
TO SAVE DEMOCRACY FROM JURISTOCRACY:
J.B. THAYER AND THE TRAGIC ORIGINS OF
CONSTITUTIONAL THEORY

Samuel Moyn & Rephael G. Stern

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Abstract: As many Americans once again worry that their democracy is hostage to judicial power, this Article recovers how the country's first constitutional law professor set out on a mission to stave off the syndrome before it stuck. The first archival reconstruction of how James Bradley Thayer (1831-1902) arrived at his epochmaking theory of judicial deference — which remains the most influential piece of scholarship on American constitutional law in the country's history — this Article demonstrates that Thayer was determined to preserve the democratic revolutions of the Civil War and Reconstruction and to transform America in the direction of British legislative supremacy. Scandalized by growing ventures to weaponize the federal judiciary so as to preempt the new American democracy, Thayer bet on something new in global history: mass democracy understood as an experiment in collective learning. The Article thereby provides a new periodization and transatlantic contextualization of the struggles over judicial fiat routinely associated with the early twentieth century: far from simply foreseeing the Supreme Court's defense of laissez-faire to come, Thayer mobilized in the first instance in response to forgotten manifestations of an American juristocracy after the Civil War. His inspiration, moreover, came from witnessing England's rapidly-expanding representative democracy in which Parliament — and not the courts — reigned supreme. And yet, as this Article emphasizes, Thayer failed in the long run. His democratizing fix, judicial self-restraint under the “clear error standard” — which this Article shows had the same English roots as his democratic faith — has tragically misled reform. An archival genealogy of rational basis review in constitutional law, this Article explains why Thayer called for it but also why his mission, in spite of its partial implementation after his death, now has to be rescued in its own right. Judicial self-restraint has not prevented the continuation and even the intensification of the very juristocratic syndrome Thayer rightly found so troubling. If Americans still remain with him at the dawn of our commitment to democracy, they will have to save it from judges in a new way all their own.

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INTRODUCTION

In late summer 1883, Harvard Law School professor James Bradley Thayer returned from a trip to England. There he witnessed the debate on the Third Reform Bill, known officially as the Representation of the People Act, which passed the next year.¹ More than any other step, by nearly doubling the electorate, it ratified the emergence of democracy, understood as a practice of lawmaking by political representatives of a mass electorate, in the world's then-leading power. Arriving at home, however, Thayer witnessed the negation of newly won popular authority over law. Only a few months after his return, on October 15, 1883, the United States Supreme Court decided the *Civil Rights Cases*,² invalidating Congress's Civil Rights Act of 1875.³ This and other offensive events shifting power to unelected judges provoked Thayer to embark on a mission to save democracy.

That mission was based, most fundamentally, on an optimistic transatlantic theory of "educative democracy" that allocated mass electoral democracy both the power and the responsibility, not to rule unerringly, but to learn from its mistakes better than alternative governing elites ever would.⁴ Inspired by the coming of popular lawmaking in his time across the Atlantic, Thayer made his first move immediately. Educative democracy, he argued, demanded that the Court generally defer to Congress's judgment that legislation that it enacted was constitutional. As he honed this response over the next decade, his work changed American constitutional theory forever.⁵ Introduced immediately in 1884 in *The Nation*,⁶ Thayer expanded and substantiated his theory in his *Harvard Law Review* article of 1893, which remains the most influential American constitutional law scholarship in the country's history.⁷

Thayer shared the theory of educative democracy with many others — and often retained more tenaciously than them — while deploying it first against the empowered judiciary of American constitutional law. Ingeniously, the Harvard professor presented his famous "clear error rule," commanding judges to invalidate federal laws only when indisputably unreasonable, as the

¹ 48 & 49 Vict. c. 3 (1884) (U.K.).

² 109 U.S. 3 (1883).

³ 18 Stat. 335-337 (1875).

⁴ For educative democracy and critiques of it, see *infra* Part I.

⁵ See *infra* Part III.

⁶ James Bradley Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, THE NATION, Apr. 10, 1884.

⁷ James B. Thayer, *The Origin and Scope of the American Doctrine of Judicial Review*, 7 HARV. L. REV. 129 (1893). Henry Monaghan, for example, called it the "most influential essay ever written on American constitutional law." Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983).

quintessence of America's best traditions. In fact, it was based on a stylized and highly selective reinvention of those traditions prompted by a transatlantic encounter.

In history and memory, campaigns to deal with judicial review run amok are generally associated with the aftermath of the Supreme Court's decision in *Lochner v. New York*⁸ to kill progressive legislation in the states. Like other recent scholarship,⁹ our research demonstrates different and earlier contexts for both "juristocracy" and the attempt to counteract it: above all, the democratic revolutions of the Civil War and the Reconstruction era. But our research also shows that, just as the war on slavery had depended on transatlantic networks,¹⁰ so too did the alliance to institutionalize democracy on the basis of an extended franchise in a popular legislative assembly. If it prompted Thayer to renovate American constitutionalism for a democratic age, it required his cosmopolitan perspective to envision a constitutionalism which contained or eliminated judicial review.

The same transatlantic sources were at work in the fix from evidence law that Thayer proposed: for that is where the clear error rule came from.¹¹ Transatlantic democratic experience had helped him towards facing the judicial threat in the first place, but transatlantic evidence law led him awry in counteracting it. Even as he strove to root the clear error rule deep in America's constitutional traditions, Thayer adapted a principle of self-restraint from the context of legal fact-finding to the very different context of limits on legislative self-government.

As a result, even today America is hostage, not just to judicial power, but also to Thayer's attempt to extricate America from its dangers. It was not just that, by some measures, Thayer (1831-1902) invented American constitutional theory in doing so.¹² Thayer's attempt to democratize America, only a theory in his lifetime, succeeded among his judicial followers from Oliver

⁸ 198 U.S. 45 (1905).

⁹ See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L. J. 2020 (2022); Helen Hershkoff & Fred Smith, Jr., *Reconstructing Klein*, 90 U. CHI. L. REV. ____ (forthcoming 2023).

¹⁰ See, e.g., W. CALEB MCDANIEL, *THE PROBLEM OF DEMOCRACY IN THE AGE OF SLAVERY: GARRISONIAN ABOLITIONISTS AND TRANSATLANTIC REFORM* (2013).

¹¹ See *infra* section II.C.

¹² "I've always thought that the activity we now call 'constitutional theory' began with the work of James Bradley Thayer," one law professor recently commented. Marc O. DeGirolami, *The Secular Prophet of American Law*, LAW & RELIGION F. (Oct. 24, 2022), <https://lawandreligionforum.org/2022/10/24/the-secular-prophet-of-american-law/>. See also Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 Harv. L. Rev. 2348 (2017); Richard A. Posner, *Against Constitutional Theory*, 73 NYU L. REV. 1, 4-5 (1998).

Wendell Holmes to Felix Frankfurter.¹³ More than three decades after Thayer's death, what he proposed after his English trip informed the constitutional revolution of 1937. Officially, constitutional adjudication became deferential, establishing a default rule that lasts until this day, supplemented in what scholars call "bifurcated review" with heightened scrutiny in exceptional situations.¹⁴ The Supreme Court was thus compelled to accept Thayer's approach to constraining its own powers, applying a rational basis test as its regular standard of review. Yet it is very hard now to conclude that the plan worked.

That is why the path Thayer traveled to his theory, which has never been traced by scholars, matters so much. Debate has long swirled around the clear error rule's contexts and motivations. It was understood in Thayer's lifetime that, as early University of Chicago law dean James Parker Hall put it of his teacher, "the great work of [Thayer's] life" was "the study and teaching of English law."¹⁵ But this Article is the first to place Thayer's constitutional theory in the most credible setting for explaining and retrieving it: the setting of the coming of transatlantic democracy, which goes furthest of contending hypotheses to establish the best frame for Thayer's work, clarifying its motivation as well as its sources.

Thayer's example as the first constitutional theorist remains exemplary when the "constitutional theory" he founded, while routinely called democratic by its practitioners, has largely spent its time since disagreeing about how to justify or even magnify countermajoritarian judicial power, not how to limit it.¹⁶ But the history this Article provides of Thayer's democratic agenda is equally the history of how he helped thwart popular self-rule. Experience since the adoption of Thayer's approach by his progressive followers proves that self-restraint is no alternative to judicial power: too easily, it is followed rhetorically or thrown overboard. No matter how prominent it becomes in rhetoric and theory, self-restraint is no restraint at all in reality and practice. As much as Thayer's diagnosis applies to the deep ills of the American body politic, his cure for judicial power has hobbled the search for better self-care.

With countermajoritarian judicial fiat and the imperatives of democratizing the country once again in obvious conflict, Thayer's concerns have renewed currency, even as his hasty solution cries out for reassessment and

¹³ See, e.g., Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

¹⁴ As G. Edward White puts it, the Supreme Court moved from "guardian review," assuming its role of defending all constitutional norms from encroachment or violation, to "bifurcated review," in which it took a deferential stance as a default, unless triggered to move to heightened scrutiny. See, e.g., 2 & 3 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY* (2016-2019).

¹⁵ James Parker Hall, *James Bradley Thayer*, in 8 GREAT AMERICAN LAWYERS 352 (William Draper Lewis ed., 1909).

¹⁶ See MARTIN LOUGHLIN, *AGAINST CONSTITUTIONALISM* ch. 10 (2021).

replacement.¹⁷ Their transatlantic origins explain how he reached them together, in a breakthrough and setback that defines even our current dilemmas to their core.

To show how, Part I sketches the rise of educative democracy as the essential general setting for the aspiration to control judicial power, and chronicles Thayer's initiation as a liberal studying constitutional law. Part II, the core of the Article, reconstructs how Thayer first adopted his positions in the 1880s and proposed the clear error standard to counteract judicial power, emphasizing the transatlantic contexts in which Thayer engaged American problems. Part III turns to how he finalized his classic 1893 *Harvard Law Review* essay — which developed his perspective in ways that were essential in their own right, while obscuring in retrospect the transatlantic setting for his initiative. Together, these Parts provide the first archivally rooted account of the motivations and origins of rational basis review in American constitutional law.¹⁸ The conclusion turns to why educative democracy became less plausible to many observers, even as Thayer's approach was implemented by the Supreme Court in the 1930s only to break down irretrievably since. For as long as educative democracy remains a credible hope, Thayer's attempt to devise an American constitutional law more hospitable to it will remain relevant to our common legal future.

¹⁷ For an early version of this argument, see Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, THE NEW REPUBLIC, Nov. 2022.

¹⁸ This research relies on material collected by Raphael Stern from eight archives. Most of the cited work is Thayer's notes on constitutional law. Legal historians have only scratched the surface of these notes. Most have only used his correspondences; his course notes have been used sparingly and very selectively. The most likely reason is that Thayer's handwriting is exceedingly difficult to decipher: not only did he write in shorthand with very poor penmanship, he routinely revised his notes by crossing out older remarks and adding in their stead his thoughts in tiny handwriting. Over the years, he also added loose pages filled with new insights as additions to his earlier notes. A magnifying glass routinely came in hand during the course of this research. Even Thayer's son, Ezra Ripley Thayer (who was a professor and, later, dean of the Harvard Law School), could not read most of his notes. In 1908, he explained to a research assistant he hired to transcribe them (but who never did) that "it turned out that the notes in question were so badly written that it was very hard to decipher them. I was so busy that I put off deciphering and transcribing from week to week until all this time has elapsed." James Bradley Thayer Papers at the Harvard Law School Archives, Cambridge, MA [hereinafter JBTP], Box 2, Folder 3, July 7, 1908, Ezra Ripley Thayer to Charles F. Bates, loose pages between 74-75.

I. AMERICA, BRITAIN, AND THE COMING OF DEMOCRACY

Having expanded suffrage in two prior steps in 1832¹⁹ and 1867²⁰ before its 1884 breakthrough, the United Kingdom did not achieve full voting rights for all adult males until 1918²¹ — something that the United States, at least theoretically, had enjoyed since the ratification of the Fifteenth Amendment in 1870²² (and for white males since 1856, when North Carolina abolished the last property requirement for participation in the rolls).²³ Yet as British traditionalists began to understand even as their parliament extended the vote in stages, Americans had countermajoritarian political features — not least the Supreme Court's power of judicial review — that made their earlier date of their achievement of universal male suffrage far less momentous.²⁴

Two contemporaneous — but diametrically opposed — transatlantic borrowings took place. The first involved conservatives looking to the New World as a model for how to expand suffrage without democratization. American structural arrangements that contained majority rule — such as the presidential veto, the Senate, and judicial review — led to “Americomania”²⁵ in England. But at the same time, Thayer looked eastward in order to Anglicize America. He drew inspiration from Britain's achievement in his lifetime of a *mass democracy without countermajoritarian judicial power*, and the theory of parliamentary supremacy that followed from it. Anglophilia — in a new version than that that had appealed to Enlightenment sages and early liberals²⁶ — now undergirded Thayer's democratizing commitments.

Understood in this way, Thayer's question was whether and how America could still achieve the functional equivalent of parliamentary supremacy within the very American constitutional system that made it attractive to those Englishmen who hoped to stop the coming of democracy in its tracks or reverse it altogether. It was this question to which Thayer's clear error rule was the answer. If judges deferred to the legislature's own sense of the constitutional propriety of its work, except when it was clearly irrational, they would not substitute their own philosophy, which risks the corruptions of their personal

¹⁹ Representation of the People Act 1832, 2 & 3 Will. 4 c. 34 (1832) (U.K.).

²⁰ Representation of the People Act 1867, 30 & 31 Vict. c. 102 (1867) (U.K.).

²¹ Representation of the People Act 1918, 7 & 8 Geo. 5 c. 64 (1918) (U.K.).

²² U.S. CONST., AMEND. XV.

²³ 1856 N.C. Sess. Laws 12-13.

²⁴ See *infra* section I.B.

²⁵ This was pioneering English constitutional theorist A.V. Dicey's phrase for his countrymen's enthusiasm for America's countermajoritarian arrangements. See *infra* section I.B.

²⁶ See, e.g., JONATHAN I. ISRAEL, ENLIGHTENMENT CONTESTED: PHILOSOPHY, MODERNITY, AND THE EMANCIPATION OF MAN 1670-1752 ch. 14 (2006) (“Anglomania, *Anglicisme*, and the ‘British Model.’”).

beliefs and social class. A countermajoritarian judicial power bequeathed from the past could remain in place, but without disturbing majority rule.

A. The Expansion of Suffrage across the Atlantic

“Democracy” may go back to ancient Greece — but it was in the later nineteenth century that mass participation through periodic election of political representatives to a legislative assembly became an essential constituent feature of the concept, or even equivalent to it. For contemporaries, democracy meant “popular government,” a phrase often used at the time by its fans and foes to understand it, as something to be achieved or counteracted.²⁷

The earlier Reform Act of 1867 had doubled the electorate in the United Kingdom, three years before the Fifteenth Amendment in the United States universalized manhood suffrage, at least theoretically, by prohibiting discrimination by race in voting rights.²⁸ These two events were seen as parallel and initiated a generation of democratic optimism among liberals about what an enlarged electorate was capable of accomplishing — just as the opposition to that enlargement led skeptics of popular rule in search of new constraints on democratic power.²⁹ Americans faced cognate pushback as in Britain as earlier holdouts to the expansion of suffrage reinvented their resistance within a new polity grounded on the mass franchise. Back to Plato, critiques of “democracy” before had been largely hypothetical. Echoing general horror of two revolutionary moments in France, when universal manhood suffrage had been briefly introduced both in 1793 and 1848, the actual experience of it across the Atlantic now provoked former opponents of democracy to reinvent their resistance within its terms.

²⁷ See, e.g., Justice David Brewer’s comment, writing for the majority in *Muller v. Oregon*, 208 U.S. 412, 420 (1908), that “it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.”

²⁸ Women were enfranchised nationally by the ratification of the Nineteenth Amendment in 1920 in the United States and by the passage of the Representation of the People Act in 1928 for the United Kingdom. Of course, because there are no voting rights in America’s federal Constitution even today, only constraints on the basis for state rules, there were many other burdens on voting for far longer (including the rise of literacy tests even for white males as property requirements were dropped). See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (rev. ed. 2009).

²⁹ Our contextualization is inspired, above all, by LESLIE BUTLER, *CRITICAL AMERICANS: VICTORIAN INTELLECTUALS AND TRANSATLANTIC LIBERAL REFORM* (2007), which does not mention Thayer but beautifully reconstructs the intellectual setting in which to understand him. See also David Hall, *The Victorian Connection*, in *VICTORIAN AMERICA* (Daniel Walker Howe ed., 1976) and ROBERT KELLEY, *THE TRANSATLANTIC PERSUASION: THE LIBERAL-DEMOCRATIC MIND IN THE AGE OF GLADSTONE* (1969).

Like other late nineteenth-century American intellectuals, Thayer was an admirer of England. Born in a village outside of Boston in 1831, he was raised in abolitionist circles in western Massachusetts, after a brief stint in Philadelphia which ended in an attack by a proslavery mob.³⁰ After attending Harvard College, he graduated from Harvard Law School in 1856. He vaulted into the city's Brahmin elite by marrying Sophia Ripley (Ralph Waldo Emerson's niece) and practicing law for some two decades. After turning down a Harvard literature professorship offered in honor of his amateur reviewing and writing while in practice, Thayer agreed to become the university's Royall Professor of Law in 1874, and began teaching constitutional law. He did so with fascination with kindred democratic developments across the ocean.

It was a vital moment in democratic theory. Establishing a special relationship diplomatically in the decades after the Civil War, the United Kingdom and United States also communed with each other intellectually, especially for elite Americans still anxious about their own cultural standing. More important, "Victorian America"³¹ could seem to be evolving politically in tandem with the mother country, then the hegemonic country in the world. "Contemporaries," writes the leading historian of transatlantic intellectual life of the period, Leslie Butler, "assumed the pursuit of . . . democratic goals in the United States had broader implications for the rest of the world and were acutely aware of a common democratic wave."³²

For such commentators, intellectuals, and scholars, it was a democratic breakthrough to refound earlier liberalism and parliamentarism on mass participation.³³ A fierce supporter of the Union and the cause of freedmen in his youth, Thayer certainly fits best in the camp that took this view, mobilizing to defend it from its enemies. Regarding the Civil War as a breakthrough for majority rule adverse to minority obstruction, and post-Civil War democratization as a chance to advance reform further, liberals in America joined those in the new Liberal Party in Britain who were advancing their own reform agenda.³⁴ "Although parliamentary government in Great Britain is nearly two centuries old," noted Thayer's Harvard colleague A. Lawrence Lowell in 1890, "it is only very recently that it has begun to adapt itself to the conditions of a widely extended franchise, and to form part of a democratic system."³⁵ And

³⁰ Astonishingly, there is no extant biography of Thayer, but there are brief treatments in Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U.L. REV 1 (1993) and ANDREW PORWANCHER ET AL., *THE PROPHET OF HARVARD LAW: JAMES BRADLEY THAYER AND HIS LEGAL LEGACY* ch. 1 (2022).

³¹ See, e.g., VICTORIAN AMERICA, *supra* note 29.

³² BUTLER, *supra* note 29, at 11.

³³ On parliamentarism before democracy, see WILL SELINGER, *PARLIAMENTARISM: BURKE TO WEBER* (2019).

³⁴ See BUTLER, *supra* note 29, at ch. 2.

³⁵ A. Lawrence Lowell, *Democracy and the Constitution*, in *ESSAYS ON GOVERNMENT* 75 (1890).

both countries had barely begun to explore democracy as a way of political life. The Civil War emerged out of a democratic revolution, and led to another in Reconstruction,³⁶ which supported a deferential judiciary not so much because no one has access to truth as majorities see it as because of continuing optimism in the *self-correcting* potential of empowered popular rule.³⁷ Democracy on a mass franchise is a learning process.

Though it had earlier sources, the theory of educative democracy was rooted in Victorian liberal John Stuart Mill's thought.³⁸ One of its leading representatives in the United States was the Scottish immigrant E.L. Godkin, who became long-time editor of *The Nation* when it began in 1865 — and where Thayer was to serve as a regular contributor, announcing his theory in its pages in 1884.³⁹ “It is not simply the triumph of American democracy we rejoice over,” opened the first issue of the magazine, “but the triumph of democratic principles everywhere.”⁴⁰ Such figures as Godkin and James Russell Lowell, Thayer's fellow Harvard Law graduate and Harvard professor, believed that the risks of empowering voters to determine their country's future were best counteracted, paradoxically, by empowering them, so as to allow for learning from mistakes. “The only way to make men fit for freedom,” Lowell commented, “is to make them free,” just as “the only way to teach them how to use political power is to give it to them.”⁴¹

This did not mean such Victorian liberals agreed that no capacities were worth requiring for credible self-rule, as if learning from mistakes could happen with no civic preparation. But they did not think that the need to control the risks of democratic empowerment they saw made older approaches to staving it off altogether (such as property qualifications) worth retrieving. Famously, in *Considerations of Representative Government* (1861), Mill himself recommended intensifying the vote of the well-educated in order to empower a new elite. This built in an “epistocratic” dimension to democracy, one very different than calling either for the endurance of aristocratic checks through an upper chamber

³⁶ This is now the dominant reading of historians, following W.E.B. Dubois's pioneering *BLACK RECONSTRUCTION IN AMERICA, 1860-1880* (1935); see, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).

