than they did in the 1960s.

fundamental rights (say, freedom of religion and freedom of speech). Suppose that in Babel, judges are trustworthy, in the sense that they can make democratic processes work better (say, by safeguarding the right to vote), and also that they can protect fundamental rights, as they really should be understood. In Babel, the argument for Thayerism would not be plausible.

It follows that the arguments for or against Thayerism must turn on judgments, or hunches, about the likely performance of various institutions. We might accept Thayerism if we thought that in the long haul, our nation would be close enough to Athens. We might reject Thayerism if we thought that in the long haul, it would look much more like Babel. For one or another reason, we might be selective Thayerians. As we have seen, Ely was a prominent example. In general, he favored a deferential judicial role, but not where the democratic process was not functioning well, perhaps because the right to vote was being compromised.[102]

Whether or not Ely was right, the broader lesson is that no approach to constitutional law can be adopted or rejected in the absence of an answer to the question of whether it would make our constitutional order better rather than worse, which requires in turn a set of judgments about the likely behavior of various institutions. Thayer, Holmes, Hand, Brandeis, Cardozo, and Frankfurter all appear not to have recognized this point; their views about the appropriate judicial role rested on abstractions.

VIII. Thayer's Arrows

Thayerians do have two other arrows in their quiver. Recall the first, emphasized by Thayer, which is that in enacting legislation, Congress has already engaged the constitutional question, and answered it. As we have seen, it is not clear whether that is a logical claim or an empirical one. If it is a logical claim, not resting on any fact, what relevance does it have? If it is an empirical claim, what is the evidence for it? And why, exactly, is it relevant?

Contemporary or future Thayerians might emphasize the systemic point pressed by Thayer himself. This is the second Thayerian arrow: if courts answer the constitutional question on their own, they might reduce the incentive of legislatures to think long and hard about questions of justice and morality. They will not ask, "is this right?"; they will ask instead, "will courts uphold this?" Thayer did not add that if courts assess the constitutional issue independently, they might weaken the incentive of other officials, including legislators, to

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[102] *See* ELY, *supra* note 8080.

try to assess that issue. They might create a culture in which officials believe that the Constitution is distinctly and uniquely for courts. That would be an inferior culture.

These are not implausible claims, but we do not know the magnitude of the effect, and we do not even know the sign. If courts decide constitutional questions independently, will public officials put issues of morality and justice to one side? It is hardly clear that that has happened or will happen. Whether legislators attend to issues of morality and justice would not seem to depend, mostly, on whether courts are or are not Thayerian. If courts do not follow Thayer, will public officials pay less attention to the Constitution? It is hardly clear that that has happened or will happen. Indeed, an independent judicial role might lead officials to pay *more* rather than less attention to constitutional requirements. It might intensify attention to those requirements.

IX. Arms Control is Hard

We might understand Thayerism as a proposal for a kind of arms control agreement: *I will adopt a Thayerian approach if you will as well*. More particularly, left-of-center judges might be willing to be Thayerian if and only if right-of-center judges are willing to be Thayerian as well. We could understand the situation in game-theoretic terms: Left-of-center judges might have this preference ordering: (1) left-of-center results, (2) Thayerism, (3) right-of-center results. Right-of-center judges might have this preference ordering: (1) right-of-center results, (2) Thayerism, (3) left-of-center results.[103] We could imagine an agreement on (2). That agreement would be more likely, of course, if there is keen interest in Thayerism in principle, in the form of a belief that it is right, appealing, or at least reasonable.

History suggests that no agreement in favor of (2) is achievable. One problem is that at any given moment, both sides might have the votes to get (1). The broader problem is that unless a strong Thayerian norm is internalized and in place, both sides will be tempted to defect. And that is, in fact, what we observe.

But my main conclusion lies elsewhere. Thayerism cannot be accepted or rejected in the abstract. It cannot be read off high ideals.

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[103] The categories are crude and intentionally so. We could imagine less crude alternatives, such as: (1) originalism, (2) Thayerism, (3) moral readings. Or: (1) moral readings, (2) Thayerism, (3) originalism. Or: (1) democracy-reinforcement, (2) Thayerism, (3) common good constitutionalism. The analysis in the text could be the same with options and preference orderings of these kinds.

Any approach to constitutional law must be defended on the ground that it would make our constitutional order better rather than worse, which requires in turn a set of judgments about the likely behavior of various institutions. In my view, Thayerism would make our system worse, but that view has a degree of tentativeness, and I hold it a bit less confidently than I did a decade ago.

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