³⁷ Cf. LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* (2003), esp. Part I (examining the career Oliver Wendell Holmes to suggest that the main implication of the Civil War was to counteract fanaticism with a kind of nihilism). The influence of this book is a pity, not least since Thayer was a charter member of the actual discussion group that gave Menand his book title. See *LETTERS OF CHAUNCEY WRIGHT, WITH SOME ACCOUNT OF HIS LIFE* (James Bradley Thayer ed., 1877).

³⁸ See, e.g., Wendy Donner, *John Stuart Mill on Education and Democracy*, in J.S. MILL'S *POLITICAL THOUGHT: A BICENTENNIAL REASSESSMENT* (Nadia Urbinati & Alex Zakaras eds., 2007).

³⁹ Thayer, *Precise Question*, *supra* note 6.

⁴⁰ Cited in BUTLER, *supra* note 29, at 87.

⁴¹ Cited in *id.* at 109.

of nobles — Mill toyed with bicameralism but urged experience not nobility as qualification for an ideal senate — or instituting juristocratic checks through constitutional rules that judges could cite to void popular legislation.⁴² But in a speech in parliament, Mill, too, insisted that empowering previously excluded classes from voting — including, in his argument, women — was essential as the very “stimulus to their faculties” they needed to engage in politics responsibly.⁴³ Self-government was a learning process, not above mistake, but superior to any existing alternatives.⁴⁴

These very same commitments made the American branch of these new democrats declared enemies of the corrupt politics and partisan wrangling that pervaded the Gilded Age through which they lived. Indeed, such commitments allow for associating Thayer himself most securely with this general approach to transforming America into a participatory democracy. For Thayer was a charter member of the so-called “Mugwumps” — those progressive Republicans in Massachusetts and throughout the northeastern United States who founded a movement to bolt from their party when Maine politician James Blaine was nominated as its presidential candidate in 1884.⁴⁵ The crossover support the Mugwumps provided for the Democratic party nominee, Grover Cleveland, helped ensure his victory in the general election that year. Cleveland, they hoped, would serve as a scourge of corruption and a standardbearer of Victorian liberalism. The defection epitomized rage that few such elite reformers could escape that the party of Abraham Lincoln’s democratic revolution had devolved into a political racket that failed to advance their goals.⁴⁶ No account of Thayer has more than noted it, but the evidence that he identified with and participated in the Mugwumps is overwhelming.⁴⁷

⁴² J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* ch. 13 (1861).

⁴³ J.S. Mill, *The Admission of Women to the Electoral Suffrage* (1867), in *SEXUAL EQUALITY: A MILL-TAYLOR READER* 240 (Ann P. & John M. Robson eds., 1994).

⁴⁴ For a long time, before Butler’s more empathetic account, such liberal Victorianism was generally treated with contempt, both for its compromises and its moralism, notably in progressive historiography. *See esp.* JOHN G. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE (1968); *see also* JOHN TOMSICH, *A GENTEEL ENDEAVOR: AMERICAN CULTURE AND POLITICS IN THE GILDED AGE* (1971).

⁴⁵ *See* Gordon S. Wood, *The Massachusetts Mugwumps*, 33 *NEW ENGLAND Q.* 435 (1960); Geoffrey Blodgett, *The Mind of the Boston Mugwump*, 48 *MISS. VALLEY HIST. REV.* 614 (1962); GEOFFREY BLODGETT, *THE GENTLE REFORMERS: MASSACHUSETTS DEMOCRATS IN THE CLEVELAND ERA* (1966).

⁴⁶ *See* DAVID M. TUCKER, *MUGWUMPS: PUBLIC MORALISTS OF THE GILDED AGE* 86 (1998) (noting that “for liberals who came of age in the abolitionist struggle . . . , the capture of their party by political professionals was one of the most outrageous crimes of the age”).

⁴⁷ Only a year after his English trip and a few months after propounding his constitutional theory in *The Nation*, Thayer threw himself into the cause. He attended the second public meeting in the summer of 1884 at the Tremont Temple in Boston, organized to respond to Blaine’s nomination, and joined the “Committee of One Hundred” to govern the movement, as well as the smaller twenty-five-man committee to reach out to New York allies to join. Next Thayer

In a career which has led scholars to speculate wildly about his motivations, while missing his decisive Mugwump participation, Thayer's role in origins of the movement so clearly clarifies the philosophical commitments he shared with fellow Victorian liberals to educative democracy and the aspiration to achieve any moral and policy ends through democratic and legislative means. In contrast, judicial review, like the rest of America's constitutional features, could become powerfully appealing to those who did not believe in educative democracy in the first place.

As time passed, judicial review also appealed to some liberals who were disappointed by where democracy led. While the experience of democracy after the 1860s could lead to enthusiastic reaffirmation, as in Thayer's case, it could also lead to good-faith reappraisals. Indeed, mass politics persuaded some that there were better alternatives to rule by the people — who were dangerous, or fickle, or both.⁴⁸ Reasons ranged from the fright caused by the Paris Commune (1871) to the rise of socialism abroad to the corruption of parties and the realities of urban politics at home.⁴⁹ As much as with conservatives who never believed in democracy in the first place, Thayer was also in debate with his own fellow liberals, not least Godkin himself, who were revisiting their original faith in light of experience.⁵⁰

B. American Constitutionalism versus Parliamentary Sovereignty

In spite of the overlap between their goals in a newly democratic age, American and British liberals operated in fundamentally different constitutional situations. Under its unwritten constitution, Britain was consecrating parliamentary sovereignty with a wider and wider franchise, and unrestricted by

attended the national conference of the group on July 22 in New York City, serving on its executive committee. See RAYMOND L. BRIDGMAN, *THE INDEPENDENTS OF MASSACHUSETTS IN 1884* 10-11, 17 (1885). Fittingly, one of the pieces of paper upon which Thayer scribbled notes is a printed handout that announces the "Anti-Grant and Anti-Blaine. Delegates to State Convention." JBTP, Box 2, Folder 1, Lecture I, Apr. 22, 1880, loose page between 6-7.

⁴⁸ See JEFFREY PAUL VON ARX, *PROGRESS AND PESSIMISM: RELIGION, POLITICS, AND HISTORY IN LATE NINETEENTH CENTURY BRITAIN* (1985).

⁴⁹ The second thoughts of educative democrat A.V. Dicey, discussed *infra* section I.B, came over the question of Irish Home Rule, which he was appalled to find liberal prime minister William Gladstone citing him to justify, and for that reason turned in his later career to explore the referendum as a supplement to parliamentary sovereignty. See A.V. DICEY, *WRITINGS ON DEMOCRACY AND THE REFERENDUM* (Gregory Conti ed., 2023).

⁵⁰ From the beginning, Godkin advocated for educational qualifications for voting, and later took what he called "the decline of legislatures" more seriously than Thayer ever did. E.L. Godkin, *The Decline of Legislatures*, *THE ATLANTIC*, July 1897, reprinted in GODKIN, *UNFORESEEN TENDENCIES OF DEMOCRACY* (1898).

judicial checks.⁵¹ It was precisely this fact that made the expansion of the electoral basis of parliamentary representation so momentous. In the same era, the United States juxtaposed even more expanded suffrage with a compensatory possibility of the invalidation of legislation, if not under the federal Constitution of 1787 then by a confirmed tradition Thayer would challenge.⁵² Thayer is best understood as attempting to transform America's constitutional order as far as possible in a British direction — even as conservative British thinkers hostile to democracy called for the reverse.

“The Framers of the American Constitution were far from wishing or intending to found a democracy,” James Russell Lowell remarked in a speech in England in 1884.⁵³ But since then, he added, both America and England herself had been driven in a democratic direction.⁵⁴ And it was a good thing too: not that democracy was unerring in its choices, but that “[a]n appeal to the reason of the people has never been known to fail in the long run.”⁵⁵ The direct response to this increased democratization, however, were calls in Britain to Americanize parliamentary sovereignty — that is, curtailing democracy.⁵⁶

Albert Venn Dicey was Great Britain's first theorist of constitutional law, a direct model for Thayer in form and substance. And Dicey complained in *The Nation* in January 1886 — a few short weeks after Thayer reviewed his treatise championing legislative supremacy in the same pages — that “Americomania” was sweeping English political thought.⁵⁷ For a long time, the “prevailing impression,” he explained, had been that “the political arrangements of the United States were at best cheap and nasty, and at worst nasty without being cheap.” However, after the Third Reform Act “the institutions of the Union now excite something like hopeless admiration on the part of thoughtful conservatives. . . . [N]ow that England is becoming democratic, respectable Englishmen are beginning to consider whether the Constitution of the United States may not afford means by which, under new democratic forms, may be preserved the political conservatism dear and habitual to the governing classes of England.”⁵⁸ This was a depressing turn of events for one who, like even the middle-aged Dicey, acknowledged that “no one is really a democrat who does

⁵¹ Further back, the monarchy had been confined to a ceremonial role, and by the 1880s the House of Lords had ceded nearly all of its powers — making the United Kingdom already in this period functionally a more unicameral system even compared to the United States today.

⁵² See *infra* section III.A.

⁵³ James Russell Lowell, *Democracy*, in DEMOCRACY AND OTHER ADDRESSES 23 (1886).

⁵⁴ *Id.* at 13-14, 26-27.

⁵⁵ *Id.* at 33.

⁵⁶ Though not entirely reliable on legal questions, the best general treatment remains H.A. Tulloch, *Changing British Attitudes towards the United States in the 1880s*, 20 HIST. J. 825 (1977). See also FRANK PROCHASKA, *EMINENT VICTORIANS ON AMERICAN DEMOCRACY: THE VIEW FROM ALBION* (2012).

⁵⁷ A.V. Dicey, *Americomania in English Politics*, THE NATION, Jan. 21, 1886.

⁵⁸ *Id.* at 52-53.

not hold that on the whole it is best in a given state or nation that the will of the majority should be supreme.”⁵⁹

Dicey did not remark that American constitutionalism left practically uncontrollable power to interpret the supreme law in judicial hands. But the conservative whom Dicey cited as the leading Americomaniac, Henry Sumner Maine, certainly did. In his *Popular Government* (1885), Maine glumly acknowledged “the irresistible force” which was driving England towards democracy “as towards Death.”⁶⁰ Fortunately, Maine added, the inspiration of the United States Constitution, as “the most important political instrument of modern times,” could postpone the inevitable.⁶¹

Especially appealing to Maine was the Supreme Court, “not only a most interesting but virtually unique creation of the founders of the Constitution.”⁶² In his eyes, the Court’s “duty of annulling” the “usurpations” of power by the political branches of government and by the states of the union, was indispensable to ensuring that the will of the people never triumphed.⁶³ Comparably, the standardbearer of the Conservative Party and later prime minister, Lord Salisbury, openly remarked: “I confess I do not often envy the United States, but there is one feature in their institutions which appears to me the subject of the greatest envy – their magnificent institution of a Supreme Court. In the United States, if Parliament passes any measure inconsistent with the Constitution of the country, there exists a court which will negative it at once.”⁶⁴

In these years, Thayer in effect moved to blunt that antidemocratic weapon where it had been forged. He did so in direct and open dialogue with Dicey’s theory of parliamentary supremacy. (Both visited one another on their

⁵⁹ *Id.* at 53.

⁶⁰ HENRY SUMNER MAINE, *POPULAR GOVERNMENT: FOUR ESSAYS* 170 (1886).

⁶¹ *Id.* at 196.

⁶² *Id.* at 217. In line with the general drift of his survey of American institutions, Maine struggled to show that, in fact, judicial review had English sources, while regretting that his country had ended up leaving the constitutionality of legislation to the legislature itself. See *id.* at 220 (suggesting “the inconvenience of discussing questions of constitutional law in legislative assemblies”). Given Godkin’s defense of juristocracy against which Thayer mobilized, see *infra* section II.B.2, it is important to note that Godkin never reached Maine’s outright phobia of democracy. See Godkin’s critical review of Maine, *Popular Government*, *NINETEENTH CENTURY* (1886), reprinted in GODKIN, *PROBLEMS OF MODERN DEMOCRACY: POLITICAL AND ECONOMIC ESSAYS* (1896). See also W.E.H. LECKY, *DEMOCRACY AND LIBERTY* (1896) and Godkin’s review of it in *The Real Problems of Democracy*, *THE ATLANTIC*, July 1896, reprinted in *PROBLEMS*.

⁶³ *Id.*

⁶⁴ Cited in ANDREW CARNEGIE, *TRIUMPHANT DEMOCRACY OR FIFTY YEARS MARCH OF THE REPUBLIC* 369-70 (1886); see also *Disintegration*, in LORD SALISBURY ON POLITICS 348-50 (Paul Smith ed., 2007).

respective trips to each other's countries over decades.)⁶⁵ Originally publishing his account in 1885, Dicey was canonized as the authoritative spokesman on the meaning of his country's constitution — including by Thayer, who immediately contributed to *The Nation* a glowing review of it.⁶⁶ And this was most of all true for Dicey's theory of the plenary authority of the modern legislature to make law, unconstrained not only by external views of the constraints of the "rule of law" (a phrase Dicey popularized) but especially by judicial actors citing constitutional norms to trump parliamentary will.

As a young liberal reformer, Dicey fully signed on to the educative theory of democracy, affirming — as Thayer would — that it "rests ultimately on the conviction that a people gains more by the experience, than it loses by the errors, of liberty."⁶⁷ In 1885, the same time Thayer was striving to free America from the threat of judicial interference with federal legislation, Dicey propounded the orthodox theory of what that regime already looked like, in an England with parliamentary sovereignty and an expanded franchise.

According to Dicey, the central principle of constitutional law was that Parliament "has the right to make or unmake any law whatsoever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."⁶⁸ By Dicey's own lights, the very notion of parliamentary sovereignty was a misnomer: "The electorate is in fact the sovereign of England."⁶⁹ But it vested its powers in a supreme legislature — and, increasingly, in the House of Commons. And while, of course, judicial application of its statutes in effect created new rules, in the common law manner, "English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges."⁷⁰ It had not always been thus; but, like a butterfly emerging from its chrysalis, a monarchical legal system had now fully transformed into a fully

⁶⁵ See, e.g., MEMORIALS OF ALBERT VENN DICEY 157-58 (Robert S. Rait ed., 1925); James Bradley Thayer Correspondence and Memoranda at the Harvard Law School Archives, Cambridge, MA [hereinafter JBTCM] Vol. 6, July 22, 1883; A.V. Dicey, *The Teaching of Law at Harvard*, 13 HARV. L. REV. 422 (1900). Thayer was one of Dicey's hosts for the Harvard events that became his LECTURES ON THE RELATION OF LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY (1905).

⁶⁶ ALBERT VENN DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE CONSTITUTION (1885); James Bradley Thayer, *Dicey's Law of the English Constitution*, Dec. 14 and 31, 1885, reprinted in JAMES BRADLEY THAYER, LEGAL ESSAYS (1908).

⁶⁷ Albert Venn Dicey, *The Balance of Classes*, in ESSAYS ON REFORM 75 (1867).

⁶⁸ A.V. DICEY, LECTURES INTRODUCTORY TO THE LAW OF THE CONSTITUTION 27 (J.W.F. Allison ed., 2013) (1885).

⁶⁹ *Id.* at 191.

⁷⁰ *Id.* at 37.

democratic one: “The prerogatives of the Crown have become the privileges of the people.”⁷¹

Citing this last line in *The Nation*, Thayer welcomed Dicey’s treatise for reaffirming “the gradual transfer of power from the Crown to a body which has come more and more to represent the nation.”⁷² Legislatures, Thayer put it in a strikingly Diceyan mode some years later, are the “majestic representative of the people” as “ultimate sovereign.”⁷³ Dicey formulated the model to which America — if not saved from judicial power — offered the countermodel. It was no wonder, Thayer concluded, that “[p]olitical students in England are . . . turning with curious interest to an inspection of the highly conservative arrangements of our constitutions. . . . More and more attention is likely to be paid to this subject.”⁷⁴ Thayer’s Diceyan skepticism towards this increasing turn to judicial power helps locate his view most plausibly in historical perspective.

Professor Mark Tushnet has argued that Thayer primarily differed from recognized contemporaneous conservative jurists committed to *laissez-faire* constitutionalism in his approach, not his underlying political views.⁷⁵ Thayer, on this telling, was equally opposed to progressive legislation as notorious prophet of the *Lochner* era as Christopher Tiedeman was. Yet whereas Tiedeman saw the judiciary as the bulwark against the coming progressive onslaught, Tushnet believes, Thayer considered the judiciary incapable of acting as a *strong enough* defender of the Constitution. In turn, he decided that it was necessary to shift attention to the political realm and cultivate a *political* conservatism.

Certainly, Thayer was by no account a radical progressive. While he opposed the intimations of the *Lochner* era that he did not live to see, he by no

⁷¹ *Id.* at 210. It was in part because of the absence of judicial controls of legislative power that the focus of debate in England was not just over whether to move to democratic representation with greater participation rights, but also over which form of it to adopt, including alternatives such as descriptive representation and proportional representation. See generally GREGORY CONTI, *PARLIAMENT THE MIRROR OF THE NATION: REPRESENTATION, DELIBERATION, AND DEMOCRACY IN VICTORIAN BRITAIN* (2019).

⁷² Thayer, *Dicey’s Law*, *supra* note 66, at 194, citing DICEY, *LECTURES INTRODUCTORY*, *supra* note 66, at 210–11.

⁷³ JAMES BRADLEY THAYER, *JOHN MARSHALL* 109 (1901).

⁷⁴ Thayer, *Dicey’s Law*, *supra* note 66, at 205. Indeed, Thayer wrote, Dicey overstated the mutability of the law in America in pointing to Article V, which allowed three-fourths of the people via their several states — like the English Parliament — to remake their legal order at will. But, Thayer rejoined, multiple assemblies with staggered meetings that could last decades, and limited in their action to proposals from Congress (since Article V’s provision for constitutional conventions had never been used) remained starkly different. “Shall we say,” Thayer asked rhetorically, “that there is no ‘legal sovereign’ in the United States? Perhaps so. Our ancestors were afraid of recognizing any such *legal* thing as uncontrollable power anywhere.” *Id.* at 202.

⁷⁵ Mark Tushnet, *Thayer’s Target: Judicial Review or Democracy?*, 88 NW. L. REV. 9, 11 (1993).

means rejected the economic libertarianism of his class and station.⁷⁶ But the assumption that he simply disagreed about the appropriate means with fellow “conservatives” — whether to rely on the judiciary or on the legislature — misses the point. It unjustifiably casts democracy through legislative institutions as merely means to an end. This, however, could not be farther from the view that Thayer himself embraced: enabling the popular will in periodic elections to make policy in the representative assembly through legislation was the *very purpose* of constitutionalism. Thayer’s essential concern was how anyone should effectuate their preferences: Thayer sincerely oriented himself as a constitutional theorist to the paramount importance of democracy.

Tiedeman believed that a specific social, economic, and political order needed to be preserved at all costs — even if this meant defying the will of the majority.⁷⁷ In Tiedeman’s view, the only “defense against the inordinate demands of Socialism” was the “popular reverence for these constitutional declarations” and “the efforts of the courts to stem the tide by courageously avoiding all enactments, which violate them in word or in spirit.”⁷⁸ Thayer’s views could not have been more different. As he told his students, even “if the country rushes into socialism,” it would still be incumbent upon the judiciary to find “almost every act of the Legislature . . . to be constitutional as being of public concern,” and therefore applicable statute.⁷⁹ When he anonymously reviewed Tiedeman’s *Treatise on the Limitations of the Police Power in the United States* in the pages of *The Nation*, Thayer stressed that his opponent had failed to consider “one matter of fundamental importance”: “the grounds, nature, and just scope of the judicial power to declare a legislative act void.”⁸⁰ “There is much reason,” Thayer concluded, “to think that missionary work is more needed in the direction of toning up our people and their legislative representatives to a recognition of the merely *moral* restraints which the

⁷⁶ Thayer had little respect for Progressive economist Richard T. Ely. See James B. Thayer, *American Judges and the Interests of Labor*, 5 Q. REV. ECON. 503 (1891).

⁷⁷ See JBTP, Box 2, Folder 4, clipping of Annual Address before Missouri Bar Association by Professor Christopher Tiedeman, loose pages between 138-39 (“In these days of great social unrest, we applaud the disposition of the courts to seize hold of the general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual’s natural rights, even though these acts do not violate any specific or special provision of the Constitution”).

⁷⁸ *Id.*

⁷⁹ Student Notes of Henry Ware at the Harvard Law School Archives, Cambridge, MA [hereinafter HWP], Box 1, Constitutional law vol. 1, Oct. 18, 1895. Many of the archival sources we cite in this Article were originally written in shorthand. For clarity’s sake, we have fully spelled out the abbreviated words and phrases.

⁸⁰ See [James Bradley Thayer,] *Recent Law Books*, THE NATION, Mar. 3, 1887, at 169. Neither Tushnet nor other treatments of Thayer cite this review. Many of Thayer’s contributions to *The Nation* were anonymous. For a list of his and others’ anonymous writings in the weekly, see 1 THE NATION: INDEXES OF TITLES AND CONTRIBUTORS v.1-105 (compiled by Daniel C. Haskell, 1951).

constitutions impose upon them, than in spurring on the judges to a sterner exercise of their power of annulling legislative acts.”⁸¹

C. *Thayer Becomes a Constitutional Law Scholar*

But the path Thayer had followed to arrive at this conclusion, inspired by educative democracy as the British Reform Act itself arrived, deserves minute retracing. After concentrating on evidence law in his first years as a professor, Thayer took up constitutional law in 1880. Within four critical years, he had developed his theory.

From the beginning of his engagement with American constitutional law, Thayer set out to question “certain fundamental political conceptions” that pervaded American legal orthodoxy.⁸² To do so, he turned to Anglo-American legal history, joining a transatlantic research community.

Thayer exemplified what David Rabban has termed “the historical school of late nineteenth-century” legal scholarship.⁸³ As the English common law had proved to be fertile ground for understanding the contingent development of modern evidence law — Thayer’s main field of research and teaching — it was quite natural that he would embark on a similar historical and comparative inquiry when it came to constitutional law. American constitutional

⁸¹ [Thayer,] *Recent Law Books*, *supra* note 80, at 169.

⁸² JBTP, Box 2, Folder 2, Feb. 1881, loose sheet in front of book, 1. The loose page does not contain a date, but the quote appears on the top of the page in a note dated Feb. 1881. This note is written with a different pen from that which was used to write the remainder of the loose page.

⁸³ DAVID RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 1* (2013). Thayer’s interest in tracing the origins of American constitutional to English was apparent in his first scholarly foray into the field: a study of judicial advisory opinions and the constitutional role of the judiciary. And he returned to the topic throughout his career. Though it is orthogonal to our argument, it is worth noting that Thayer viewed advisory jurisdiction as acceptable if not a stepping stone to judicial power. “It would be strange if an opinion called for in this way and arrived at without the usual assistance of counsel not in the regular course of judicial proceedings should be deemed a declaration of the law *binding* upon anybody,” he noted in his first research. JBTP, Box 2, Folder 2, Lecture VI, Mar. 12, 1880, 55-57A. But Thayer recognized that the House of Lords had regularly called upon judges for counsel. See James Bradley Thayer, *Memorandum on the Legal Effect of Opinions Given by Judges to the Executive and the Legislative under Certain American Constitutions*, in CHARLES S. BRADLEY, *THE METHODS OF CHANGING THE CONSTITUTIONS OF THE UNITED STATES, ESPECIALLY THAT OF RHODE ISLAND* (1885), *reprinted as Advisory Opinions*, in THAYER, *LEGAL ESSAYS*, *supra* note 66. Later in life, he welcomed University of Oxford jurist Frederick Pollock’s dream of international consultation among English-speaking peoples of one another’s judges. See 1 *CASES ON CONSTITUTIONAL LAW* 175-83 (James Bradley Thayer ed., 1895); Frederick Pollock, *The Vocation of the Common Law*, 11 *LAW Q. REV.* 323 (1895), *reprinted in* *THE EXPANSION OF THE COMMON LAW* (1904); James Bradley Thayer, *International Usages — A Step Forward*, 2 *UNIV. L. REV.* 272 (1895), *reprinted in* *LEGAL ESSAYS*, *supra* note 66.

law, he told his first constitutional law students in 1880, “can only be [properly construed by reference to legal principles which are fixed deep in the common law of England.]”⁸⁴

The comparison of England and its law of the constitution with American constitutional law required questioning widely-held assumptions. In light of the English constitution and its history, “it will not do to say and to think that constitutional law is peculiar to this country.”⁸⁵ Two features of the American Constitution came in for particular scrutiny.

First, England’s “unwritten law, — applicable to and forming a part of what is called ‘the constitution’” and composed of “not *merely* certain political principles, theories, solemn declarations, practices, & arrangements . . . but . . . also certain statutes & common law rules and certain law”⁸⁶ suggested that the *written* constitution of the United States was not the only kind. Second, while the English constitution was, like the American one, “enforceable through the courts,”⁸⁷ those courts enjoyed radically different powers. They could set aside various executive actions and “declar[e] a constitutional restriction on *the king’s prerogative*”⁸⁸ as unconstitutionally *ultra vires*. However, “*no English court can declare an act of parliament unconstitutional or void.*”⁸⁹ Given the English descent of American arrangements, these two differences required explanation.

Even as history offered these answers, it also underscored the contingency of the American divergence. These “peculiarit[ies],” wrote Thayer, “run[] back only to the period of our acquiring or asserting independence of Great Britain, — say to the Declaration of Independence in 1776.”⁹⁰ The written colonial charters provided the template for written state and federal constitutions. Judicial review of the constitutionality of statutes, meanwhile, developed from the courts’ role in assessing whether certain local laws violated the charters.⁹¹ Yet as Thayer emphasized, it was not a foregone conclusion that

⁸⁴ JBTP, Box 2, Folder 2, Feb. 6, 1880, 3-4. The bracketed part of the quote is partially crossed out in his notebook, but it is not clear when he did this. In preparation for this course, Thayer asked his former student, Louis D. Brandeis, for research assistance. See Louis Dembitz Brandeis Papers at University of Louisville, Louisville, KY, Microfilm Reel 119, Dec. 8, 1879, James Bradley Thayer to Louis D. Brandeis.

⁸⁵ JBTP, Box 2, Folder 2, undated, loose sheet in front of book, 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ JBTP, Box 2, Folder 2, undated, loose sheet in front of book, 3.

⁸⁹ *Id.*

⁹⁰ *Id.* at 4.

⁹¹ See *id.* at Lecture II, Feb. 13, 1880, 9. Thayer returned to such claims throughout his career. It was because American states had originated as colonies with constrained legislative powers, he remarked in his Dicey review for example, that judges came first to exercise powers to override them, and subsequently at the federal level under the 1787 Constitution. See Thayer, *Dicey’s Law*, *supra* note 66, at 199-200. Thayer derided Marshall’s claim in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), that the *writtenness* of the United States instrument implied judicial review.

judicial review was necessary or constitutionally mandated after those charters were voided and sovereignty passed to Americans on their own. “The right of the courts to declare the acts of the legislature void was not & is not now (in most cases, I suppose) fixed by any provision of the constitutions themselves, but results from the nature of the case.”⁹² Indeed, “it was not at first acceded to without some surprise.”⁹³ Even while he assured his students that judicial review was “vindicated”⁹⁴ with the passage of time, his historical inquiry intimated that its present configuration was by no means inevitable or untouchable.

In fact, Thayer’s early skepticism about the status of judicial review in American constitutional law underwent a slight, yet extremely important, shift between 1880 and its public annunciation in 1884.⁹⁵ In 1880, Thayer offered an orthodox, though carefully circumscribed, view of judicial review. In the United States, he told his class, it is “the function of the judiciary to declare for the purpose of cases brought before it what is the meaning and application of the constitution.”⁹⁶ So long as these constructions of the constitution are “essential to the determination of such cases” they are authoritative.⁹⁷ Judicial interpretations of the constitution that were necessary to holdings in cases — not merely dictum — were authoritative. Thayer spent an entire lecture further fleshing out this difference between binding holdings and dicta.⁹⁸ This also meant that judicial constitutional interpretations were binding on the legislature and the executive only when it came to “recognizing or administering *existing rights*” — not in respect to “granting new ones.”⁹⁹

While he was shortly to embrace a view closer to legislative supremacy in tune with English assumptions, in his early teaching, then, Thayer gestured towards departmentalism: judicial review is not the same as judicial supremacy.¹⁰⁰ Thayer argued that President Andrew Jackson’s 1832 veto of the

THAYER, JOHN MARSHALL, *supra* note 73, at 97. Cf. Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397 (2019).

⁹² JBTP, Box 2, Folder 2, undated, loose sheet in front of book, 4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Cf. Hall, *supra* note 15, at 366-67 (“[H]e *always* insisted upon the wisdom and necessity of judicially upholding all legislation concerning the constitutionality of which there might be reasonable disagreement.”) (italics added).

⁹⁶ JBTP, Box 2, Folder 2, Lecture VII, Mar. 19, 1880, 67.

⁹⁷ *Id.*

⁹⁸ JBTP, Box 2, Folder 2, Lecture VIII, Mar. 26, 1880, 75-83.

⁹⁹ *Id.* at Lecture VII, Mar. 19, 1880, 69.

¹⁰⁰ Thayer, who strongly qualified judicial supremacy out of sympathy for British-style legislative supremacy, thus does not map onto recent framings by scholars, since he never moved to any model of popular constitutionalism, whether allied to departmentalism or in “dialectical” relation with judicial supremacy. For the first model, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); for the second,

bill to renew the charter of the U.S. Bank, in which Jackson famously stated that “[t]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both,”¹⁰¹ affirmed a certain amount of judicial supremacy.¹⁰² Daniel Webster’s famous claim¹⁰³ that Jackson “denies that the constitutionality of the *existing* bank is a settled question” had been “in a literal sense true.”¹⁰⁴ Yet the president, Thayer insisted, had only denied the constitutionality of the bank for “*for the purposes* of his veto act chartering it anew, & not for this purpose of abridging any rights held under its existing charter.”¹⁰⁵

By March 1884, Thayer’s emphasis in his discussions of judicial review had shifted. He never abandoned the proposition that courts must interpret the Constitution to resolve cases and controversies, but the real question is how easily they could allow themselves to invalidate the laws they were called upon to apply. “Now suppose a law [is] made” either through bicameralism and presentment or through bicameralism, presidential veto, and bicameral override, this is a law which “bind[s] you & me & everyone.”¹⁰⁶ If a case involving the constitutionality of this law reaches the Supreme Court, “[i]s it the true rule of our system that a different & doubtful question on which competent persons are divided, on which the judges are divided, the opinion of five gentlemen . . . shall operate a full veto on this legislation?”¹⁰⁷ Even while refusing to answer in the negative — and deny the power of a bare majority of the court to strike down this legislation — Thayer allowed himself to “venture to doubt whether the courts have not stretched their power?”¹⁰⁸

This late March 1884 constitutional law class provided Thayer’s first private annunciation of both the juristocratic problem and the clear error rule as democratic solution. He put forth the following proposition:

They [the judiciary] are but one department. Legislation is not entrusted to them. They are therefore to abstain from anything which amounts to determining political or legislative questions. And so they [have] no right in a doubtful constitutional question to substitute their own judgment for that of the legislature, when the legislature is sitting it [sic] for the purpose of legislation. The law must be made *in pursuance* of the

see Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1028 (2004).

¹⁰¹ See Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576–91 (James D. Richardson ed., 1899).

¹⁰² JBTP, Box 2, Folder 2, Lecture VII, Mar. 19, 1880, 69.

¹⁰³ See *Register of Debates*, 22nd Cong., 1st sess. (July 11, 1832), 1221–40.

¹⁰⁴ JBTP, Box 2, Folder 2, Lecture VII, Mar. 19, 1880, 69.

¹⁰⁵ *Id.*

¹⁰⁶ JBTP, Box 2, Folder 3, Mar. 28, 1884, 9.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

constitution. But [if] it is doubtful whether it [the law] is or not [constitutional] why should the courts [and] judges take the place of that of the legislative department? Confessedly the legislature must determine without the courts at the outset & confessedly the country must act on the legislature's judgment¹⁰⁹

Since the judiciary had to “abstain” from encroaching on the legislative role, the judiciary should not substitute its own views for those of the legislature in cases of constitutional doubt. After all, many individuals would come to rely on the legislation. If the Court eventually ruled it unconstitutional, “it may produce ruinous consequences.”¹¹⁰ As he summarized the view he would shortly thereafter publish in *The Nation*:

The true rule would seem that they are to reverse but not to declare the law no law . . . unless it would be not merely unsound to support it, but irrational. Something that is so plainly unconstitutional that a leg body could not reasonably think it constitutional, should be set aside. But something which the legislative body although mistaken, are not irrational in declaring the law should not be touched by the courts.¹¹¹

Educative democracy required that courts defer to the people's representatives — even when their decisions were unsound and mistaken. Moreover, Thayer analogized constitutional review of this sort to judicial review of jury determinations. It “is like . . . the jurisdiction of a court over a jury's verdict, — a power not to substitute in the determination of a question of fact their own judgment for that of the jury, nor to set it aside if they think otherwise, nor even think so strongly, or even if in their judgment it is plain, — but only if the jury could not rationally conclude as they did.”¹¹²

Since these few years clearly mattered so much in the crystallization of Thayer's theory, the next Part archivally reconstructs each factor in his transformation. His trip to England on the verge of democratic expansion was undoubtedly crucial. And his article in *The Nation*, which was published on April 10 — just two weeks after he wrote his March notes — offers some further clues.¹¹³ For Thayer did not cite just to the U.S. Supreme Court's recently-decided *Civil Rights Cases*.¹¹⁴ The immediate context in which he wrote — in what

¹⁰⁹ *Id.* at 9-10.

¹¹⁰ *Id.* at 10.

¹¹¹ *Id.*

¹¹² *Id.* at 11.

¹¹³ See Thayer, *Precise Question*, *supra* note 6.

¹¹⁴ 109 U.S. 3 (1883). Thayer pointed to a number of pre-1880 cases and treatises, including *Ogden v. Saunders*, 25 U.S. 213 (1827), *The Sinking Fund Cases*, 99 U.S. 700 (1878), the Massachusetts Supreme Judicial Court case *Wellington et al. Petitioners*, 33 Mass. (1 Pick.) 87 (Mass. 1834), the Court of Appeals of the State of New York case *The People v. The Supervisors of Orange*, 17 N.Y. 235 (N.Y. 1858), and THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (1868). Thayer often cited Cooley in his lectures and scholarship as holding views

was a Letter to the Editor responding to editorials by A.G. Sedgwick criticizing the Supreme Court's recent decision in *Julliard v. Greenman* — provides another clue.¹¹⁵ And in explanation of the clear error standard he proposed to tame judicial power, Thayer also cited two recent British decisions on evidence law: the House of Lords' 1882 decision in *The Capital and Counties Bank vs. Henty*¹¹⁶ and the 1884 appeal ending the long-running case of *Belt v. Lawes*.¹¹⁷ Thayer's commitment to counteract the conservative threat of juristocracy by reinterpreting the meaning of judicial review and disciplining it with the clear error rule was precipitated by these particular influences. And it was always with the example of British parliamentary supremacy in mind.

II. THE PATH TO THE THEORY

This Part reconstructs these multiple contexts. II.A starts with the British connection, detailing the impact that Thayer's summer 1883 English experience had on his thinking about democracy and the role of the judiciary in relation to it. II.B turns to Thayer's views on the Supreme Court's jurisprudence concerning the Test-Oath Acts and the Legal Tender Act, as well as to his shifting views on the Supreme Court's severe curtailment of Reconstruction, capped by its decision in the *Civil Rights Cases*. Finally, II.C takes up the two English evidence law cases he cited in *The Nation* in defense of the clear error rule. Together, the sections prove that Thayer's criticism of the enterprise of judicial review in the United States — he told his class in September 1884 that it was becoming “absolutely monstrous”¹¹⁸ — was the act of a transatlantic intellectual who hoped to counter the judicial threat to democracy in the spirit of English parliamentarism.

A. The Trip to England

similar to his. See, e.g., JBTP, Box 2, Folder 3, Lecture 9, Mar. 5, 1886, 125. After Thayer sent Cooley a copy of *Origin*, *supra* note 7, Cooley wrote a lengthy response, concluding that his views were “entirely in harmony with what you have written.” Thomas M. Cooley Papers at the Bentley Historical Library, University of Michigan, Ann Arbor, MI, Nov. 23, 1893, Thomas M. Cooley to James Bradley Thayer; see also Alan Jones, *Thomas M. Cooley and “Laissez-Faire Constitutionalism”: A Reconsideration*, 53 J. AM. HIST. 751, 762 (1967).

¹¹⁵ 110 U.S. 421 (1884).

¹¹⁶ 7 App. Cas. 741 (1882) (U.K.).

¹¹⁷ 12 Q.B.D. 356 (1884) (U.K.).

¹¹⁸ JBTP, Box 2, Folder 3, Lecture 1, Sept. 30, 1884, 43.

In the spring of 1883, Thayer took a leave from his teaching at Harvard and went to Europe.¹¹⁹ After disembarking from the S.S. *Archimedes* in Marseille in mid-March, he proceeded to travel throughout France, Italy, Greece, and Switzerland in his version of the Gilded Age grand tour.¹²⁰ In mid-June, he crossed the English Channel and arrived in London.

Thayer would spend the next two plus months there. On most weekdays he conducted research on the history of evidence law and the jury at the library of Lincoln's Inn.¹²¹ While he worked his way through the English and European legal past during these days — he read the thirteenth-century work of Fleta, Glanville's *Tractatus de legibus et consuetudinibus regni Anglie*, Ducange's Glossary, and the Yearbooks — he otherwise immersed himself in the British present, rubbing shoulders not just with leading scholars but also with several members of Parliament, including Prime Minister William Gladstone. He also struck up a friendship with John Coleridge, the baron and Lord Chief Justice of England, and accompanied him as he rode circuit and heard cases. Shifting between the legal texts of the past and the political, constitutional, and intellectual debates of the British present left a profound mark on Thayer. The triumph of Gladstone and the Liberals in the 1880 elections — alongside the increasing violence in Ireland, the outbreak of the First Boer War (1880-81), and the British invasion and occupation of Egypt in 1882 — were some of the most principal issues of the day.

All of them underscored the centrality and dynamism of Parliament in the governance of the United Kingdom. There were no political earthquakes in the spring and summer of 1883. The 1883 Parliament session Thayer observed was “neither interesting nor eventful”¹²² and its leading act guaranteed tenants compensation for land improvements.¹²³ Yet in part for this reason, there was chatter that deep reform was needed. The people “disgusted with the selfishness and imbecility of Parliament, will take the matter into its own hands,” predicted

¹¹⁹ This section substantiates Jay Hook's passing speculation that “Thayer's English sojourn was close to the birth of his thesis [about judicial review] and may yield clues about its pedigree.” Hook, *supra* note 30, at 5.

¹²⁰ See WILLIAM STOWE, *GOING ABROAD: EUROPEAN TRAVEL IN NINETEENTH-CENTURY AMERICAN CULTURE* (1994).

¹²¹ JBTCM, Vol. 6, June 17, 1883. For some of his notes taken at Lincoln's Inn, see JBTP, Box 21, Folder 5, Memo Book no. 5 (including notes on Glanville, Fleta, the Yearbooks, Maine's Dissertations on Early Law and Custom, and observations about trials in Jersey and Guernsey) and Box 23, Folder 2, Memo Book no. 4 (including notes on Francis Palgrave's *RISE AND PROGRESS OF THE ENGLISH COMMONWEALTH* (1832) and Bracton).

¹²² James Bryce, *The Parliamentary Session of 1883*, *THE NATION*, Sept. 6, 1883, at 201.

¹²³ *Id.*, at 202. Thayer and Bryce corresponded with one another as early as 1882. See MS Bryce U.S.A. 20 at the Bodleian Libraries, Oxford, U.K., Feb. 22, 1882, James Bradley Thayer to James Bryce. The two would continue to write to each other, with Bryce even asking Thayer to edit his magnum opus, *THE AMERICAN COMMONWEALTH* (1888). See JBTP, Box 27, Folder 15, Mar. 11, 1887, James Bryce to James Bradley Thayer. Bryce got Thayer special access to the Inn.

Thayer's closest contact James Bryce early in the session.¹²⁴ Although various reform options were floated, the one that gained most traction staked out the position that the problem lay not in parliamentary government itself, but rather in the current configuration of parliament. The needed fix was making parliament more "amenable to the nation" — more representative.¹²⁵

Such imperatives prompted the Third Reform Act of 1884,¹²⁶ which passed after Thayer returned home.¹²⁷ In the wake of the 1867 Act,¹²⁸ there was a pronounced imbalance between the criteria for eligibility in primarily urban settings (boroughs) and in agricultural areas (counties).¹²⁹ In the summer and fall 1883, just as Thayer was in England, there was a newfound momentum for the introduction of such a bill to correct the asymmetry.¹³⁰ Longtime Liberal Member of Parliament, John Bright, with whom Thayer interacted on several occasions, was especially crucial in garnering support for the bill.¹³¹ Not only did the Act of 1884 render more men eligible to vote than the Acts of 1832 and 1867 combined,¹³² it also represented the apex of democratization of the 1880s.¹³³ As in the prior Reform Acts — and for that matter in the Radical Reconstruction Congress that proposed the Fifteenth Amendment in the United States — the legislature served not only as the locus of democratic deliberation, but also as the institution that brought about mass democratic participation.

The intense focus on Parliament throughout 1883 served as a stark contrast to the backseat that Congress occupied in American politics. The 1880s were a highpoint in the Gilded Age's corrupt party politics and the spoils system. While Congress was certainly not idle during these years—it had a particular penchant for spending bills—it was an open secret that policy decisions were

¹²⁴ James Bryce, *The Prospects of the Government*, THE NATION, May 31, 1883, at 464; see also James Bryce, *Parliamentary Business and the Liberal Party*, THE NATION, June 21, 1883, at 527 ("If this session should pass, like the two last, without breaking fruit in useful measures for England and Scotland, there would be general disappointment in the country and a belief that the Liberal Government was, after all, but little more efficient than the Tory Government, whose failure to legislate had been so often arraigned.").

¹²⁵ James Bryce, *The Prospects of the Government*, THE NATION, May 31, 1883, at 464.

¹²⁶ Representation of the People Act 1884, 48 & 49 Vict. c. 3 (1884) (U.K.).

¹²⁷ The Third Reform Act was part of a broader multi-faceted reform that is conventionally seen as spanning 1883-85 and including the Corrupt and Illegal Practices Act of 1883, the Third Reform Act of 1884, and the Redistribution of Seats Act of 1885. Combined, these three acts "radically reshaped Britain's electoral system." Luke Blaxill, *Joseph Chamberlain and the Third Reform Act: A Reassessment of the "Unauthorized Programme" of 1885*, 54 J. BR. STUD. 88, 88 (2015).

¹²⁸ Representation of the People Act 1867, 30 & 31 Vict. c. 102 (1867) (U.K.).

¹²⁹ See ANDREW JONES, THE POLITICS OF REFORM 1884 1-2 (1972).

¹³⁰ *Id.* at 3.

¹³¹ See HERMAN AUSUBEL, JOHN BRIGHT: VICTORIAN REFORMER 221 (1966).

¹³² See Matthew Roberts, *Resisting "Arithmocracy": Parliament, Community, and the Third Reform Act*, 50 J. BR. STUD. 381, 391 (2011).

¹³³ See RICHARD SHANNON, THE AGE OF SALISBURY 1881-1902 76 (1996).

made in party headquarters, not in the halls of Capitol Hill.¹³⁴ With congressmen beholden to their parties, they used their power to enrich their constituencies. The political economy of this venality was on display in the 1882 session. “The ‘record’ of the session,” wrote one commentator, “is a shocking one.”¹³⁵ “In general legislation, although there were many subjects which urgently called it, little has been done.”¹³⁶ When Thayer visited the House of Representatives a few years later, little had changed. Given that “almost no one was paying any attention” to the debate regarding tariffs — all of the important decisions had already been made in backrooms — he saw little reason why Congress should not dispense with the charade of debate. Instead it could save time by “setting apart 15 or 20 committee rooms and letting as many members at a time, go to the rooms, each with a stenographer, and letting him speak his piece” so that it could be in the Congressional record.¹³⁷ The veneer of Congress as a great deliberative and representative body was especially superficial when compared to Parliament’s centrality in England’s ongoing experiment in popular self-rule.

B. The Catalysts for Confronting the Constitutional Judiciary

It was against this immediate backdrop of comparing democratic lawmaking across the Atlantic that Thayer evolved his views of judicial review, linking the need for revitalization of Congress to the pattern of judicial invalidation of statute that increasingly concerned him. There were three catalysts in this pattern. Thayer was critical of the Supreme Court’s approach during and after Reconstruction era that undercut Congress’s powers to impose a “test-oath” on government officials, its power to issue legal tender, and to legislate under its Reconstruction Amendments powers. All three concerns antedated Thayer’s English trip and annunciation of the clear error rule. But the second and third reared their heads at the critical moment in 1883-84 and propelled him over the threshold. The following subsections explore these in order.

1. The Test-Oath Cases

During the Civil War, statutes requiring individuals to take oaths attesting to their past and future loyalty to their respective government

¹³⁴ See, e.g., RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* ch. 7 (1948).

¹³⁵ [A.G Sedgwick,] *The Work of Congress*, *THE NATION*, Aug. 3, 1882, at 86.

¹³⁶ *Id.* (adding that on the appropriations side, by contrast, Congress had been extremely active with the “startling” amount of money earmarked for cronies).

¹³⁷ *JBTCM*, Vol. 4, May 20, 1888, 39.

proliferated in the North and South.¹³⁸ In 1862, Congress passed a law requiring that all government officials take an “ironclad” oath that they had neither fought against the United States nor aided, counseled, or encouraged anyone who did.¹³⁹ This requirement was extended to lawyers practicing in federal courts in 1865.¹⁴⁰ Oaths were also instituted on the state and municipal level. In border states, local legislatures also put in place loyalty oaths. The Missouri test-oath requirement, which was enshrined in its new constitution of 1865, was especially strict. Anyone who wanted to “vote, hold elective office, work as a professor, teacher, or clergyman, or serve as an officer of a public or private corporation” was required to take an oath that they had never fought for, assisted, adhered to the cause of, desired the triumph of, or sympathized with the Confederacy.¹⁴¹ These oaths, in the words of historian Michael Ross, “could penalize a significant portion — perhaps a majority — of the state’s population.”¹⁴²

In early 1867, the U.S. Supreme Court issued two decisions declaring test-oaths unconstitutional. *Cummings v. Missouri*¹⁴³ invalidated the Missouri constitutional provision, while *Ex Parte Garland*¹⁴⁴ struck down the federal statute concerning lawyers.¹⁴⁵ Both decisions were 5-4, with Justice Stephen Field writing for the majority. After noting that the state oath at issue was unprecedented “for its severity”¹⁴⁶ and for its reach in working retroactively in time and across an extraordinary scope of “words, desires, and sympathies,”¹⁴⁷ Field held that it violated the federal constitutional prohibition on ex post facto laws.¹⁴⁸ *Ex Parte Garland* confirmed this reading. The petitioner was a lawyer admitted to practice before the Supreme Court who had later served as a member in the Confederate House and Senate, only to receive a full pardon from President Andrew Johnson in 1865.¹⁴⁹ After he was stopped from

¹³⁸ See HAROLD M. HYMAN, TO TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 139 (1959).

¹³⁹ *Id.* at 164.

¹⁴⁰ See MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 132 (2003).

¹⁴¹ *Id.* at 128.

¹⁴² *Id.* at 129.

¹⁴³ 71 U.S. 277 (1867).

¹⁴⁴ 71 U.S. 333 (1866). The Court issued both opinions on January 14, 1867.

¹⁴⁵ For an illuminating discussion of the backroom politicking that occurred in these cases see ROSS, *supra* note 140, at 128-34, 138-44.

¹⁴⁶ *Cummings*, 71 U.S. at 318.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 328 (holding that some of the actions proscribed in the oath were not criminal offenses at the time they had been committed and that even those which “constituted high offences at the time they were committed” had additional punishments tacked on, thus violating the Ex Post Facto Clause). Justice Field also discussed the fact that the oaths were reminiscent of bills of attainder in violation of the federal Constitution, but he did not seem to ultimately rest his decision on this basis. *Id.* at 323-25.

¹⁴⁹ *Garland*, 71 U.S. at 336.

appearing before the Supreme Court because he had not taken the federal oath, he argued that he was not required to take it given his pardon.¹⁵⁰ The Supreme Court agreed. Once again, Justice Field held that the requirement to take the federal oath — and the consequences of not taking it — was an *ex post facto* punishment and deprivation of a “right” to appear as a lawyer.”¹⁵¹

This pair of cases, along with the recently decided *Ex Parte Milligan*,¹⁵² elicited harsh reactions from several quarters. Justice Samuel Miller dissented in both cases. He reserved his sharpest criticism for the majority’s reliance on the *Ex Post Facto* Clause, arguing that the majority employed “elastic rules of construction” to hold that the Constitution simultaneously “confer[s] no power on Congress to prevent traitors practising in her courts” and allowed the Court to “nullify a provision of the constitution of the State of Missouri.”¹⁵³ The Republican press echoed many of these criticisms.¹⁵⁴ The *New York Herald* even threw its weight behind a congressional proposal that would require unanimity among the Supreme Court justices in cases raising constitutional claims.¹⁵⁵

In the crucial stage of his evolution, Thayer revisited these cases and joined in the wave of criticism. For one thing, the decisions do “not necessarily cover” the reason why the oaths were best regarded as *punishments* subject to the *ex post facto* prohibition and, in turn, “unconstitutional.”¹⁵⁶ This point was one of the several “strong points of objection” that Justice Miller raised in his dissent.¹⁵⁷ Even while signaling his discomfort with the test oaths — “it might well be questioned whether the test oaths were not measures of a political character ill judged perhaps & objectionable on other grounds perhaps” — Thayer insisted that they were not “objectionable as having the nature of criminal proceedings or of punishment, or in other words as affecting a person [after an act] by way of punishment for that act . . . in his person or estate.”¹⁵⁸ Even if these measures were “extreme” or “fanatical” they were not unconstitutional.¹⁵⁹ Even more important, Thayer found the Supreme Court’s conflation of its own view of these oaths with their constitutionality especially bothersome. Instead of reading

¹⁵⁰ *Id.* at 336-37.

¹⁵¹ *Id.* at 379; *see also id.* at 377 (holding that the deprivation of this right “adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law”). Field also held that this prohibition constituted a congressional encroachment on the President’s pardon power. *See id.* at 381.

¹⁵² 71 U.S. 2 (1866).

¹⁵³ *Garland*, 71 U.S. at 392 (Miller, J., dissenting).

¹⁵⁴ *See* ROSS, *supra* note 140, at 144.

¹⁵⁵ *See The Bill to Regulate the Practice and Define the Powers of the Supreme Court*, N.Y. HERALD, Jan. 23, 1867, at 4 *cited in* ROSS, *supra* note 140, at 144-45.

¹⁵⁶ JBTP, Box 2, Folder 2, Lecture XIII, May 14, 1880, 112.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

the federal and state constitutions as “fundamental political declarations,” the judiciary approached it “as if it were a contract or a statute.”¹⁶⁰ This was particularly apparent when it came to the Court’s Ex Post Facto Clause (and Contract Clause¹⁶¹) jurisprudence in which it read the Constitution as if there were a clear-cut answer. Thayer insisted that “the court cannot substitute its judgment for that of the legislature.”¹⁶²

Thayer worried that the Court’s interpretive consequence and willingness to override other plausible readings of constitutional rules revealed a deeper problem. This jurisprudence “tends to raise grave doubts as to whether the courts have not often set themselves too large a task in their endeavors to guard the constitutions from infringement.”¹⁶³ The perception of the judiciary — and the judiciary’s perception of itself — “as *the only* guardians of the integrity of the constitution” and as the only “*security* for the preservation of the constitution” was particularly pernicious.¹⁶⁴ Not only does “[i]t need[] but little reflection to see that this is not so,” Thayer told students in the course of teaching these cases; this aggrandizing view was politically debilitating.¹⁶⁵ With the judiciary assuming the mantle of protecting the constitution, Thayer worried that other political forces relinquished their respective duties. With the Court in the driver’s seat,

the people and the legislature come to lose their own political instruments and appetites of duty & [are] less amenable than they should be to the point of political honor and political duty — a great misfortune if it be time, as I think it is, that the guarantees of the constitutions are largely to be looked for . . . [in] the character and sense and adequate political conceptions of the people & of those who were to administer the government & all its departments.¹⁶⁶

The hydraulic relationship between the judiciary, the other departments, and the people was being distorted. The American judiciary was breeding “in legislatures and in voters the feeling that no one but the courts has any responsibility, — that whatever they will pass is politically allowable.”¹⁶⁷

England — with its institutionalization of educative democracy — proved a useful counterpoint. “If we look at England we see a country where legally speaking nothing stands between the legislature & the enactment of any outrageous law you please to name.”¹⁶⁸ The absence of judicial review meant

¹⁶⁰ *Id.* at 110.

¹⁶¹ *See infra* section II.B.2.

¹⁶² JBTP, Box 2, Folder 2, Lecture XIII, May 14, 1880, 112.

¹⁶³ *Id.* at 110.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 111.

¹⁶⁸ *Id.* at 110.

that the judiciary was not a “guardian” of the English constitution. And, yet, outrageous laws were not passed in the British Isles. This was because of “the prevalence of certain political principles and political traditions,” “the amenability of the legislature to popular opinion and also to the well instructed opinion,” and “a careful regard to the great ends of good government in the details of administration.”¹⁶⁹ All of these traditions and sensibilities were cultivated and sustained in England specifically because there was no one political entity assuming the onus of guarding the constitution. It was the balance between different competing political interests that sustained this dynamic and fostered responsible self-rule.

2. *The Legal Tender Cases*

As noted above, Thayer believed that the guardian mentality that plagued the Supreme Court also applied to its Contract Clause jurisprudence.¹⁷⁰ As this section argues, by 1880 Thayer was even more disturbed by the Court’s recent Contract Clause jurisprudence than he was by the test-oath cases. The consequences of invalidating the test oath statutes paled in comparison to the Court’s decision in *Hepburn v. Griswold*,¹⁷¹ which had the potential to upend the entire national economy. The Court’s flipflopping two years later in the *Legal Tender Cases*¹⁷² only partially assuaged Thayer’s concerns. When questions about the Contract Clause resurfaced in 1884 in *Julliard v. Greenman*,¹⁷³ Thayer’s passions were ignited once again. As this section illustrates, his article in *The Nation* was a direct response to and rebuttal of the views of other scholars, including E.L. Godkin and Oliver Wendell Holmes.

The 1863 decision *Gelpcke v. City of Dubuque*¹⁷⁴ had, Thayer reported, been the first sign of trouble. In this case the U.S. Supreme Court took the extraordinary step of refusing to adhere to Iowa Supreme Court precedent on a matter of state law.¹⁷⁵ Justice Swayne held that, even if the Iowa Supreme Court’s

¹⁶⁹ *Id.*

¹⁷⁰ *See supra*, at n. 161.

¹⁷¹ 75 U.S. 603 (1869).

¹⁷² 79 U.S. 457 (1870). The court announced the judgment on May 1, 1871, but only delivered the opinion on January 1, 1872. *See* CHARLES FAIRMAN, 1 RECONSTRUCTION AND REUNION: 1864-88 686, 759 (1971).

¹⁷³ 110 U.S. 421 (1884).

¹⁷⁴ 68 U.S. 175 (1863).

¹⁷⁵ The Iowa Supreme Court decision at issue was *Burlington & Missouri Railroad Company v. The County of Wapello*, 13 Iowa 388 (Iowa 1862). Justice Swayne argued that the U.S. Supreme Court was only required to listen to “settled adjudications” of state courts. While claiming that he was not determining whether *Wapello* fell within that category, he effectively ruled that it was not. Instead, he followed prior Iowa Supreme Court decisions on the ground that they “are sustained

recent ruling proclaiming it unconstitutional for Iowan towns to issue municipal bonds to aid in the construction of railroads applied, it could only be read “as affecting the future” and “can have no effect upon the past.”¹⁷⁶ This was because the city of Dubuque had issued the bonds at a time when the Iowa Supreme Court still held it constitutional for municipalities to do so. It was only after the bonds issued that the state’s highest court reinterpreted the law as unconstitutional. Even though Swayne did not predicate his refusal to adhere to state law on the Contract Clause, which prohibits states from impairing existing contracts though subsequent laws, much of his language resonated with this proscription.¹⁷⁷

Thayer was not convinced by this argument. He found Justice Miller’s lone dissent “very strong.”¹⁷⁸ Miller complained that the majority was so fixated on exercising its “fancied duty . . . to enforce contracts” that it found contracts even when it was highly questionable whether they existed.¹⁷⁹ Thayer struck a similar chord when he raised the concern in class that the Court anointed itself the sole guardian of the constitution in respect to the Contract Clause.¹⁸⁰ This worry would only intensify with the prolonged saga surrounding the Legal Tender Acts.

The first case to squarely raise the constitutionality of the 1862 Legal Tender Act before the Supreme Court was *Hepburn v. Griswold*.¹⁸¹ Together with the 1863 Legal Tender Act, the act of 1862 empowered the federal Treasury to issue over \$400 million in non-interest-bearing treasury notes.¹⁸² Controversially, these notes were not backed by hard currency but were made legal tender for nearly all public and private debts.¹⁸³ During the course of the war and in its aftermath, creditors and hard currency advocates raised a variety of legal challenges to the 1862 Act throughout state and lower federal courts.¹⁸⁴ *Hepburn*

by reason and authority” and “in harmony with the adjudications of sixteen states of the Union.” *Gelpcke*, 68 U.S. at 205-06.

¹⁷⁶ *Gelpcke*, 68 U.S. at 206.

¹⁷⁷ For a careful analysis of Swayne’s rather cryptic opinion, see David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836-1864*, 1983 DUKE L.J. 471, 494 (“Whatever else may be said about *Gelpcke*, Swayne can hardly be accused of having revealed the basis of his decision.”).

¹⁷⁸ JBTP, Box 2, Folder 2, Lecture XIII, May 14, 1880, 116C.

¹⁷⁹ *Id.* at 210.

¹⁸⁰ Thayer seems to have mistakenly read Swayne’s opinion as implicating the Contracts Clause. He would eventually reverse his ultimate view of *Gelpcke v. City of Dubuque* on federalism grounds. See *infra* note 354.

¹⁸¹ 75 U.S. 603 (1869). In *Bank v. Supervisors*, 7 Wall. 26 (1869), and *Veazie Bank v. Fenno*, 8 Wall. 533 (1869), the Court avoided the constitutional question.

¹⁸² Three Acts in total were passed. The first came into law on February 25, 1862, the second on July 11, 1862, and the third on March 3, 1863. See FAIRMAN, *supra* note 172, at 688-89.

¹⁸³ *Id.* at 677-87.

¹⁸⁴ See *id.* at 692-700; SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE* ch. 7 (3d ed. 1993).

arose from a loan procured in 1860 which came due on February 20, 1862 — that is, five days before the Legal Tender Act was passed. The question at issue was whether the debtor could repay the loan in paper currency (since it was now legal tender) or only in gold (which was the only legal tender at the time the loan was issued).¹⁸⁵

By a 5-3 majority, the Supreme Court held that the loan had to be repaid in gold. Chief Justice Salmon Chase, who as the secretary of the treasury in 1862 had ultimately supported the Legal Tender Act,¹⁸⁶ wrote the majority opinion. Not dealing directly with whether Congress had the constitutional power — for example, under the Borrowing Clause¹⁸⁷ — to enact the Legal Tender Act in the first place, the Court found that the Act was unconstitutional insofar as it applied to debts that existed before it came into effect.¹⁸⁸

The Court's first holding was predicated on Congress's War Powers and the Necessary and Proper Clause. Congress, the Court recognized, had the express power to “declare and provide for carrying on war.”¹⁸⁹ Yet since the Constitution did not expressly provide a power to make paper currency legal tender, any such authority would have to be an implied one — that is, based on the Necessary and Proper Clause.¹⁹⁰ The argument that making legal tender facilitated Congress's War Power proved too elastic however. “Is there any power which does not involve the use of money?” Chase asked rhetorically.¹⁹¹ Since this rationale set no clear outer limits to congressional power, the majority imposed one. Through a particularly narrow reading of *McCulloch v. Maryland*,¹⁹² it held that it was not necessary and proper to the war effort to render paper money a valid tender for *past* debts.¹⁹³

The Court further held that extending the Legal Tender Act to past debts impaired contracts in violation of the Contract Clause. Given that the Contract Clause only applied to *states*, not the federal government, Chase argued that the Clause embodied the “spirit” of the Constitution; even if it did not fully

¹⁸⁵ *Hepburn*, 75 U.S. at 604.

¹⁸⁶ Regarding Chase's views and actions as Secretary of the Treasury see FAIRMAN, *supra* note 172, at 683-86.

¹⁸⁷ U.S. CONST., Art I, §8, Cl. 2.

¹⁸⁸ See *Hepburn*, 75 U.S. at 607-08. The court reached this constitutional question after it held that it could not narrowly construe the Act as only applying to debts incurred following its passage. See *id.* at 609-11.

¹⁸⁹ *Id.* at 617.

¹⁹⁰ See *id.* at 614. Chase added that the power to make paper notes a legal tender for debts “is certainly not the same power as the power to coin money.” *Id.* at 616.

¹⁹¹ *Id.*

¹⁹² 17 U.S. 316 (1819).

¹⁹³ *Hepburn*, 75 U.S. at 621 (“We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war”).

apply to Congress, any federal law that impaired contracts and was “not made in pursuance of an express power” was “inconsistent with the spirit of the Constitution.”¹⁹⁴

Dissenting, Justice Miller attacked the opinion as constitutionally and politically unsound. The Legal Tender Act easily passed constitutional muster as necessary and proper to any number of explicit powers granted to Congress.¹⁹⁵ Furthermore, the majority’s distinction between the unconstitutionality of making paper money legal tender for preexisting debts and the constitutionality of making it legal tender for futures debts was one “unsupported by any sound view of the situation” circa 1862.¹⁹⁶ Equally problematic was Chase’s extrapolation of the broader meaning of the Contract Clause.¹⁹⁷ An even sharper response came from the political branches. The same day that *Hepburn* was publicly announced, President Ulysses S. Grant nominated William Strong and Joseph Bradley to fill the two vacancies on the Supreme Court.¹⁹⁸ Both of these new appointees were known to be inclined to reverse *Hepburn* should such an occasion arise.¹⁹⁹ And, despite vociferous protestations and a dissent by Chief Justice Chase, the two joined the three *Hepburn* dissenters and overturned *Hepburn* in the 1871-72 consolidated cases collectively known as the *Legal Tender Cases*.²⁰⁰

Justice Strong’s majority opinion in the *Legal Tender Cases* resonated with Miller’s *Hepburn* dissent. The stakes at hand were enormous, he emphasized: the continued invalidation of the Legal Tender Acts endangered the “continued existence of the government” and was likely to lead to a “great business derangement, widespread distress, and the rankest injustice.”²⁰¹ It was therefore incumbent upon the Court to be “unwilling to precipitate” such consequences unless it was patently clear that “there is a clear incompatibility between the

¹⁹⁴ *Id.* at 623. The Court seemed to further hold that the Legal Tender Act violated the Fifth Amendment’s due process clause. *Id.* at 625.

¹⁹⁵ *Id.* at 632 (Miller, J., dissenting) (pointing to “[t]he power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defense and general welfare”).

¹⁹⁶ *Id.* at 634.

¹⁹⁷ *Id.* at 637. Miller warned that the invocation of “the spirit of the Constitution” was especially dangerous since it “would authorize this Court to enforce theoretical views of the genius of the government or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views.” *Id.* at 638

¹⁹⁸ FAIRMAN, *supra* note 172, at 677.

¹⁹⁹ See ROSS, *supra* note 140, at 183.

²⁰⁰ 79 U.S. 457 (1870). The court consolidated the cases *Knox v. Lee* and *Parker v. Davis*. Professor Charles Fairman provides a thorough account of the protests of and roadblocks created by Chief Justice Chase and the other justices who formed the majority in *Hepburn* when it was decided to reexamine and overturn the decision. See FAIRMAN, *supra* note 172, at 747-57.

²⁰¹ *Legal Tender*, 79 U.S. at 529.

Constitution and the legal tender acts.”²⁰² “[A] decent respect” for Congress, which “has always been the rule,” also required such deference: it was not enough to “rais[e] a doubt” about the Acts’ unconstitutionality, they needed to be clearly unconstitutional.²⁰³

Congress, by contrast, did not need to meet this high bar in order to be justified in issuing greenbacks. Reading *McCulloch v. Maryland* in a more functional way than Chief Justice Chase had in *Hepburn*, Strong found that Congress could be understood to have had the power to make paper money legal tender.²⁰⁴ Given that the Constitution certainly conferred upon the government of the United States “the power of self-preservation,” — including through the War Powers²⁰⁵ — the Acts were constitutional so long as they were a necessary and proper means to achieve this end.²⁰⁶ No express constitutional provision to issue greenbacks was needed; the means to achieving a proper end could not be limited to those “definitely intrusted [sic] to Congress and mentioned in detail.”²⁰⁷ Even more fundamentally, it was not the province of the Court “to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient.”²⁰⁸ It was Congress’s mandate.

The prolonged drama surrounding the constitutionality of the Legal Tender Act bothered Thayer from the first. Like many others Mugwumps, he opposed making greenbacks legal tender.²⁰⁹ “Highly objectionable,” he wrote in his notes after listing the constitutional hooks for the legislation.²¹⁰ But it was not his personal political views that made the Supreme Court’s rulings troubling to him; it was his commitment to educative democracy that made him worry. While other Court watchers immediately sided with either *Hepburn* or the *Legal Tender Cases*, Thayer saw the substantive assessment of the Court’s jurisprudence as entangled with the preliminary question of how it should approach any constitutional review of Congress’s legislative actions. The problem was the Court’s unreflective willingness to subject Congressional action to its own views of the Constitution. It was in this context that Thayer’s concerns arose that the Court saw itself as “*the only* guardians of the integrity of the constitution.”²¹¹

²⁰² *Id.* at 531.

²⁰³ *Id.*

²⁰⁴ See Gerard Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 146-47 (2006).

²⁰⁵ *Legal Tender*, 79 U.S. at 567.

²⁰⁶ *Id.* at 533.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 542.

²⁰⁹ See TUCKER, *supra* note 46, at 15-25.

²¹⁰ JBTP, Box 2, Folder 3, Mar. 25, 1884, 32.

²¹¹ JBTP, Box 2, Folder 2, Lecture XIII, May 14, 1880, 110.

Operating in this mindset, the Court had “*conjured*” up a “largely indefensible” reading of the Contract Clause that transformed it “from a somewhat humble origin” into a clause that had “a very extensive reach.”²¹² The Court’s self-fashioning as the savior of the constitution once again stretched itself — and the text of the constitution — beyond its proper scope.²¹³ In the process, it trampled upon Congress’s — and the people’s — prerogative to make decisions fundamental to their collective existence themselves.

But Thayer’s anxieties became more pronounced and propelled him to his 1884 theory in the direct aftermath of public doubts raised about the Supreme Court’s third decision concerning the Legal Tender Acts. In *Julliard v. Greenman* (1884),²¹⁴ the Court upheld an 1878 Act²¹⁵ that kept greenbacks in circulation and reiterated that Congress had the power to make legal tender. Writing for an 8-1 majority (only Justice Field dissented), Justice Horace Gray supported Congress’s power on an even broader rationale than before. He supposed that “as incident to the power of borrowing money” Congress could also make legal tender.²¹⁶ Regardless it could because it was quite simply “one of the powers belonging to sovereignty in other civilized nations” to do so.²¹⁷ The Constitution had not “expressly withheld” this power from Congress, so the Court was “irresistibly impelled” to find that making legal tender was one of its “necessary and proper” powers.²¹⁸ The Court also cleared away any misapprehension that the outcome in the *Legal Tender Cases* hinged solely on the exigencies of war. The question of whether it is “wise and expedient to resort to” paper currency was “a political question, to be determined by Congress when the question of exigency arises.”²¹⁹

A number of legal commentators were skeptical about *Julliard*. Crucially, *The Nation* published two of these critiques just weeks before Thayer wrote his article in the very same pages of the newspaper. In early March 1884, E.L. Godkin, the magazine’s editor, denounced the Court for its disposition of the case.²²⁰ In the *Legal Tender Cases*, the Court had predicated Congress’s authority on the War Power because “it was so strongly urged by most constitutional lawyers that the power to ‘borrow money’ did *not* include the power to issue

²¹² *Id.*, Lecture XIV, May 31, 1881, 117A.

²¹³ Thayer would later further attack the majority holding in *Hepburn* and its invocation of the “the spirit of the Constitution.” “The test of validity,” wrote Thayer in 1888, [is] *not the spirit of the constitution*, but *the written requirements, prohibitions & guarantees* of the Constitution.” JBTP, Box 2, Folder 4, Lecture 18, Nov. 27, 1888, 141.

²¹⁴ 110 U.S. 421 (1884).

²¹⁵ Act of May 31, 1878, 20 Stat. 87.

²¹⁶ *Julliard*, 110 U.S. at 447.

²¹⁷ *Id.* at 450.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ [E.L. Godkin,] *The Week*, THE NATION, Mar. 6, 1884, at 201.

legal-tender notes.”²²¹ And, yet, in *Julliard*, where the War Power was clearly inapplicable, the Court had “reversed in a curious way” and “had to fall back on” the borrowing power — “the very support which the judges then rejected as plainly too weak for reliance.”²²² This decision, he inveighed, “weakens the court itself and enlarges the power of Congress.”²²³ The Court’s determination that the Necessary and Proper Clause grounds the power to issue legal tender and that the decision to do so is “a political question . . . and not a judicial question” solely within the purview of Congress (and not subject to judicial review) suggested that the Court was “abdicating the protection of private rights and private property against the encroachments of the Legislature.”²²⁴ Godkin threw his storied commitments to educative democracy overboard in ranking these considerations highest.²²⁵ If Godkin had previously believed that it was necessary to empower the people and their representatives in Congress so that they educate themselves in the workings of democracy, he drew a clear line — and called in the judiciary — when these lessons threatened private rights and private property.

Two weeks later, Arthur G. Sedgwick, a Harvard Law graduate who edited the *American Law Review*, expressed similar criticism.²²⁶ In *Julliard*, the Court had “taken the trouble to invent this curious species of argument” predicated on the Borrowing Clause “which enables Congress to do what it pleases.”²²⁷ Especially detrimental was the Court’s determination that this was a political question. The Court thereby gave Congress unfettered discretion to chart its own course of action. According to Sedgwick, this was nothing less than judicial abdication; it gave Congress either “arbitrary power, or at the best the authority enjoyed by the English Parliament.”²²⁸

Thayer’s 1884 piece was a response to Godkin and Sedgwick’s criticisms. Thayer’s writing appeared in the “Correspondences” section and was addressed to “The Editor of the Nation.” There is little better evidence of our thesis than that Thayer introduced the clear error rule in direct response to this expression of horror.²²⁹ After all, he wanted the very parliamentary supremacy *The Nation* now rued.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *supra* section I.A.

²²⁶ For more on Sedgwick see DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 285 n.100 (2015).

²²⁷ [A.G. Sedgwick,] *A New View of the Constitution*, THE NATION, Mar. 20, 1884, at 248.

²²⁸ *Id.*

²²⁹ Barely a week after the piece was published, Thayer sent a copy to Justice Gray and wrote that *The Nation* “has a good deal nowadays on legal matters which seems to me not worth reading,” alluding to Godkin and Sedgwick’s recent opinion pieces. Thayer went on to praise

Thayer's take on *Julliard* was multifaceted. As an abstract matter, he thought that there was ample constitutional justification for the Legal Tender Acts. In his notes, he provided a list of constitutional bases upon which to predicate the legislation.

1. The power to carry on war may justify it (express)
2. The power to furnish a currency (implied)
3. The power to raise money (express).
4. The power to regulate commerce.²³⁰

And as would he intimate in his article in *The Nation*, he believed that the Court's posture — it was reviewing the constitutionality of legislation — required deference.²³¹ As he told Justice Gray in April 1884, although he was “not over confident about” his article, he was inclined to believe that his suggestion of deference could serve as a “permanent *modus vivendi* for the different departments.”²³² Indeed, in a follow-up conversation he had with Gray two months later about *Julliard*, Thayer pressed the Supreme Court justice on why he had not been clearer in his opinion. He specifically wanted to know why Gray had not simply stated that (1) Congress has the express power to borrow money, (2) it can make “all laws really conducive to this end” under the Necessary and Proper Clause, and (3) that “giving paper quality of legal tender was really conducive as matter of fact to this end.”²³³ Thayer did not find Gray's response that he wanted to “keep clear of any discussion of a financial sort” fully satisfactory.²³⁴ When Thayer tried to impress upon the justice his now-formulated rule that the Court should only declare legislation unconstitutional when it was “clear beyond a reasonable doubt,” Gray asked, “well what is a reasonable doubt[?]”²³⁵ Failing to convince Gray to embrace his standard, Thayer wrote to himself that “I should sometime like to go farther with him as to my doctrine.”²³⁶

Gray's opinion in *Julliard*. Horace Gray Papers at the Library of Congress Manuscripts Division, Washington, D.C. [hereinafter HGP], Box 2, Apr. 20, 1880, James Bradley Thayer to Horace Gray.

²³⁰ JBTP, Box 2, Folder 3, Mar. 25, 1884, 32.

²³¹ As we discuss below, Thayer did not fully distinguish at this point between judicial review of federal legislation and review of state legislation. This dimension to his theory only emerged as his views about *Slaughterhouse* and the *Civil Rights Cases* changed. See *infra* section III.B.

²³² HGP, Box 2, Apr. 20, 1880, James Bradley Thayer to Horace Gray.

²³³ *Id.*, June 9, 1884, 34.

²³⁴ *Id.*

²³⁵ *Id.* Gray further pointed to his opinion as then-Massachusetts Supreme Judicial Court Justice in *Commonwealth v. Costley*, 118 Mass. 1 (Mass. 1875), in which he discussed the legal overlap between “moral certainty” and “beyond a reasonable doubt.” *Id.* at 23-4.

²³⁶ JBTP, Box 2, Folder 3, June 9, 1884, 34.

While Thayer never got further with Gray,²³⁷ he boldly reiterated his views in his disagreement with Holmes. On multiple occasions in the early 1870s, including in the 1873 edition of James Kent's *Commentaries* that he edited, Holmes had argued that the *Legal Tender Cases* had been wrongly decided.²³⁸ While the Coinage Clause provided an express power to coin metal coins and an implied power to make these coins legal tender, according to Holmes, it also impliedly deprived Congress from making paper legal tender. This argument, he believed, "was unanswerable."²³⁹ Thayer, however, forcefully answered him. Whether he was still bothered that Holmes had supplanted him as the editor of Kent's *Commentaries* (especially given that Thayer had initially been tasked with the honor and brought Holmes onto the project)²⁴⁰ or was taken aback by the young scholar's self-assurance, Thayer took aim at Holmes on two counts.²⁴¹ For one, Holmes was wrong by implication: "The clause of the Constitution . . . which provides for the coinage of money is not one which, by any necessary construction, says anything about legal tender."²⁴² He also reiterated that the judiciary should be particularly deferential when it reviewed Congress's legislative product. "We are considering the value of arguments and of arguments for the judicial setting aside of legislation," he emphasized. "[T]his argument, as one justifying the declaration that a legislative act is void, is a slight one. . . . It seems, at best, to belong to legislative, rather than judicial discussion."²⁴³ While it is unclear to what extent Holmes ever fully internalize this reprimand, Thayer stuck to his view that the Court ultimately reached the right decision.²⁴⁴ Congress — not the judiciary — was entrusted with charting the nation's course.

²³⁷ In December 1884, Thayer once again requested that Gray "consider a little carefully the matter of declaring laws unconstitutional, - the precise question which a court is to ask itself?" HGP, Box 2, Dec. 15, 1880, James Bradley Thayer to Horace Gray.

²³⁸ See [Oliver W. Holmes], *Summary of Events: Legal Tender*, 4 AM. L. REV. 766 (1870); [Oliver W. Holmes], *Book Review: The Legal Tender Cases of 1871*, 7 AM. L. REV. 146 (1872); JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 254 n.1 (Oliver W. Holmes ed., 12th ed. 1873).

²³⁹ [Holmes], *Book Review*, *supra* note 238, at 146.

²⁴⁰ For more on this episode, see MARK DEWOLFE HOWE, 2 JUSTICE OLIVER WENDELL HOLMES 10-16 (1963); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 125-27 (1995).

²⁴¹ See JBTP, Box 2, Folder 4, Lecture 26, May 14, 1886, 24; James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 73 (1887-1888).

²⁴² Thayer, *Legal Tender*, *supra* note 240.

²⁴³ *Id.* at 89. See also JBTP, Box 2, Folder 4, Lecture 26, May 14, 1886, 27 ("I meant that this argument as an argument justifying the declaration that a legislative act is void is a slight one").

²⁴⁴ In 1898, Holmes brought up their disagreement with the clear intention of having the last word on the matter. "I have reread your argument on the Legal tender," Holmes wrote, "and I confess I think you leave mine untouched." The John G. Palfrey collection of Oliver Wendell Holmes Jr. Papers, 1715-1938 at the Harvard Law School Archives, Cambridge, MA, Box 22, Folder 30, Oliver Wendell Holmes to James Bradley Thayer Correspondent, Page (seq. 18). Available at <https://nrs.lib.harvard.edu/urn-3:hls.lib:5362406?n=18>. And while many assume

Thayer maintained this conviction in subsequent years. In his 1887 *Harvard Law Review* article on the *Legal Tender Cases* he signaled that, while he continued to view paper money as politically and economically unsound, he believed that the Supreme Court had reached the proper decision. This remained the case as late as 1901 when, in his short biography of Chief Justice John Marshall, Thayer remarked in an aside that had the Court left the *Legal Tender Act*, which was “thought by many to be unconstitutional and by many more to be ill-advised,” unconstitutional, then “we should have been saved some trouble and some harm.”²⁴⁵ And, yet, hewing to his unwavering commitment to educative democracy, he argued that the “good which came to the country” from the legislation, and specifically the “vigorous thinking that had to be done in the political debates that followed . . . far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.”²⁴⁶

3. *The End of Reconstruction*

The other catalyst in 1883-84 for Thayer’s article in *The Nation* was the Supreme Court’s narrowing of Reconstruction legislation, confirmed by its *Civil Rights Cases* decision.²⁴⁷ This section shows that, even as Thayer wavered about how far and fast to expect the post-Civil War legal order to transform racist attitudes, he was consistently concerned about the Court’s propensity to invalidate congressional acts on the basis of the Reconstruction Amendments, and therefore to stifle legislative democracy.

Like many other New Englanders, Thayer had been staunchly opposed to slavery. During the Civil War, he was a member of the pro-Union and anti-Slavery New England Loyal Publication Society.²⁴⁸ In the early 1870s, after listening to a traveling choir of formerly enslaved people, he wrote a diary entry mixed with disdain toward the institution of slavery, sympathy for the plight of former enslaved, and a hope in the change that the end of slavery would bring about. Slavery was an “awful waste”: it “cut off these people from all that

Holmes adopted the clear error standard entirely, given the prominence he accorded it in his *Lochner* dissent, whether Holmes ever abandoned “guardian review” is in dispute. Compare *Lochner*, *supra* note 8, at 76 (Holmes, J., dissenting) with WHITE, 2 LAW IN AMERICAN HISTORY, *supra* note 14, at 410 (arguing that even if Holmes “was more deferential to legislation that sought to regulate economic activity or redistribute economic benefits than many of his judicial colleagues” he too engaged in “guardian review”). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1428-38 (2001).

²⁴⁵ THAYER, JOHN MARSHALL. *Supra* note 73, at 107.

²⁴⁶ *Id.*

²⁴⁷ For a classic reassessment of the Supreme Court’s Reconstruction jurisprudence, see Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39.

²⁴⁸ See JBTP, Box 18, Folder 15.

elevates in life, & deprive[d] the rest of the world of what they could contribute to it.”²⁴⁹ And for many educative democrats, the Fifteenth Amendment was precisely about the elevation that the practice of democracy could bring.²⁵⁰

By 1883-84, Thayer had long been critical of the Supreme Court’s approach to African-American slavery. He especially disdained Chief Justice Roger Taney’s opinion in *Dred Scott*.²⁵¹ In his first constitutional law lectures, Thayer emphasized that Taney’s most notorious statement that African-Americans could never become citizens of the United States was dictum. Echoing Horace Gray and John Lowell, who published a pamphlet just three months after the decision was announced dismissing “the opinion of the Chief Justice” as “by no means the ablest or soundest of the opinions in this case” nor even the true holding of the court,²⁵² Thayer noted that “the *decision* as distinguished from the dicta was much more narrow.”²⁵³ He thereby affiliated with the many Republicans who had dismissed most of Taney’s pronouncements as not binding.²⁵⁴ Still, the fact that all of Taney’s opinion was widely seen as being the Court’s holding illustrated to Thayer the judiciary’s outsized importance. If there was anything to be learned from the case, he told students it was “how careful we must be to see whether a constitutional point was really *decided* by the court.”²⁵⁵

But exactly what Thayer hoped would come after emancipation was hazy. At times, he hoped that there would not only be political and civil equality but also a degree of social integration and equality. In 1874, he reflected on the significant changes that had been wrought over the past twenty years.

What changes in politics, in social order, in law. The Missouri Compromise repeal, the conflict in Kansas, the war, slavery abolished and a social revolution in half the states of this Union hardly paralleled in history. The old Chancellor and Chief Justice of South Carolina beginning life over again at the bottom of the ladder and arguing before a colored judge and trying cases before a colored jury; a spectacle worthy to be painted as the symbol of the great, the strange and necessary change. The changes in the law, the changes in the University.”²⁵⁶

²⁴⁹ JBTCM, Memo Book A, 21-23.

²⁵⁰ See BUTLER, *supra* note 29, at ch. 2.

²⁵¹ 60 U.S. 393 (1857).

²⁵² HORACE GRAY & JOHN LOWELL, A LEGAL REVIEW OF THE CASE OF DRED SCOTT, AS DECIDED BY THE SUPREME COURT OF THE UNITED STATES 9 (1857).

²⁵³ JBTP, Box 2, Folder 2, Feb. 20, 1880, 26. Thayer subsequently wrote to Horace Gray to praise the pamphlet as a “great discussion,” HGP, Box 2, Mar. 6, 1880, James Bradley Thayer to Horace Gray.

²⁵⁴ See DON E. FEHRENBACHER, THE DRED SCOTT CASE 417 (1978).

²⁵⁵ HWP, Box 1, Constitutional law vol. 1, Nov. 14, 1895.

²⁵⁶ JBTCM, Memo Book A, 42.

These changes, including the extension of political and civil rights to African Americans by Congress first by Amendment and then by statute, were positive ones.²⁵⁷

This, however, did not mean that Thayer believed that courts were the primary vehicle through which further change should be brought about. In an 1880 lecture in his course on the law of carriers, he covered permissible grounds upon which railroad companies could remove individuals who had paid. In addition to being able to “exclud[e] dogs from all passenger cars” there are “some places” in which it has been “thought and held” that black persons could be excluded from “orderly passenger cars.”²⁵⁸ Thayer unequivocally denounced this view — it was a “wretched prejudice and . . . wretched remnant” of the past.²⁵⁹ But where he approved of legislatures attempting to do away with this remnant, he did not believe courts could or should go farther than them. On the one hand, “statutes can accomplish something in helping” society overcome its racist prejudices.²⁶⁰ On the other hand, it would be difficult for a court to find this racial segregation “unreasonable” given that, just like in “India or Africa the exclusion of whites from certain cars is to be reasonable,” so too in these American states courts have little recourse to undo the “prevailing dislike however irrational or otherwise objectionable among the majority of travelers the company seeks to accommodate.”²⁶¹ For better or worse, it was the people and their elected representatives — not the courts — who needed to affect change.

Thayer further argued that even the moral turpitude of racism did not necessarily mandate a broad reading of the Reconstruction Amendments. While it “had been supposed and held” in some lower courts that the Fourteenth

²⁵⁷ Among Thayer’s papers is a letter of condolence sent by Booker T. Washington to Thayer’s wife, Sophia, upon Thayer’s death. “He was a good true friend of mine and of my race,” wrote Washington. What to make of this in respect to Thayer’s views of race is not clear. JBTP, Box 25, Folder 9, Feb. 22, 1902, Booker T. Washington to Sophia Thayer.

²⁵⁸ JBTP, Box 2, Folder 1, Lecture II, Apr. 29, 1880, 16.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* Comparable ambivalence about native peoples comes through in Thayer’s writing on that topic. He was a strong supporter of the General Allotment Act of 1887 that broke up reservations in favor of individual parcels and generally adopted a paternalist outlook in hopes of one day seeing the status of this “people without law” regularized. See James B. Thayer, *The Dawes Plan and the Indians*, THE ATLANTIC, Mar. 1888 and *A People without Law*, THE ATLANTIC, Oct. and Nov. 1891, reprinted in THAYER, LEGAL ESSAYS, *supra* note 66, as well as in the context of the larger liberal campaign in AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880-1900 (Francis Paul Prucha ed., 1973). For a more favorable interpretation, see Valerie Sherer Mathes, *James Bradley Thayer in Defense of Indian Legal Rights*, 21 MASS. HIST. REV. 41 (2020); for more negative comment, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900 335-41 (1976) and Richard B. Collins & Karla D. Miller, *A People without Law*, 5 INDIGENOUS L.J. 83 (2006).

Amendment prohibited discrimination as a matter of federal citizenship, Thayer told his students that the Supreme Court's decision in *The Slaughterhouse Cases* "seems to negative such a view."²⁶² Thayer agreed with the premise that the purpose of the Reconstruction Amendments was to counteract the "obvious" "disadvantage" that the "newly recognized citizens in the South" would incur "in their own states if they were not protected against them by the General Government."²⁶³ Indeed, the Fourteenth Amendment was "by far more important than any adopted since organization of government expect alone that one abolishing slavery. It would give the nation complete power to protect its citizens against local injustice & oppression."²⁶⁴ But it is true that Justice Miller's majority opinion to the contrary — which practically reduced the new protections of the Amendment to naught, and the Privileges and Immunities Clause in particular to a dead letter — did not itself spark Thayer's revolt. Thayer simply noted that he found the dissent "powerful."²⁶⁵

Thayer also stood behind the Court's decision in *Ex Parte Virginia*,²⁶⁶ in which the Court upheld the constitutionality of the 1875 Civil Rights Act's §4 and denied a writ of habeas corpus to a state judge detained after refusing to allow black citizens to serve on juries. The majority held that the Fourteenth Amendment granted defendants equal rights to an impartial jury trial, including to have jury members not excluded on account of their race. In its coverage, *The Nation* was heavily critical of the majority and sided with Justice Field's dissent. The majority's capacious reading of Congress's enforcement power under the Fourteenth Amendment §5, wrote *The Nation*, "will probably surprise most lawyers who read this decision."²⁶⁷ "[W]e cannot avoid," the magazine concluded, "sharing the impression of the two dissenting judges, that the view taken by the majority of the scope of the Fourteenth Amendment, if it is to be carried to its logical result, implies a long, and we may add unexpected, stride in the direction of centralization."²⁶⁸ In response, Thayer told his class that *The Nation* "is not wholly free from error."²⁶⁹ The position of the minority (and *The Nation*) that it was problematic for Congress to penalize a violation of the

²⁶² JBTP, Box 2, Folder 1, Lecture II, Apr. 29, 1880, 16.

²⁶³ *Id.* at Lecture V, Mar. 5, 1880, 49A (undated loose page).

²⁶⁴ *Id.* at 49B *citing* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §237 (1868).

²⁶⁵ JBTP, Box 2, Folder 2, Lecture V, Mar. 5, 1880, 50. For Thayer's subsequent efforts to reconcile his views about *The Slaughterhouse Cases* (and the *Civil Rights Cases*) with his theory of judicial review — and his differentiation between review of federal legislation and that of state legislation — see *infra* section III.B.

²⁶⁶ 100 U.S. 339 (1879).

²⁶⁷ *Legislation Under the Fourteenth Amendment*, THE NATION, Mar. 25, 1880, at 228.

²⁶⁸ *Id.*

²⁶⁹ JBTP, Box 2, Folder 2, Lecture XV, June 4, 1880, 124. Thayer also discussed *Tennessee v. Davis*, 100 U.S. 257 (1879), and sided with the majority, again contra *The Nation*.

Fourteenth Amendment was, he sarcastically noted, “an impressive one.” “If the 14th amendment confers a grant of legislative power whether expressly or by implication then Congress has the power, if not it is hard to see how the mere declaration that Congress can enforce by appropriate legislation confers any additional power on any . . . accepted theory of constitutional construction.”²⁷⁰ Even while it might not have been “statesmanlike” for Congress to punish a state official in such a direct manner, the Supreme Court could obviously not side aside a law on that ground. Not only does “[t]he legislature have a right to be unstatesmanlike if it please[s],” said Thayer, the Supreme Court cannot invalidate a law “on the ground that it is indiscreet & dangerous or not in harmony with the general purpose & spirit of our system of government.”²⁷¹

It was against this background that Thayer wrote his article in *The Nation*, with the great prominence it gave the Civil Rights Cases of the prior autumn. Thayer damned with faint praise Justice Bradley’s majority opinion invalidating the 1875 Civil Rights Act §1 (which had barred discrimination by certain private actors), calling it a “a very able and sound judgment.”²⁷² But Thayer’s whole purpose in the article was to go public in response, in order to contain an activist judiciary that asserted the prerogative of “stating its own opinion on questions that may be purely legislative or political.”²⁷³ And he approvingly cited an excerpt (originally written by Chief Justice Morrison Waite in the *Sinking Fund Cases*)²⁷⁴ that Justice John Marshall Harlan inserted in his dissent in the *Civil Rights Cases*. The judiciary, both had said, should presume that legislation is constitutional and only invalidate it “in a very plain case.”²⁷⁵ Thayer did not mention that Harlan had used the line — nor even mention the dissent generally. But it is clear that the cases in which the Supreme Court smashed one of Congress’s finest Reconstruction achievements played a role in prompting Thayer’s demarche, alongside his impatience with criticisms his fellow liberals made of Congress’s powers in other areas. Indeed, over time, Thayer’s views of the *Civil Rights Cases* would shift, playing a crucial role in the finalization of his theory of judicial review.²⁷⁶

C. The Clear Error Standard

²⁷⁰ JBTP, Box 2, Folder 2, Lecture XV, June 4, 1880, 130-31.

²⁷¹ *Id.* at 130.

²⁷² Thayer, *Precise Question*, *supra* note 6, at 315. Compare Tushnet, *supra* note 75, at 23, which ignores the irony of Thayer’s description, not to mention that the entire point of the article is to contest the disposition of the Civil Right Cases.

²⁷³ Thayer, *Precise Question*, *supra* note 6, at 315.

²⁷⁴ 99 U.S. 700 (1878).

²⁷⁵ *Id.*, cited in 109 U.S. 3, 27 (1883) (Harlan, J., dissenting).

²⁷⁶ See *infra* section III.B.

While Thayer did not cite Harlan's dissent, in 1884 he was very direct about the source of the clear error standard he proposed to constrain judicial fiat: Anglo-American evidence law. It came from evidence law. "We are not without analogies to help us in stating the right question," Thayer wrote, "for the situation is not in all respects a new one. *It is much the same as that in which a court finds itself when it revises the action of a jury or of a lower court in deciding questions of fact.*"²⁷⁷

In his lifetime, Thayer was known, first and foremost, as a scholar of the Anglo-American law of evidence — and, more specifically, as a historian of the law of juries.²⁷⁸ In his introduction to *A Preliminary Treatise on Evidence at the Common Law*, he confessed that, while he had initially set out to write a practical treatise on evidence law, he soon realized he first needed to plumb the history of trials and, especially, juries.²⁷⁹ This was because English evidence law was "the child of the jury."²⁸⁰ It was in pursuit of this history that Thayer set out to England in 1883.

His research mediated between the deep past of the common law and its present. The jury, he maintained, embodied the deeply-rooted Germanic "idea and practice of popular justice."²⁸¹ In 1066, the Norman invaders of England brought over the jury's predecessor institution, the inquisition, in which opposing parties produced individuals with particular knowledge of facts to testify under oath. Over the next centuries, the inquisition's role evolved from "ascertain[ing] facts" on behalf of interested parties to "decid[ing] the result of a controversy through a trial."²⁸² With the emergence of the jury composed of individuals who did not possess special knowledge about the legal dispute in

²⁷⁷ Thayer, *Precise Question*, *supra* note 6, at 314 (emphasis added). One author rightly intuited the evidence law source of the clear error rule, but wrongly believes this requires demoting the democratic reasons for turning to it — when they were in fact its motivation. Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393, 404, 406-409 (2019).

²⁷⁸ See, e.g., Hall, *Thayer*, *supra* note 15, at 353-65. Thayer's disciple, John Henry Wigmore, continued in this pursuit; see PORWANCHER ET AL., *THE PROPHET*, *supra* note 30, at 98-106.

²⁷⁹ See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 1 (1898).

²⁸⁰ *Id.* at 47.

²⁸¹ THAYER, *PRELIMINARY TREATISE*, *supra* note 279, at 8. It is interesting, however, that Thayer shows no sign of taking over Alexis de Tocqueville's memorable case for the jury's democratic credentials, though Tocqueville's thought had been crucial in the invention of the theory of educative democracy by Mill and others. Rather, Thayer's turn to evidence law is about *when judges may override other entities*, and he never engaged in an analogy of juries and legislatures for their democratic credentials. Cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. 16 (Henry Reeve trans. 1835) (characterizing juries as "schools" and "that portion of the nation to which the execution of the laws is entrusted, as the Houses of Parliament constitute that part of the nation which makes the laws").

²⁸² See RABBAN, *supra* note 83, at 274.

question, rules and procedures were developed in order to regulate how the jury received its information and how it rendered its verdict. This is how, he argued, the law of evidence — with all of its intricacies — gradually took shape.²⁸³ It was also the reason why the modern law of evidence was so perplexing and frustrating. Far from being a logically consistent body of law, it was an amalgamation of rules developed over time and in response to varying concerns. Yet, he continued, armed with this knowledge about the historical development of the jury and evidence law, lawyers and judges no longer needed to be “enslaved” to these rules; instead they could undertake “certain much-needed reforms in the whole law of evidence and procedure.”²⁸⁴ He developed his main casebook — one not for constitutional law but for evidence law — with the same message in mind.²⁸⁵

It was essentially from evidence law — and in particular two English cases — that Thayer extrapolated his proposed clear error standard in judicial review of legislation. The two cases he cited in *The Nation* revealed the lasting influence of his recent trip to England — but also some of the ultimate shortcoming of simply transplanting judicial self-restraint from everyday evidence law to constitutional self-government.

The first case was *The Capital and Counties Bank v. Henty* (1882).²⁸⁶ In this case, the House of Lords affirmed the Court of Appeal’s determination that allegedly libelous statements made were in fact not libelous. Thayer cited *Henty* for the great Scottish law Lord Colin Blackburn’s statement that “whether a jury or another set of judges” was entitled to deference in its view of facts amounted to “a very different question” than *de novo* factfinding.²⁸⁷ Thayer had long idolized Blackburn and unsuccessfully sought him out in England; he was, as Thayer told his wife, “the greatest English lawyer now living.”²⁸⁸

The second example Thayer cited was the final appeal in recently concluded saga of *Belt v. Laves*.²⁸⁹ “[T]he talk of the town” in early 1880s London, *Belt v. Laves* was a libel case arising after one English sculptor and journalist alleged in the pages of *Vanity Fair* that another prominent sculptor was not in fact the creator of most his artwork.²⁹⁰ After a prolonged trial, the

²⁸³ See THAYER, PRELIMINARY TREATISE, *supra* note 279, at 181 (arguing that what “gave our system birth” was the “judicial oversight and control of the process of introducing evidence to the jury”).

²⁸⁴ THAYER, PRELIMINARY TREATISE, *supra* note 279, at 3.

²⁸⁵ SELECT CASES ON EVIDENCE ON THE COMMON LAW (James Bradley Thayer ed., 1892).

²⁸⁶ 7 App. Cas. 741 (1882) (U.K.). Thayer further discussed Blackburn’s jurisprudence, and this case, in “Law and Fact” in *Jury Trials*, 4 HARV. L. REV. 147, 169 (1890).

²⁸⁷ Thayer, *Precise Question*, *supra* note 6, *citing id.* at 776.

²⁸⁸ JBTCM, Vol. 6, Aug 11, 1883, 2.

²⁸⁹ 12 Q.B.D. 356 (1884) (U.K.).

²⁹⁰ RICHARD BARRY O’BRIEN, THE LIFE OF LORD RUSSELL OF KILLOWEN 149 (1902).

jury awarded five thousand pounds in damages to the plaintiff.²⁹¹ In January 1883, the case was appealed to the Divisional Court, with Lord Chief Justice Coleridge sitting on the three-judge panel. The three judges deliberated through the summer of 1883—during the very time that Thayer spent quite a bit of time with Coleridge while he was in England.

When the panel finally reached a decision, it split 2-1 in favor of granting a retrial, with the majority (Coleridge included) holding that certain questions that had been submitted to the jury should have in fact been conclusively determined by expert opinion.²⁹² But instead of directing that a retrial be held, Coleridge's two colleagues insisted that the parties settle, reducing the damages to five hundred pounds. Coleridge dissented to this attempt to impose a compromise.²⁹³ So too did the defendant. On the subsequent appeal to the Court of Appeal, the three judges affirmed the decision of the majority of the Division Court, holding that it was the plaintiff's right to agree to receive less damages instead of having to endure a retrial.²⁹⁴

Of particular interest to Thayer were the comments of Sir William Brett, who sat on the Court of Appeal panel, regarding the relationship between the judiciary and the jury. Brett stressed that the jury was responsible for determining the "ultimate question" at issue: whether the defendant was guilty of libel. So long as the underlying evidence was not so clearly "to the contrary of the verdict that reasonable men could not fairly find as the jury have done" the judge was not to disturb the verdict.²⁹⁵ "It has been said," Brett added, that the inquiry into the right answer was the same as into whether it was unreasonable. This is "true, but the mode in which the subject is approached makes the greatest difference. To ask, 'Should we have found the same verdict?' is surely not the same thing as to ask whether there is a room for a reasonable difference of opinion."²⁹⁶ This was exactly the way to tame judicial review of legislation, Thayer evidently surmised. In both overseeing juries and reviewing legislation, judges were to ask not whether they would have agreed with the existing decision or legislation, but "whether there is room for a reasonable difference of opinion."²⁹⁷

An easy inference for the evidence law professor, Thayer's clear error standard was actually an astonishingly imperfect response to his rage at judicial usurpation. It is one that haunts American constitutional history since, not only

²⁹¹ See P.D. Edwards, *Millais, Edmund Yates, and the Case of Belt v. Lawes*, 19 VICTORIAN REV. 1, 12 (1993).

²⁹² See *id.* at 14.

²⁹³ 12 Q.B.D. at 356.

²⁹⁴ See *id.*

²⁹⁵ Cited in Thayer, *Precise Question*, *supra* note 6, at 316.

²⁹⁶ Cited in SELECT CASES ON EVIDENCE, *supra* note 285, at 177n.

²⁹⁷ Cited in Thayer, *Precise Question*, *supra* note 6, at 316.

in particular debates about what the rationality standard requires but also in the unending discussion it has helped inspire about judicial “activism” or “passivity.” After all, the contest between judiciary and legislature is essentially a question about power: and if this is true in all law, including evidence law, the standard for overturning jury *factual* determinations is a far cry from the question of who should have the last word on the momentous national *political* matter of whether democratic lawmaking can take effect. Equally important, self-restraint in that situation is one that may turn out to be much harder to exercise than the activity of the sitting judge supervising a trial would suggest. Inspired by the English analogy of parliamentary sovereignty to counteract an American threat to self-rule, Thayer reached for another English analogy to ward off the threat — but it would not work.

Interestingly, the very cases he cited suggested as much. In *Henty*, the House of Lords affirmed the Court of Appeal’s reversal of the trial court’s decision to submit the case to the jury. In other words, this was an instance in which the judiciary narrowed the province of the jury. Thayer recognized this much in his *Preliminary Treatise*, conceding that this case exemplified how “this clear but delicate line” between a judge imposing his own view and evaluating the reasonableness of a jury’s verdict has often been “overstepped.”²⁹⁸ Likewise, in *Belt v. Lawes* the Court (with the approval of the plaintiff) ultimately did not hew to the jury’s determination of damages.

Furthermore, Thayer’s own evolving views of the judiciary’s relationship to the jury stood in tension with his efforts to enshrine judicial deference in constitutional review. While he insisted that the jury be the one to reach a verdict, he believed that judges should assist the jury, including by indicating their own views of the fact.²⁹⁹ He also averred that the doctrine that the jury decide “disputed questions of ultimate fact” should be “taken with the gravest qualifications.”³⁰⁰ Even while recognizing that the jury had historically “stood out against” judges’ attempts to curtail their autonomy, he noted, without much apprehension, that “it is remarkable how judges and legislatures in this country are unconsciously travelling back towards the old result of controlling the jury”³⁰¹ “The judges,” he concluded, are “forever advancing, incidentally, but necessarily and as part of their duty, on the theoretical province of the legislator and the juryman.”³⁰² Indeed, in 1898, Supreme Court Justice Henry Brown wrote to Thayer that he was in favor of emulating the English judiciary’s practice of “leav[ing] so little to the jury that the latter can do but little harm.”³⁰³ If the

²⁹⁸ THAYER, *PRELIMINARY TREATISE*, *supra* note 279, at 210.

²⁹⁹ *Id.* at 188 n.2.

³⁰⁰ *Id.* at 249.

³⁰¹ *Id.* at 218.

³⁰² *Id.* at 208.

³⁰³ JBTP Box 18, Folder 5, June 15, 1898, Henry B. Brown to James Bradley Thayer.

judiciary's relationship to juries was to continue as a model, the fate of deferential judicial review of legislation was rather bleak.

III. FINALIZING THE THEORY

In the nine years between the publication of his article in *The Nation* and the appearance of "Origin" in the *Harvard Law Review*, Thayer further tweaked his theory of judicial review. As he wrote to himself after assigning his article in *The Nation* to his class in 1891, "[t]his letter needs supplementing [since it was] not as carefully stated as [it] should be."³⁰⁴

Thayer maintained his commitment to educative democracy. But the mature theory would evolve from the sketch he provided in *The Nation* in two primary ways. Thayer struggled to "naturalize" his views by rooting them in American tradition — so much so that his 1893 *Harvard Law Review* article could present deferential review as already the law of his jurisdiction, not a newfangled proposal for change to press America in an English direction. At the same time, by 1893 he clarified that his proposals applied only to "horizontal" judicial review of coordinate branches, rather than "vertical" review in a federal system. These changes were essential in their own right, albeit were not as clearly shaped by — and, in some respects, disguised in retrospect — the transatlantic crucible in which the theory had in fact been forged.

Part of the reason for this was that Thayer became even more radical in hostility to an overweening judiciary, and — while he always stressed to students the English counterpoint — he needed a strategy to Americanize his views. Finalizing the theory meant presenting it in terms of American tradition, rather than English superiority.

Across these years, commenting on the abuses of judicial power in American law that he saw as mounting, Thayer became even more outspoken in his opposition to the idea that the judiciary was the "guardian" of the Constitution and of the rule of law. Time and again, he resorted to comparisons to the United Kingdom to drive this point home. "A dispensation exists to suppose the judiciary the only barrier that keeps out . . . anarchy: & when it is found that that body cannot protect us to think that we have no protection," he wrote in 1886.³⁰⁵ But this was a flawed proposition on his view. "But protection lies in our fellow citizens, in our legislatures, in the same things which protect England: we *are protected* by these things."³⁰⁶ He made a similar point in 1889: "[C]onsider where England is: it is true that because parliament is legislatively

³⁰⁴ JBTP Box 23, Folder 6, Lecture 3, Oct. 12, 1891, 81.

³⁰⁵ JBTP, Box 2, Folder 3, Lecture 9, Mar. 5, 1886, 126A.

³⁰⁶ *Id.*

omnipotent therefore the liberties of the people are lost? It is no such pitiful distrust of legislative bodies that has worked out the liberties of England.”³⁰⁷ Legislative — not judicial — supremacy was the only solution for America’s growing democratic woes.

A. Clear Error Review as National Tradition

In *The Nation*, Thayer opened by acknowledging the “common opinion that courts should declare laws unconstitutional when they think them so,”³⁰⁸ without laboring to show that the clear error rule had strong historical credentials. He did not even mention *Marbury v. Madison*³⁰⁹ or its author. By contrast, the *Harvard Law Review* article of 1893 opens with the stated goal of assessing the historical origins of judicial review, in effect to provide the clear error rule for chastening its serious historical credentials. “I am not stating a new doctrine,” Thayer maintained, “but attempting to restate more exactly and truly an admitted one.”³¹⁰

Debate will swirl as long as the 1787 Constitution exists over how presumed judicial review was at the Founding,³¹¹ and therefore whether Thayer’s attempt to cast judicial invalidation of statutes (at least federal statutes) as a late-breaking addition was a matter of discovery or invention. But what is clear is that by 1893 Thayer added to his agenda the task of correcting misimpressions of *Marbury* and making claims on its legacy more difficult — contrary to those who were rushing to canonize it in his day, to empower the Supreme Court beyond what Thayer claimed were historical norms. Thayer undoubtedly had an American problem to solve, but the effect of his American storytelling was to conceal the direct English inspiration for his theory that had been more visible before.

Proponents of judicial review have sometimes been sternly critical of Thayer’s story,³¹² while others have been more empathetic in regarding it as a

³⁰⁷ JBTP, Box 2, Folder 4, Lecture 15, Nov. 18, 1889, loose pages between 138-39.

³⁰⁸ Thayer, *Precise Question*, *supra* note 6.

³⁰⁹ 5 U.S. (1 Cranch) 137 (1803).

³¹⁰ Thayer, *Origin*, *supra* note 7, at 155.

³¹¹ See, e.g., Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions*, 87 VA. L. REV. 1111, 1114 nn.14-19 (2001).

³¹² Perhaps most pungently, Charles Black remarked condescendingly, “What he has accumulated (and this is the whole strength of his case) is a set of quotations, detached from the facts and the holdings. . . . As I write this, I have just finished conferring with first-year law students on papers they have written, . . . [and t]he most frequent admonition I have had to give them is against doing what Thayer has done here. . . . [T]hat his ‘rule of administration’ [*i.e.*, the clear error rule] was actually a part of settled tradition is clearly and patently wrong.” CHARLES L. BLACK, JR. *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 197, 202. (1960).

usable past for important political ends.³¹³ Our goal in this section cannot be to validate it, and indeed nothing ultimately turns on its authenticity and everything on its political importance and limits.³¹⁴ But two components in its construction in between the first annunciation and the final exposition are worth highlighting. First, Thayer presented judicial review as contingent and controversial, and *Marbury* as deficient and unconvincing. Second, he discovered or rediscovered examples in which judges had abstained from using the powers they eventually acquired, deferring to legislatures instead.

Origin begins by casting the resumption of judicial review after the colonial era of checking legislation against royal charter as unmandated by the Constitution and protested by the best jurists.³¹⁵ The implication was that judicial review — “a natural result” of having been a colonized people, but “by no means a necessary one” for a sovereign people³¹⁶ — was atavistic. *Marbury*, Thayer continued, itself came late, was a poor opinion, questioned by others, and not followed much for a long time.³¹⁷

Admiring of Marshall’s jurisprudence — he even went on to write a short biography of him crediting the nationalism of cases like *McCulloch v. Maryland*³¹⁸ for making it possible for the union to survive civil war³¹⁹ — Thayer clearly despised *Marbury*, which he dismissed as “overpraised.”³²⁰ (In the biography of the great chief justice he wrote later, Thayer recorded publicly the truth that the opinion did not “rank with Marshall’s greatest work.”)³²¹ And he told his students that the famous statement “[i]t is emphatically the province and duty of the Judicial Department to say what the law is”³²² was merely dictum akin to “the talk of so many gentlemen on the street.”³²³

Instead, Thayer celebrated the 1825 dissent of the Chief Justice of the Supreme Court of Pennsylvania, John Bannister Gibson, in *Eakin v. Raub*³²⁴ as

³¹³ See Thomas C. Grey, *Thayer’s Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U.L. REV. 28, 31 (1993) (arguing that the cases Thayer selected for his history of judicial review were meant to “teach Thayerism” and he was undoubtedly “keenly aware of the many important decisions the other way”).

³¹⁴ Cf. BLACK, THE PEOPLE *supra* note 312, at 203 (stating that “[i]t was really a proposal for change” requiring independent refutation on those terms).

³¹⁵ Thayer, *Origin*, *supra* note 7, at pt. I.

³¹⁶ *Id.* at 131.

³¹⁷ See *id.* esp. 139.

³¹⁸ 17 U.S. 316 (1819).

³¹⁹ THAYER, JOHN MARSHALL, *supra* note 73, at 59 (crediting Marshall’s ideas for “saving the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces”).

³²⁰ Thayer, *Origin*, *supra* note 7, at 130 n.1; HWP, Box 1 Constitutional law vol. 1, Oct. 16, 1895.

³²¹ Thayer, *Origin*, *supra* note 7, at 84; compare the detailed critique of the opinion at *id.* 94–101.

³²² 5 U.S. 137, 177 (1803).

³²³ GEHP, Constitutional law, 11.

³²⁴ 12 Ser. & Rawle 330 (Pa. 1825).

the most “thorough consideration of the subject,”³²⁵ “the ablest discussion” of judicial review,³²⁶ and “stronger”³²⁷ than *Marbury*. It is safe to say that *Eakin v. Raub* was not well-known beforehand.³²⁸ While acknowledging that all government branches exist by dint of the Constitution, Gibson forcefully argued that the legislature is “superior to every other, inasmuch as the power to will and to command, is essentially superior to the power to act and obey.”³²⁹ In turn, and given that the Constitution did not expressly mandate judicial review, it was “a fallacy” to assume that subjecting legislation to constitutional review was supposed to take place “before the judiciary.”³³⁰ Rather, the legislature “ought . . . to be taken to have superior capacity to judge of the constitutionality of its own acts.”³³¹ This did not mean that the legislative power would go unchecked, Gibson insisted. “The people, in whom full and absolute sovereign power resides” — not the courts — were to be the ones to “instruct[] their representatives to repeal the obnoxious act.”³³² Even though Gibson went beyond Thayer in restricting the reach of judicial review — Thayer, after all, did not deny the power of the judiciary to ultimately review legislation³³³ — Thayer found his approach resonated deeply with his own belief that “it is of the greatest public importance” to dislodge the perception that the judiciary was the guardian of the constitution and instead embrace the fact that “our chief protection lies elsewhere” and namely in the people and their representatives themselves.³³⁴

Thayer’s casebook formalized the canon he proposed in the article.³³⁵ Of course, it covers the gamut of topics in the field, but its pivotal chapter on judicial review marooned *Marbury* (and Federalist 78, which Thayer saw *Marbury*’s operative passages doing little more than reciting)³³⁶ in a sea of doubt. And of course, Thayer featured Gibson’s dissent questioning the premise of

³²⁵ GEHP, Constitutional law, 13.

³²⁶ Student Notes of Robert Pollard Oldham at the Harvard Law School Archives, Cambridge, MA, [hereinafter RPOP] Constitutional law, 11.

³²⁷ HWP, Box 1 Constitutional law vol. 1, Oct. 16, 1895.

³²⁸ Cooley cited the case but misspelled it as *Eakin v. Raub* as early as 1868. See COOLEY, TREATISE, *supra* note 114, at 66. At least one other scholar of the history of judicial review was unfamiliar with the case until some point in the mid-1880s. See JBTP, Box 16, Folder 7, Nov. 10, 1893, William M. Meigs to James Bradley Thayer (“Gibson’s dissent in *Eakin v. Raub* was unknown to me, when I wrote my article [referring to *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175 (1885)] but my attention was called to it some time ago”).

³²⁹ Cited in THAYER, 1 CASES ON CONSTITUTIONAL LAW, *supra* note 83, at 139.

³³⁰ *Id.* at 135.

³³¹ *Id.* at 138.

³³² *Id.* at 142.

³³³ On the other hand, Gibson, as Thayer recorded in a note, changed his mind two decades later. *Norris v. Clymer*, 2 Penn St. 281 (1845), cited in *id.* at 145n.

³³⁴ Thayer, *Origin*, *supra* note 7, at 156.

³³⁵ THAYER, CASES ON CONSTITUTIONAL LAW, *supra* note 83.

³³⁶ Thayer, *Origin*, *supra* note 7, at 138-39, and THAYER, JOHN MARSHALL, *supra* note 73, at 96-97.

judicial review in his casebook.³³⁷ The timing of Thayer's canonizing intervention fits well with those who emphasize that *Marbury* was rediscovered late — when judicial power became of decisive importance to conservatives after the 1860s, and not only American ones.³³⁸

But especially because state courts had so long adopted judicial review, and *Marbury* had occurred, Thayer's main energies were poured not into whether but how the power of invalidation had been accepted or exercised before recent times.³³⁹ The balance of Thayer's revisionism, therefore, was to present evidence that for a long time — even after *Marbury* — judges felt such a horror of displacing legislative power with their own policymaking that they qualified their power. After recognizing the legislature's judgment as to the constitutionality of its own action, they contracted it only when it was indubitably out of step.³⁴⁰

Thayer's examples of judges forbidding their own self-aggrandizement — also populating his casebook — involved “more than a mere form of language, a merely expression of courtesy.”³⁴¹ Rather, it was an implicit rule. Unlike in *The Nation* article, it was only at this point, having extrapolated it from sources, that Thayer indulged in the comparison of the rule of constitutional judging with cognate practices elsewhere in the law — including evidence law. In fact, the example of Lord Blackburn in *Capital and Counties Bank v. Henty*, like evidence law generally, was demoted on the list of parallel judicial practices.³⁴²

However much actually provoked by countermajoritarian backlash at the coming of mass democracy, Thayer's attitude towards judicial review itself was presented as consonant with the best minds in American legal history, with the possibility of judicial invalidation of statute a contingent and recent deviation. However much actually inspired by transatlantic evidence law, the rule of clear error to discipline judicial review, similarly, was now much more presented as a matter of long-standing American constitutional history and theory.

³³⁷ THAYER, CASES ON CONSTITUTIONAL LAW, *supra* note 83, at 133.

³³⁸ See ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989); Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case,”* 38 WAKE FOREST L. REV. 375 (2003). But see Keith Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill?: Marbury and the Construction of the Constitutional Canon*, 39 HASTINGS CON. L. Q. 823 (2012).

³³⁹ THAYER, CASES ON CONSTITUTIONAL LAW, *supra* note 83, at ch. 1, §2. He also strategically extracted portions of a partial treatise defending judicial invalidation of statute that appeared the same year as his *Harvard Law Review* article, to suggest that colonial practice of testing legislation against royal charter was out of step with the global rejection of judicial review. See *id.* at 146-49, citing BRINTON COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION (William M. Meigs ed., 1893).

³⁴⁰ Thayer, *Origin*, *supra* note 7, at Parts II-III.

³⁴¹ *Id.* at 143.

³⁴² See *id.* at 147-48.

B. *Vertical Review in a Federal System*

The second prominent difference separating the theory as it appeared in *The Nation* from its classic form in *Origin* was the addition of a vertical federal element that refused to extend the clear error rule beyond the judicial consideration of congressional statute, including to the inferior legislatures of states. Once again, this was an American problem, and Thayer treated it as such.

After reminding himself in 1891 that his article in *The Nation* was “not as carefully stated as [it] should be,” he singled out the need to “note a distinction between [the] laws of [the] U.S. and of [the] states.”³⁴³ In the mature theory, he devoted a section to clarifying that judicial deference to legislatures he recommended was limited to constitutional review (including by state courts) of federal laws. But when it came to federal courts assessing whether “[s]tate action be or be not conformable to the paramount [federal] constitution, the supreme law of the land, we have a different matter in hand.”³⁴⁴ In these instances, the judiciary was being called upon to help determine the “allotment of power between the two governments, — where the line is to be drawn.”³⁴⁵ And, since the judiciary was serving as the representative of the “paramount constitution and government,” its duty was to ensure that the Constitution be given “nothing less than its just and true interpretation.”³⁴⁶ National supremacy mandated that the judiciary forego its default deference and instead “guard” the constitution “against any inroads from without.”³⁴⁷

Thayer first registered the need for this vertical component to his theory in 1888. In situations in which there was potential friction between federal and state power, federal courts, he told his students, served as junior partners to Congress in maintaining federal supremacy: because the state law was “infringing & even hostile to the general government” it was up to the courts to utilize their “perfectly *independent* judgment.”³⁴⁸ This posture, he conceded, was fundamentally different from that of the federal judiciary when faced with assessing the constitutionality of federal legislation. The following year he admitted that, while he was “at first inclined to think” that the federal judiciary

³⁴³ JBTP, Box 23, Folder 6, Lecture 3, Oct. 12, 1891, 81.

³⁴⁴ Thayer, *Origin*, *supra* note 7, at 154. For comparison, among contemporary Supreme Court critics, Nikolas Bowie has most clearly embraced Thayer’s asymmetrical standard for horizontal and vertical federal judicial control of legislatures, but justifies it on grounds that it is actually the federal statute passed as the Ku Klux Klan Act of 1871 (17 Stat. 123, remaining good as 42 U.S.C. § 1983) that authorizes vertical enforcement — a claim Thayer never made. *See, e.g.*, Nikolas Bowie, *How the Supreme Court Dominates American Democracy*, WASH. POST, July 16, 2021.

³⁴⁵ Thayer, *Origin*, *supra* note 7, at 154.

³⁴⁶ *Id.* at 155.

³⁴⁷ *Id.*

³⁴⁸ JBTP, Box 2, Folder 4, Lecture 6, Feb. 21, 1888, 80.

should still be deferential to state legislatures since “Congress is in the background with power to act,” he had concluded that this was asking too much.³⁴⁹ State courts might owe their own legislatures deference — that had been Chief Justice Gibson’s view in *Eakin v. Raub*, a Pennsylvania Supreme Court case³⁵⁰ — but for federal courts only the federal Congress was a coordinate power. Instead, the federal judiciary should, in the first instance (and without waiting for Congress to preempt) assess whether the state legislation conformed to a “true and just interpretation” of the federal constitution.³⁵¹

Though its ramifications are major, what exactly caused Thayer to supplement his theory in this way is not clear. While Gibson made this exact same distinction in *Eakin v. Raub* — in his case calling for U.S. Supreme Court supervision of states while weakening the power of state judiciaries relative to their own coordinate branches — Thayer was already thinking about this component by the time he encountered *Eakin* at some point in 1893. The syllabus for his constitutional law course for 1892-1893 did not contain a mention of *Eakin*;³⁵² his first mention of the case was when he read *Origin* in August at the Congress on Jurisprudence and Law Reform.³⁵³

It is possible that Thayer had always assumed this distinction and only realized that he needed to make it explicit after 1884. After all, he had long been a nationalist and believed in federal supremacy.³⁵⁴ Already in March 1884, he distinguished federal judicial review of federal legislation from review of state legislation. While noting that the latter “is not legislation by the U.S. government” and, in turn, “there is no question as to another department of the government,” he confessed that he “will not speak confidently as to that.”³⁵⁵ In 1886, while discussing “the function of a court in declaring laws of *its own* legislature unconstitutional,” he noted that the issue of “Supreme Court [of the] U.S. as to states is different.”³⁵⁶ He did not, however, further spell out this

³⁴⁹ JBTP, Box 3, Folder 1, Lecture 42, Mar. 5, 1889, 84.

³⁵⁰ 12 Ser. & Rawle 330 (Pa. 1825).

³⁵¹ JBTP, Box 3, Folder 1, Lecture 42, Mar. 5, 1889, 84.

³⁵² See JBTP, Box 23, Folder 7, undated, Cases on Constitutional Law: For the Use of the Class in Constitutional Law at the Harvard Law School, 1892-3.

³⁵³ See Thayer, *Origin*, *supra* note 7, at 129 n.1. His first notes about the case are from October 1893. See JBTP, Box 23, Folder 6, Lecture 4, Oct. 11, 1893, 112.

³⁵⁴ This was evident throughout his jurisprudence from his views on the Civil War, to his pronouncements regarding the Contract Clause and Ex Post Facto Clause, *supra* sections II.B.1-2, to his approach to the Reconstruction Amendments. His nationalism even led him to change his views on *Gelpcke v. Dubuque*, *supra* note 174, ultimately arguing that the majority was correct in not deferring to the state supreme court’s interpretation. See James Bradley Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891), *reprinted in* LEGAL ESSAYS, *supra* note 66.

³⁵⁵ JBTP, Box 2, Folder 3, Mar. 25, 1884, 13. See also *id.*, Lecture 3, Oct. 7, 1884, 47 (expressing similar ambivalence).

³⁵⁶ *Id.*, Lecture 8, Mar. 4, 1886, 124.

difference. Yet, this still leaves unanswered what exactly caused Thayer to introduce his vertical dimension.

The more plausible reason for the change based on available evidence is that the shift in Thayer's theory coincided with a shift in his views about the Court's Reconstruction cases. In his 1890 notes, he now seemed to side openly with Justice Harlan's dissent in the *Civil Rights Cases*. Summing up Harlan's argument in favor of the constitutionality of the 1875 Civil Rights Act, Thayer wrote, "1. reasonable doubt 2. Supports under 13th amendment."³⁵⁷ He followed this up by recording that Harlan's dissent was a "strong opinion."³⁵⁸ And he finished by briefly discussing *People v. King* (1888),³⁵⁹ a recent New York Court of Appeals decision holding a state law similar to the 1875 Civil Rights Act constitutional.

As his views on the *Civil Rights Cases* became even more acerbic than in 1884, Thayer continued to believe that the dissent in *The Slaughterhouse Cases* was correct. In 1888, Thayer wrote that the "[d]ecision in slaughter house cases [was] hardly final" and that he found the "fundamental position of [the] minority right & will finally be universally accepted."³⁶⁰ If the clear error standard applied across the board, Thayer was forbidden from reaching this conclusion. If it was wrong to strike down the Civil Rights Act in the *Civil Rights Cases*, why was it right to strike down the Louisiana law in *The Slaughterhouse Cases*?³⁶¹

Thayer clearly struggled with this seeming inconsistency. Reading his notes, it is apparent that he toyed with multiple different paths to reconciling his views. When it came to *Slaughterhouse*, he kept his opinion that the majority had unnecessarily degraded the content and implications of the Privileges and Immunities Clause. The "*Immunities & Privileges of citizens of [the] U.S.,*" he wrote echoing the dissents, were those "*which belong to all persons [and] citizens & [are the] same as that of citizens of states.*"³⁶² He even argued that Thomas Cooley (whom he had previously pointed to as the first to distinguish between the Privileges and

³⁵⁷ JBTP, Box 3, Folder 2, Lecture 13, [no date], 1890, 141.

³⁵⁸ *Id.*

³⁵⁹ 110 N.Y. 418 (N.Y. 1888).

³⁶⁰ JBTP, Box 2, Folder 4, Lecture 10, Oct. 30, 1888, 130.

³⁶¹ The only other instance in which Thayer argued that a court was justified in striking down legislation was the antebellum case *Wynehamer v. People*, 13 N.Y. 378 (N.Y. 1856). See JBTP, Box 3, Folder 1, Lecture 29, Jan. 21, 1889, 43 (noting that the decision was "strong & good").

³⁶² JBTP, Box 2, Folder 4, Lecture 10, Oct. 30, 1888, 130.

Immunities of citizens of the United States and those of citizens in the several states)³⁶³ “admits such clause unnecessary.”³⁶⁴

Even so, Thayer still tried initially to find a way to side with the *Slaughterhouse* majority. In 1888, he toyed with the idea that the majority was correct in upholding the law and the monopoly as a valid exercise of police powers. The majority could have avoided the Privileges and Immunities Clause and simply upheld the state statute “as police regulation as in *Bartemeyer*.”³⁶⁵ Here he was referring to *Bartemeyer v. Iowa*,³⁶⁶ decided shortly after *Slaughterhouse*, in which the Supreme Court upheld an Iowa state law prohibiting the sale of alcohol as a valid exercise of state police power and not infringing upon the Fourteenth Amendment. Deferring to the legislature on police power grounds also had the benefit of avoiding what Thayer termed, an “*intent & purpose* of the legislature” test.³⁶⁷ This intent and purposes test seemed to be a reference to the type of test that Justice Field had used in his dissent in *Slaughterhouse* when he argued that the Louisiana law was largely created in order to advance the interests of specific groups.³⁶⁸ Thayer seemed to be rejecting this type of test, however, given that it required that the judiciary enter the morass of deciding what a law “really” intended to do and what its “ostensible purpose” was.

But even this attempt to find a way to side with the *Slaughterhouse* majority was not entirely satisfactory to Thayer. He apparently struggled to convince himself that the monopoly in question was a legitimate exercise of police power. In his 1890 lectures, he posed the question whether the key issue separating the dissent from the majority was whether the Louisiana statute “is legitimate legislation (not perhaps *prudent* or judicially or legislatively speaking *defensible*) of the kind called auxiliary exercise of the police power[?]”³⁶⁹ His need to turn the case into one dealing with the “auxiliary exercise” of police powers — rather than straightforward police power — suggests his continued

³⁶³ See JBTP, Box 2, Folder 3, Lecture 9, Oct. 28, 1884, 61. Thayer pointed to JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1937 (Thomas M. Cooley ed., 4th ed. 1873) (“It is to be observed, however, that it is not the privileges of citizens of the several States which are to be protected under the clause now being considered, but ‘the privileges and immunities of citizens of the United States.’”).

³⁶⁴ JBTP, Box 2, Folder 4, Lecture 10, Oct. 30, 1888, 130. For the proposition that even Cooley doubted whether the Privileges and Immunities Clause was needed on his and the majority’s interpretations, Thayer pointed to THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 247 (1880) (“It may well be questioned whether the provision just considered was necessary. . . . It is plain that state laws cannot impair what they cannot reach.”). According to Thayer, the federal government could have always — even before such an amendment — provided these protections to its citizens.

³⁶⁵ JBTP, Box 2, Folder 4, Lecture 10, Oct. 30, 1888, 130.

³⁶⁶ 85 U.S. 129 (1873).

³⁶⁷ JBTP, Box 2, Folder 4, Lecture 19, Apr. 17, 1888, 97.

³⁶⁸ See 83 U.S. 36, 88-89 (1872) (Field, J., dissenting).

³⁶⁹ JBTP, Box 3, Folder 2, Lecture 12, Nov. 4, 1890, 140.

discomfort with the notion that the majority could have in fact sustained the statute as a valid exercise of police powers.

It was against this backdrop that Thayer formulated his distinction between judicial review of congressional legislation and state legislation. Allowing for aggressive judicial review of state legislation enabled him to side with the dissent in *Slaughterhouse* and its invalidation of the state law. Meanwhile, retaining deferential review when it came to federal legislation aligned with Justice Harlan's dissent in the *Civil Rights Cases*. Introducing this vertical element to his theory of judicial review allowed Thayer to square the circle of his views on the Supreme Court's Reconstruction jurisprudence. Of course, the modification of the theory applied far beyond that context.

In the years after he published *Origin*, Thayer became even more outspoken in his criticism of the *Civil Rights Cases*. At least three students recorded that Thayer believed that they were wrongly decided. According to the notes of two students, Thayer argued that the outcome should have been dictated by the Court's decision in *Ex parte Siebold*³⁷⁰ and *Ex parte Yarbrough*.³⁷¹

³⁷⁰ 100 U.S. 371 (1879).

³⁷¹ See Student Notes of Joseph Warren at the Harvard Law School Archives, Cambridge, MA, Constitutional law vol. 1, 239; Student Notes of George Ernest Hills at the Harvard Law School Archives, Cambridge, MA, [hereinafter GEHP] Constitutional law, 54.

Ex parte Siebold upheld provisions of the 1870 Enforcement Act which made it a crime for election officials to tamper with elections. The Court rejected the petitioners' argument that Congress could not directly legislate on the matter at the same time as it allowed for certain state election laws to operate. Article 1, Section 4 of the Constitution, it stated, allowed Congress to choose when, how, and to extent it would directly regulate elections because "the power of Congress over the subject is paramount." 100 U.S. 371 at 384.

In *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court upheld two provisions of federal law that made it a crime to conspire to deprive others of their constitutional rights and their right to vote in federal elections. The Court rejected the argument that Congress could only correctively legislate — that is, legislate in cases in which the state had acted to deprive individuals of their rights. While the Fifteenth Amendment did not grant an affirmative right to vote, it "does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right." *Id.* at 665. This *de facto* conferral of a right to vote resulted from the fact that Article 1, Section 4 of the Constitution already empowered Congress to regulate the time, place, and manner of federal elections. The Fifteenth Amendment, in turn, served as a "protection" to the "exercise of this right" to vote. *Id.* Moreover, although the Court acknowledged that the Fourteenth Amendment only covered violations of rights by States — not by individual actors — it held that this bar was inapplicable in the present case since in Article 1, Section 4 "Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States, essential to the healthy organization of the government itself." *Id.* at 666.

Applying these two holdings to the *Civil Rights Cases*, Thayer (at least according to his students) argued that it was not correct that Congress could not promulgate affirmative legislation that prohibited individual action. "Equality before the law does belong to one [as] a citizen of [the] U.S." Since this right to equality did not, according to Thayer, only emanate from the Fourteenth Amendment (it came from the original constitution though from where exactly is unclear in his account), it was not confined to being protected only though corrective

The third recorded that Thayer was repeatedly confounded by the fact that no justice raised the possibility that the rights of the African-Americans at issue were “privileges and immunities of citizens of the United States” and could thus be protected by direct and affirmative Congressional legislation.³⁷²

Even so, Thayer seems to have had second thoughts regarding the appropriateness of broad federal constitutional review of state law. By 1899, he told his class that the ultimate ascendancy of the *Slaughterhouse* minority’s view of the Fourteenth Amendment (through the expansion of the Due Process Clause) “has worked a vast change in relation of states to general Government.”³⁷³ “Today hardly anything can be done by the states by way of regulating its own affairs that does not get before the court in some case.”³⁷⁴ While he occasionally supported aggressive review, it was increasingly clear to him that the fix he had devised to reconcile his views of the Reconstruction cases would sweep far beyond them — and not in a good way.³⁷⁵ To this end, he asserted that *Allgeyer v. Louisiana*,³⁷⁶ in which the Supreme Court struck down a state law imposing various conditions on an out-of-state insurance company as a prerequisite to conducting business in the state as a violation of the Fourteenth Amendment (not to mention the clearest anticipation of the *Lochner* era to come), was “[w]rong on principle.”³⁷⁷ Not only did this ruling unjustifiably cut into the state’s police powers, it improperly rendered due process rights into “something new . . . rights which were not thought of as coming under or within such expression before.”³⁷⁸ Once Thayer had condoned aggressive judicial review of state laws, however, it was hard to walk it back. By 1901, Thayer lamented that “the Federal courts are now reviewing the most ordinary legislation of the states and regulating their domestic affairs.”³⁷⁹

CONCLUSION: THE FATE OF EDUCATIVE DEMOCRACY

legislation and only against state action. Under *Siebold*, Congress’s power in this realm was “paramount” and under *Yarborough* “Congress had a perfect right to protect it,” including through affirmative action and against private individuals. GEHP, Constitutional law, 54-56.

³⁷² RPOP, 47.

³⁷³ GEHP, Constitutional law, 51.

³⁷⁴ *Id.*

³⁷⁵ For an instance of his support see his Letter to the Editor of the *Boston Post* regarding *Leisy v. Hardin*, 135 U.S. 100 (1890) in JBTP, Box 23, Folder 6, loose page between 70-71.

³⁷⁶ 165 U.S. 578 (1897).

³⁷⁷ GEHP, Constitutional law, 51.

³⁷⁸ *Id.*

³⁷⁹ JBTP, Box 13, Folder 2, 2.

The main goal of this Article is to provide the first serious history of the origins of James Bradley Thayer's constitutional theory — and thereby of an essential feature of contemporary constitutional law. It is an important if ironic fact that the first professional constitutional theorist in the United States was so hostile to judicial review — so much so that he committed himself to a campaign to blunt its effects.³⁸⁰ But while each is best understood in the Anglo-American setting that mattered most for Thayer himself, his democratic commitment to restrain the judiciary and his recourse to evidence law for a legal fix have pulled apart since. It seems fitting to close our history by stressing this contemporary moral.

Is educative democracy still credible? In retrospect what may seem remarkable is how weakly it ever got entrenched, notwithstanding the heroic efforts of Thayer to point the way and his partial success posthumously. Three main developments that began while he was still living explain this result, each more grievous than the last to the ideal of educative democracy that Thayer — as this Article has shown — tried to rescue from judicial power.

First, educative democracy never lacked critics of its optimism, and by World War I it became fashionable to treat it as naïve and obsolete. The alliance of liberalism and an electoral democracy without limitation proved brief and evanescent. Walter Lippmann in the United States in *The Phantom Public* (1925), preceded in the United Kingdom by Graham Wallas in his pioneering *Human Nature in Politics* (1909), concluded that the optimistic assumptions about collective opinion and democratic will-formation through political representation that had so marked the Victorian age were unsustainable in light of the actual experience of mass politics.

Second, parliamentarism itself collapsed, as both observers of and participants in mass politics conceded the need for more and more of executive control of decisionmaking (including by administrators allocated political authority on grounds of their expertise). Even countries where these tendencies

³⁸⁰ Thayer's attitude towards constitutions as such is also worth comment. From an early date, he criticized the temptation to lengthen constitutions for "obscur[ing] and marr[ing]" what was supposed to be a "charter of a few simple, well-established, uncontroverted principles." Cited in Hall, *James Bradley Thayer*, *supra* note 15, at 355-56 (discussing the Kansas Constitution in 1859). Hired by railroad magnate Henry Villard to write a model constitution for the Dakotas (and affecting the drafting, though he was long given too much credit for the results), Thayer expressed his preference for "a very short and simple instrument" of self-government. Cited in Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L. REV. 343, 357 (1989). In 1895, he told his students: "The new Am. State consts. are getting longer — it seems to show that people think legislatures are not to be trusted, and so tie down their legislatures by detailed constitutions limits a departure." HWP, Oct. 10, 1895. And he repeated his opposition in an 1899 letter to Columbia University president Seth Low when he spoke of the "mischievous business of inserting (?) prohibition into a constitution." Seth Low Papers at Columbia University Rare Book and Manuscript Library, New York, N.Y., Apr. 18, 1889, James Bradley Thayer to Seth Low.

did not lead to the overthrow of formally democratic rule as the twentieth century wore on — like the United Kingdom and United States — emerged from the experience radically transformed. Across the Atlantic, democratic theory itself transformed in a strongly elitist direction.³⁸¹

Third, relatedly, and perhaps most remarkably, the liberal movement with which the ideal of educative democracy had been inextricably linked internalized a profound skepticism about electoral majoritarianism (though only rarely daring openly to reject the ideal of democracy as such).³⁸² As radical democrat Roberto Unger commented, “ceaseless identification of restraints upon majority rule, rather than restraints upon the power of dominant minorities” became the hallmark of liberalism after World War II, not least as “the overriding responsibility of judges and jurists.”³⁸³ As a result, even a leading constitutional theorist renowned for his own case against judicial activism, John Hart Ely, refused to affiliate with Thayer; without mentioning that the default posture of judicial deference was essentially Thayer’s contribution, Ely criticized his forerunner for refusing the exceptions to the regime of judicial restraint that he championed in the name of protecting minorities or of “representation-reinforcement.”³⁸⁴

None of these developments, on their own or together, justify relinquishing educative democracy, including for its implications for the constitutional power of judges. Thayer’s defense of democracy was not that it is above mistakes.³⁸⁵ It was that empowered courts cannot stave them off for long, while empowered voters can learn and reorient. “Under no system can the

³⁸¹ See, e.g., KYONG-MIN SON, *ECLIPSE OF THE DEMOS: THE COLD WAR AND THE CRISIS OF DEMOCRACY BEFORE NEOLIBERALISM* (2020).

³⁸² Cf. JASON BRENNAN, *AGAINST DEMOCRACY* (2016).

³⁸³ ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 73-74 (1996).

³⁸⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) and esp. *The Rule of Clear Mistake: “A Great and Stately Jurisdiction”?*, in ELY, *ON CONSTITUTIONAL GROUND* (1996). For why Ely’s exceptions regime has predictably failed either to protect minorities or police representation, see Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2021).

³⁸⁵ For example, though a staunch anti-imperialist, Thayer was forced to approve the Insular Cases because his theory of constitutional law required it. If empire was to be halted, it would have to be through popular decision. “Though, as a political question, Professor Thayer wholly disapproved of our acquisition and retention of the island possessions of Spain in 1898, yet he did not permit his political beliefs to affect his convictions of the constitutionality of all that our government did in that behalf.” Hall, *Thayer*, *supra* note 15, at 368; James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899), *reprinted in* LEGAL ESSAYS, *supra* note 66; JBTP Box 23, Folder 7, “The Insular Tariff Cases in the Supreme Court,” loose pages (arguing in a draft article which was never published that “[i]t is fortunate for the country and for the future of our system of constitutional law that the Supreme Court has recognized the essentially political nature of the questions which the General Government has had to deal with in legislating for our new possessions”).

power of courts go far to save a people from ruin,” Thayer had remarked on the first point in closing his classic article.³⁸⁶ Yet it was at the end of his life that Thayer underlined the second point most openly as an inveterate political theorist of educative democracy, in an aside in his John Marshall biography anticipating answers to the blows the ideal would take after his death. Apart from so often being erroneous in its own right, judicial invalidation of legislative work meant that “the people . . . lose the political experience, and the moral education and stimulus that fighting the question out in the ordinary way, and correcting their errors.”³⁸⁷ More than this, if empowerment of judges took place, it mattered less and less who was in the legislature, or whether fundamental political norms figured in its work — since it would not have the last word.³⁸⁸ The loss of faith in democratic self-rule thus fit with the stunting of citizen engagement and legislative responsibility alike, making suspicion of democracy a self-fulfilling prophecy. In response, Thayer took one last chance, in the year before his death, to counsel judicial self-restraint. “It is the courts that can do most to cure the evil.”³⁸⁹

In spite of the blows that educative democracy was taking, Thayer’s counsel was heeded in the middle of the twentieth century, when the constitutional revolution of 1937 effectively made rational basis review the permanent future norm. The adjudicative standard for economic regulation, in *West Coast Hotel v. Parrish* that year, became whether the legislative measure challenged as unconstitutional was a “reasonable” one.³⁹⁰ But the victory proved pyrrhic, as liberals themselves who had advocated Thayer’s prescription for years could not resist the allure of judicial power once they could exercise it. In turn, conservatives have spent a generation gaining control of the superweapon of the Supreme Court — in spite of their own Thayerian noises during era of liberal ascendancy — and are set to use it to their own ends for the foreseeable

³⁸⁶ Thayer, *Origin*, *supra* note 7, at 156. In defense of this premise, he cited a (French) study precisely of English disempowerment of judges affirming that “if passions carry [the popular will] away, the most perfect constitutions and the wisest laws are powerless to stop it.” *Id.*, *citing* 1 CHARLES FRANQUEVILLE, *LE SYSTÈME JUDICIAIRE DE LA GRANDE-BRETAGNE* 25 (1893) (our translation), which in turn cited the line from Horace, the ancient writer, that “laws without morals are useless.” Thayer had already said much the same to students, in more plainspoken terms. “Nothing can save a country when its representative legislature is lunatics or a body of scoundrels. The legislative power is enormous and the judicial power is small,” he remarked in 1886. Or, as he put it elsewhere, “Given a legislature of mad men & this could ruin us any day, so far as legislation would be allowed to operate.” JBTP, Box 2, Folder 4, Lecture 15, Nov. 18, 1889, loose pages between 138-39.

³⁸⁷ THAYER, JOHN MARSHALL, *supra* note 73, at 106. This is the beginning of the long passage Frankfurter cited to close his dissent in *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 677-71 (1943).

³⁸⁸ THAYER, JOHN MARSHALL, *supra* note 73, at 103-104.

³⁸⁹ *Id.* at 108.

³⁹⁰ *West Coast Hotel v. Parrish*, 300 U.S. 379, 398 (1937).

future. Indeed, it has long since begun. The late nineteenth century during which Thayer witnessed a “vast and growing increase of judicial interference with legislation”³⁹¹ has been matched only by our own time in the history of the republic.

If Thayer’s commitment to educative democracy is worth retrieving, it is only by abandoning his solution of judicial self-restraint — which, like any regulation of the powerful by themselves, predictably fails. It was easy for judges to adopt it as a mere rhetoric of judicial decision, dissimulating ruling power with a show of humility. As one current justice on the Supreme Court put it, “preaching about . . . the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means.”³⁹² More moderately, Professor Mark Tushnet remarked in his submitted testimony to the recent White House Commission on the Supreme Court, “it has proven difficult if not impossible for even a single justice to sustain” Thayer’s recommended “posture of deference.”³⁹³ If this is true, then in future years educative democracy will have to depend on other forms of regulation — including institutional reform — than Thayer contemplated.³⁹⁴ If Americans still remain with him at the dawn of our commitment to democracy, they will have to save it from judges in a new way all their own.

³⁹¹ THAYER, JOHN MARSHALL, *supra* note 73, at 106.

³⁹² *Obergefell v. Hodges*, 576 U.S. 644, 742 (2015) (Alito, J., dissenting). Compare Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

³⁹³ Mark Tushnet, *Submission to the Presidential Commission on the Supreme Court of the United States*, Aug. 17, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf>.

³⁹⁴ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021). The present Article is in dialogue with Cass Sunstein’s draft stimulating reconsideration, *Thayerism*, (Sept. 16, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816. Clearly, Thayer adopted implicit premises but only got a basic start in assessing the comparative institutional credibility of the legislature and judiciary, even as he stressed their hydraulic relation. But where Sunstein concludes that “[a]ny approach to constitutional law must be defended on the ground that it would make our constitutional order better rather than worse,” requiring comparative institutional analysis, Thayer’s favoritism for legislative power reflects that his main commitment was ideological: to self-rule in and through its premier institutional locale, then or now, where majority rule decides when “better” and “worse” are in dispute.